Law Review 12103

October 2012

Pension Credit for 1980s Military Service

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Q: I have read with interest your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), available at www.servicemembers-lawcenter.org. I am trying to figure out if USERRA applies to me.

I served on active duty in the Marine Corps twice. I graduated from high school in 1977 and joined the Marine Corps. I served on active duty for four years and was honorably discharged in 1981. In June 1983, I took a job as a deputy sheriff in my home county in Virginia. In 1984, the Marine Corps contacted me and urged me to reenlist and come back on active duty.

I returned to active duty on December 15, 1984 and left active duty on December 11, 1988, just four days short of four years later. I gave prior notice to the Sheriff, orally and in writing, before I left the job in December 1984, and I made a written application for reemployment with the Sheriff in December 1988, after I was honorably discharged.

The Sheriff adamantly refused to take me back, and I contacted the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), through that agency's "director" in Richmond, Virginia. That DOL-VETS employee contacted the county on my behalf, but the Sheriff still refused to bring me back on board. I finally returned to work as a deputy sheriff in July 1990, with no back pay for the substantial delay in reemploying me. I did not sign any release cutting off my back pay award in exchange for getting my job back.

Under Virginia law, I am eligible to retire when I am over 50 and when I have 25 years of law enforcement service in Virginia. I am already over 50, but the county and the Virginia Retirement System have told me that I am not eligible to retire until July 2015, or 25 years after I returned to work for the county in July 1990.

I have read in your articles that under section 4318 of USERRA I am entitled to be treated *as if I had been continuously employed* in the civilian job (deputy sheriff) during the time that I was away from work for service. If I had been so credited, I would have been eligible to retire as a deputy sheriff as early as April 2008, or 25 years after I was hired in April 1983. What do you think?

A: Assuming the facts are as you have stated them, you have been eligible to retire since April 2008, but not under USERRA. Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which dates back to 1940. Because you completed your military service and applied for reemployment with the county prior to 1994, your rights are under the VRRA.

Congress enacted the VRRA in 1940, as part of the Selective Training and Service Act (STSA), the law that led to the drafting of millions of young men, including my late father, for World War II. As originally enacted in 1940, the reemployment chapter was limited to draftees. In 1941, as part of the Service Extension Act, Congress amended the reemployment chapter to make it apply to voluntary as well as involuntary military service.

The VRRA has applied to the Federal Government and to private employers since 1940. In 1974, Congress amended the law, expanding the applicability to include state and local governments as well. Because you performed your military service after 1974, the VRRA clearly applies to the county and the VRS.

The VRRA did not specifically mention pension benefits, but in its very first case construing the VRRA the Supreme Court enunciated the "escalator principle" when it held: "The returning veteran does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946). In 1977, the Supreme Court applied the escalator principle to pension benefits under a defined benefit plan. *Alabama Power Co. v. Davis,* 431 U.S. 581 (1977).

Raymond E. Davis worked for the Alabama Power Company from Aug. 16, 1936, until June 1, 1971, when he retired. His long career with the company was interrupted by 30 months of World War II active duty, from March 1943 until September 1945, when he was honorably discharged at the end of the war.

On July 1, 1944, while Mr. Davis was on active duty, the company established a defined benefit pension plan that rewarded company service both before and after that date. When the company computed Mr. Davis' monthly pension entitlement upon his retirement in 1971, the company excluded the 30 months that he was away from work for military service. This exclusion cost Mr. Davis $18 per month in pension benefits.

Mr. Davis sued, claiming that he was entitled to pension credit for his military service time under the "escalator principle" enunciated by the Supreme Court in *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946). The District Court ruled in his favor. *Davis v. Alabama Power Co.,* 383 F. Supp. 880 (N.D. Ala. 1974). The employer appealed, and the Court of Appeals affirmed the District Court's judgment in a brief *per curiam* decision. *Davis v. Alabama Power Co.,* 542 F.2d 650 (5th Cir. 1976).

The Supreme Court granted *certiorari* and affirmed, in a unanimous decision written by Justice Thurgood Marshall. The Court held that Mr. Davis was entitled to pension credit for the 30 months that he was away from work for military service, because the pension benefit met the two-pronged test as a perquisite of seniority. A pension benefit is intended to be a reward for length of service rather than a form of short-term compensation for services, and it is reasonably certain that Mr. Davis would have received the 30 months of pension credit if his career with the company had not been interrupted by military service. Justice Marshall's opinion contains an interesting and useful survey of the Supreme Court cases about the escalator principle.

Based on this precedent, the county and VRS are required to treat you *as if you had been continuously employed in the civilian job* during the four years (December 1984 to December 1988) that you were on active duty and also during the 19 months (December 1988 to July 1990) when your reemployment was unlawfully delayed, provided you met the VRRA eligibility criteria in December 1988. The VRRA eligibility criteria are similar but not identical to the USERRA criteria.

Under the VRRA, you had the right to reemployment after the 1984-88 period of service if you left your civilian job for the purpose of performing that period of service, if your period of active duty did not exceed four years, if you served honorably, and if you made a timely application for reemployment with the pre-service employer, within 90 days after leaving active duty. It appears that you met these conditions in December 1988.

