

## LAW REVIEW 129

### Status of the Returning Veteran

By CAPT Samuel F. Wright, JAGC, USNR\*

**Q: Since 1990, I have worked for the county comptroller of a county government in Florida. The comptroller is an elected official. In 1995, I was promoted to the position of manager of the official records department, office of the comptroller; I held that position at the time I was recalled to active duty in May 2003. When I was recalled, my assistant was promoted to my position, and he did a fine job. When I returned from active duty in November 2003, the comptroller refused to reinstate me in the manager position that I had held or in any comparable position. Instead, she created a new position called “director of special projects” and put me in that position. Although it carries the same salary as my previous position, I am not satisfied. There are no “special projects” for me to direct, and this is essentially a make-work job. I formerly had a private office and a staff; I do not have that in the new position. I believe that I do not have, after my return from service, the same status that I had before, and that I would have certainly continued but for my being called to the colors. Have my rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) been violated?**

**A:** Because your period of service was for more than 90 days, the employer has the option, either to re-employ you in the position that you would have attained if you had been continuously employed—in this case, almost certainly the same position that you had held—or alternatively in “a position of like seniority, status and pay, the duties of which the person [returning veteran] is qualified to perform.” [38 U.S.C. 4313(a)(2)(A).] So, the big question in this case is whether your post-service position is of like status to your pre-service position. I think that the new position is clearly not of like status to the former position. I have discussed the concept of “status” in some detail in Law Reviews 8 and 79, but I have decided to add further detail here, because I am receiving numerous inquiries on this subject.

As I explained in Law Reviews 89 and 120, USERRA was enacted in 1994 as a complete rewrite of and replacement for the Veterans’ Reemployment Rights (VRR) law, which can be traced back to 1940. USERRA made some major changes, but the concept of “status” has not changed from the VRR law to USERRA.

I explained in Law Review 120 that the VRR law did not give rulemaking authority to the Department of Labor (DOL), but DOL did publish a *VRR Handbook*. While employed as a DOL attorney, I co-edited the 1988 edition of that handbook, which replaced the 1970 edition. Several courts, including the Supreme Court, have accorded a “measure of weight” to the interpretations expressed in the *VRR Handbook*. See *Monroe v. Standard Oil Co.*, 452 U.S. 549, 563 n. 14 (1981); *Leonard v. United Air Lines, Inc.*, 972 F.2d 155, 159 (7th Cir. 1992); *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).

The 1988 *VRR Handbook* has this to say about the concept of status: “The statutory concept of ‘status’ is broad enough to include both pay and seniority, as well as other attributes of the position, such as working conditions, opportunities for advancement, job location, shift assignment, rank or responsibility, etc. Where such matters are not controlled by seniority or where no established seniority system exists, they can be viewed as matters of ‘status.’ In a determination of whether an alternative position offered is of ‘like seniority, status, and pay,’ all of the features that make up its ‘status’ must be considered in addition to the seniority and rate of pay that are involved.” (*VRR Handbook*, pages 11-1 through 11-2.)

USERRA’s legislative history also addresses the issue of “status,” as follows: “Although not the subject of frequent court decisions, courts have construed status to include ‘opportunities for advancement, general working conditions, job location, shift assignment, [and] rank and responsibility.’ [*Monday v. Adams Packing Association, Inc.*, 85 LRRM 2341, 2343 (M.D. Fla. 1973).] See *Hackett v. State of Minnesota*, 120 Labor Cases (CCH) Par. 11,050 (D. Minn. 1991). A reinstatement offer in another city is particularly violative of status. [See *Armstrong v. Cleaner Services, Inc.*, 79 LRRM 2921, 2923 (M.D. Tenn. 1972)], as would reinstatement in a position which does not allow for the use of specialized skills in a unique situation.” [House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2464.]

