

Law Review 1283

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DOJ Files Class Action USERRA Lawsuit against NYC

By Captain Samuel F. Wright, JAGC, USN (Ret.)

1.1.1.7—USERRA applies to state and local governments

1.3.2.3—Pension credit for service time

1.4—USERRA Enforcement

On August 2, 2012, the Honorable Preet Bharara announced the filing of a class action lawsuit against the City of New York, the New York City Police Department (NYPD), and the New York City Police Pension Fund—these defendants are referred to herein as “the City.” Preet Bharara is the United States Attorney (appointed by the President with Senate confirmation) for the Southern District of New York, which consists of the counties of New York, Bronx, Westchester, Rockland, Putnam, Orange, Dutchess, and Sullivan in New York State. Although part of New York City is located in the Eastern District of New York, the outcome of this lawsuit will control for all NYPD officers and retirees, regardless of where they are assigned within the City.

To understand the issues in this lawsuit, let us consider the hypothetical but realistic Officer Francis Muldoon, Jr. of the NYPD. Muldoon joined the NYPD as a rookie in 1984 and retired 25 years later, in 2009. He was also a member of the Coast Guard Reserve, and his NYPD career was interrupted several times by periods of voluntary and involuntary military service, under title 10 and title 14 of the United States Code.

Muldoon met the eligibility criteria under the Uniformed Services Employment and Reemployment Rights Act (USERRA)[\[1\]](#) in that he gave prior notice to the NYPD before each period and served honorably during each period of service. He did not exceed the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to his employment relationship with the NYPD.[\[2\]](#) After each period of uniformed service, Muldoon was timely in reporting back to work or applying for reemployment with the NYPD, and he did return to work after each period.

Because Muldoon met the USERRA eligibility criteria for each period of uniformed service, the City must treat him *as if he had been continuously employed* by the NYPD during each period of service, for purposes of determining his eligibility for the NYPD pension and determining the amount of his monthly pension check. *See* 38 U.S.C. 4318.

For example, let us assume that Muldoon was away from work for military service for all of calendar year 2007—he was called to duty on January 2 and released on December 31. The NYPD needs to come up with a reasonable estimate of what Muldoon *would have earned* in 2007 if he had not been called to the colors.[\[3\]](#) Under the City’s pension formula for police officers, Muldoon’s NYPD earnings or imputed earnings for 2007 will have a major impact on the computation of his NYPD pension, as of his retirement in 2009.

The problem is that the City calculated Muldoon’s NYPD pension based on Muldoon’s *base pay only* in 2007. The City did not calculate the overtime compensation and night shift differential compensation that Muldoon would have received, with reasonable certainty, if he had not been called to the colors. That number can be reasonably estimated, based on Muldoon’s overtime compensation and night shift differential compensation in 2006 and 2008 and based on the overtime and differential compensation that other similarly situated NYPD officers received in 2007. Excluding this compensation from the computation of Muldoon’s NYPD pension will mean that he is shortchanged each month for the rest of his life.[\[4\]](#)

The class members who are plaintiffs in this lawsuit (the Muldoons) are all the current and retired NYPD officers who have interrupted their NYPD careers to perform active military service since September 11, 2001, or who will do so in the future. If you are a member of this class, you will be notified, probably by mail. When you are notified, you will be given the opportunity to opt out of the lawsuit. I strongly recommend that you *not* opt out. As a class plaintiff, you receive the benefits of this lawsuit if the plaintiffs win and none of the costs or risks if the plaintiffs lose, except that you are bound by the outcome and cannot bring your own lawsuit about the same issue later.

In announcing this lawsuit, United States Attorney Preet Bharara said: "This country owes an enormous debt of gratitude to the men and women who so unselfishly devote themselves to military service, often risking their lives to protect the United States and its people. NYPD officers who serve in our military put their lives on the line doubly—as civilians and as service members. The purpose of this lawsuit is to ensure that service members remain on the same footing as their civilian counterparts and receive all the benefits to which they are entitled, and that they are not penalized for their service by the unlawful calculation of those benefits."

Mr. Bharara announced, in his press release, that Assistant United States Attorneys Tara M. LaMorte and Aratsu K. Chaudhury, of his office's Civil Rights Unit, are in charge of this case. He also said, "Any current or former NYPD officer who believes that his or her pension benefits may have been improperly reduced based on military service should call the Civil Rights Unit Complaint Line at (212) 637-0840.

I congratulate Mr. Bharara and his staff for bringing this class action lawsuit. We will keep the readers informed of developments in this important case.

NOTE: Please see [Law Review 12104](#) for new developments in this case.

[1] Congress enacted USERRA (Public Law 103-353) on October 13, 1994, as a long-overdue replacement for the Veterans' Reemployment Rights Act (VRRA), which dates back to 1940. We shall assume that Muldoon met the VRRA criteria for periods of military service before the enactment of USERRA.

[2] In accordance with section 4312(c) of USERRA, 38 U.S.C. 4312(c), all involuntary service periods and some voluntary service periods are exempted from the computation of Muldoon's five-year limit. Please see Law Review 201 for a definitive summary of the five-year limit—what counts and what does not count. I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 783 articles about USERRA and other laws that are especially pertinent to those who serve our nation in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week.

[3] If Muldoon's imputed earnings for 2007 are not reasonably determinable, the calculation must be made based on Muldoon's NYPD earnings in calendar year 2006. See 38 U.S.C. 4318(b)(3)(B).

[4] I invite the reader's attention to Law Review 1022, concerning a very similar issue arising in the context of the pension plan of the Police Department of the City of Omaha in Nebraska.