On October 13, 1994, President William J. Clinton signed into law Public Law 103-353, 108 Stat. 3149. For those of you who did not go to law school, this means that USERRA was the 353rd Public Law enacted (signed into law by the President or enacted over the President's veto) during the 103rd Congress (1993-94). The reference to "108 Stat.

3149" means that you can find Public Law 103-353 in Volume 108 of *Statutes at Large,* starting on page 3149. You see, this "legal gobbledygook" is not so terribly complicated, once somebody gives you the code.

Most of Public Law 103-353 (USERRA) was codified in title 38 of the United States Code, chapter 43, and some of that law has been amended by new Public Laws enacted in 1996, 1998, 2000, 2004, 2006, 2008, 2010, 2011, and 2012. Section 8 (transition rules) was not codified. The fact that it is not codified does not mean that it is any less binding or any less a part of United States statutory law.

You can find Section 8 (transition rules) on pages 3175-77 of Volume 108 of *Statutes at Large*. Section 8(a)(2) provides: "The provisions of chapter 43 of title 38 [the VRRA], United States Code, in effect on the day before such date of enactment [October 13, 1994], shall continue to apply to reemployments initiated before the end of such 60-day period [October 13, 1994 through December 12, 1994]."

Section 8(f) provides: "Except as otherwise provided, the amendments made by this Act [Public Law 103-353] do not affect reemployments that were initiated, rights, benefits, and duties that matured, penalties that were incurred, and procedures that begin before the end of the 60-day period [December 12, 1994] referred to in subsection (a)."

Section 8(h)(1) provides: "Nothing in this Act [USERRA] shall be construed to relieve an employer of an obligation to provide contributions to a pension plan (or provide pension benefits0, or to relieve the obligation of a pension plan to provide pension benefits, which is required by the provisions of chapter 43 of title 38, United States Code, in effect on the day before this Act takes effect."

Reading these three provisions together, it is clear that your pension rights arising out of your 1984-88 active duty period are governed by the VRRA and not USERRA, and that the 1994 enactment of USERRA has preserved your rights. You have enforceable rights under the VRRA.

Q: The county insists that I do not have VRRA rights because I did not give notice before I left my job to report to active duty in December 1984. I specifically recall that I did give such notice, both orally and in writing, but I cannot put my hands on a copy of the letter that I sent to the Sheriff in November 1984, almost 28 years ago. How am I going to prove that I gave prior notice before I reported to active duty in December 1984?

A: You are not required to prove that you gave such notice, because prior notice was not required under the VRRA. *See Winders v. People Express Airlines, Inc.,* 595 F. Supp. 1512, 1518 (D.N.J. 1984), *affirmed,* 770 F.2d 1078 (3rd Cir. 1985). You are only required to prove that you left your job, in December 1984, *for the purpose of going on active duty*. You can easily show this from records that still exist. Your 1988 DD-214 shows that your active duty period began on December 15, 1984. If the county's records show that your last day on the job was December 10, 1984, it will be self-evident that you left the job in order to report to active duty.

Q: The County insists that I did not have the right to reemployment in December 1988, because I had been on active duty for almost eight years, including my 1977-81 active duty period. Does that period count toward the four-year limit under the VRRA?

A: No. The 1970 edition of the *Veterans' Reemployment Rights Handbook,* published by DOL, provides as follows: "It is essential to note that these [duration of service] limitations apply only to active duty performed after the employee leaves the employment to which he claims restoration. Active duty performed before the employment relationship began does not count toward the years of active duty for which the employee is permitted to absent himself from the employer in question."

DOL did not have rulemaking authority under the VRRA, but DOL did publish the *VRR Handbook*. While employed as a DOL attorney (1982-92), I co-edited (along with one other DOL attorney, Billie Jane Spencer) the 1988 edition of that handbook. Several courts, including the Supreme Court, have accorded a "measure of weight" to the statutory interpretations expressed in the *VRR Handbook*. [*See Monroe v. Standard Oil Co*., 452 U.S. 549, 563 n.

14 (1981); *Leonard v. United Airlines*, 972 F.2d 155, 159-160 (7th Cir. 1992); *Shadle v. Superwood Corp.*, 858 F.2d 437, 440 (8th Cir. 1988); *Dyer v. Hinky Dinky, Inc.*, 710 F.2d 1348, 1352 (8th Cir. 1983); *Smith v. Industrial Employers and Distributors Association*, 546 F.2d 314, 319 (9th Cir. 1976), *cert. denied*, 431 U.S. 965 (1977); *Helton v. Mercury Freight Lines, Inc.*, 444 F.2d 365, 368 n. 4 (5th Cir. 1971).]

Q: The VRS insists that I cannot be given Virginia retirement credit for my 1984-88 active duty period because Virginia law makes no provision for such credit. What do you think about that?

A: State law is irrelevant because federal law (the VRRA) requires that you be given such credit. Federal law trumps conflicting state law. I invite your attention to Article VI, Clause 2 of the United States Constitution: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[1]

As a nation, we are celebrating the sesquicentennial of a great war fought about the supremacy of federal authority over state authority. State and local officials in Virginia sometimes need to be reminded that General Ulysses S. Grant did not surrender to General Robert E. Lee at Appomattox Courthouse.

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[1] Yes, it is capitalized just that way, in the style of the late 18th Century.