**Q: As you suggested, I contacted the National Committee for Employer Support of the Guard and Reserve (ESGR), the Department of Defense organization established to assist Reserve Component personnel with exactly this sort of problem. [You can reach ESGR at 800-336-4590, and their Web site is [www.esgr.com](http://www.esgr.com).] The county comptroller told the ESGR ombudsman to “pound sand.” I then contacted the Veterans’ Employment and Training Service, U.S. Department of Labor (DOL-VETS), but she told me to pound sand as well. DOL-VETS offered to refer my case to the Department of Justice, to initiate a lawsuit on my behalf, but about that time I decided to retain private counsel. My attorney has filed suit in the United States District Court for the Middle District of Florida. The county comptroller has filed an answer and motion for summary judgment, asserting that my “special projects” position is of like status to the position that I held before I was mobilized. The defendant’s attorney has cited *Couture v. Evergreen International Airlines, Inc.*, 950 F. Supp. 614 (D. Del. 1996) and *McCormick v. Carnett-Partsnett Systems, Inc.*, 396 F. Supp. 251 (M.D. Fla. 1975). What do you think?**

**A:** I have read those two cases, and I think that they constitute a very thin reed for the county comptroller to rely upon. I suggest two much stronger and more pertinent cases: *Ryan v. Rush-Presbyterian-St. Luke’s Medical Center*, 15 F.3d 697 (7th Cir. 1994) and *Nichols v. Department of Veterans’ Affairs*, 11 F.3d 160 (Fed. Cir. 1993). Please note

that these are Court of Appeals cases, and the defendant's attorney has cited District Court cases.

**Q: In May 2003, on my last day at work before I reported to active duty, I called upon the chief deputy comptroller to say goodbye. During that brief meeting, she brought up the possibility of moving me to a new position upon my return from service, but I certainly did not agree to waive any of my USERRA rights. The comptroller now claims that during that meeting I agreed to accept the special projects position upon my return from service. Her lawyer has cited *Couture*, claiming that case supports the claim that I waived my right to return to the manager of official records position. I did not agree to any such thing, but does it even matter?**

**A:** Because the employer did not raise the possibility of moving you into the "special projects" position until your last day at work before mobilization, it certainly appears that this transfer (downgrade) was motivated by your pending service, in violation of 38 U.S.C. 4311(a). I invite your attention to Law Review 35, titled "Impending Service Results in Immediate Firing."

I agree with you that it does not matter what you may have said during that May 2003 meeting, before you went on active duty, because you cannot waive re-employment rights that are not yet in existence. You did not have such rights until six months later, when you completed the period of service and made a timely application for re-employment.

USERRA's legislative history has the following to say about waiver: "The Committee [House Committee on Veterans' Affairs] wishes to stress that rights under chapter 43 [USERRA] belong to the claimant, and he or she may waive those rights, either explicitly or impliedly, through conduct. Because of the remedial purposes of chapter 43, any waiver must, however, be clear, convincing, specific, unequivocal, and not under duress. Moreover, only known rights that are already in existence may be waived. See *Leonard v. United Air Lines, Inc.*, 972 F.2d 155, 159 (7th Cir. 1992). An express waiver of future statutory rights, such as one that an employer may wish to require as a condition of employment, would be contrary to the public policy embodied in the Committee bill and would be void." House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2453. See also 1988 *VRR Handbook* at page 22-2 and also Example 2 on page 22-5.

In *Leonard*, the United States Court of Appeals for the Seventh Circuit cited this *Handbook* paragraph and example in holding that Mr. Leonard did not waive his pension rights under the VRR law when he withdrew his pension contributions before re-entering active duty for the Berlin Airlift Crisis of 1948. I also invite your attention to *Lapine v. Town of Wellesley*, 304 F.3d 90 (1st Cir. 2002), holding that Gary Lapine did not waive his re-employment rights when he withdrew his pension contributions and wrote an ill-advised letter to the town's police chief, just before re-entering active duty.

In *Couture*, the case cited by the employer's attorney, the issue was whether the returning veteran (Mr. Couture) had waived his rights by accepting an alternative position *after returning from service*. That is a very different question from the question

presented in your case—whether you waived your rights before you left your job for service. I do not think that *Couture* hurts your case one bit.

*\*Military title used for purposes of identification only. The views expressed herein are the personal views of the author, and not necessarily the views of the Department of the Navy, the Department of Defense, the Department of Labor, or the U.S. government. Captain Wright was employed by the Department of Labor from 1982 to 1992. While so employed, he largely drafted (with one other Department of Labor attorney) the interagency task force work product that became USERRA, with some changes in Congress, of course. The best way to contact Captain Wright is by e-mail, at samwright50@yahoo.com.*