Law Review 13032

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A Great American Company Must Reemploy Great American Service Members

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1.3.1.2—Character and duration of service
1.3.2.2—Continuous accumulation of seniority-escalator principle
1.4—USERRA enforcement

Jones v. Marriott Hotel Services, Inc., **Case No. C 12-000587 WHA, United States District Court for the Northern District of California.**

Christopher A. Jones is a Captain in the Marine Corps Reserve and a life member of ROA. In January 2001, Mr. Jones was hired as an Assistant Sous Chef Trainee at the Westchester Marriott Hotel in Tarrytown, New York. In 2002, Mr. Jones was selected for an Assistant Sous Chef position at the Renaissance New York Hotel. In November 2004, Mr. Jones was selected for a Sous Chef position at The Lodge at Sonoma in Sonoma, California.

In October 2006, he was selected for the Banquet Chef position at the San Francisco Marriott Marquis. He was serving in that position when the Marine Corps called him to active duty in late 2008. He served honorably and was released from active duty in late 2009. It is clear that in late 2009 he met the qualifications for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

Mr. Jones left his job at the Marriott for the purpose of performing service in the uniformed services, and he gave prior oral and written notice to the employer. 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 Marriott and since this was an involuntary call-up it did not count toward his five-year limit in any case.[1] He was released from active duty without a disqualifying bad discharge and made a timely application for reemployment with Marriott, well within the 90 days permitted under 38 U.S.C. 4312(e)(1)(D).[2]

Because he met the USERRA eligibility criteria, Mr. Jones was entitled to reemployment "in the position of employment in which the person [Jones] would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status, and pay, the duties of which the person is qualified to perform." 38 U.S.C. 4313(a)(2)(A).

As I explained in Law Review 104 and other articles, Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA). The VRRA was enacted in 1940, as part of the Selective Training and Service Act, the law that led to the drafting of millions of young men (including my late father) for World War II. The reemployment statute has been part of the fabric of our country for more than 72 years, and a great company like Marriott should have a better appreciation for its obligations under this law.

In its 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).[3]

Section 4316(a) of USERRA codifies the escalator principle in the current law: "A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on

the date of commencement of service plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed." 38 U.S.C. 4316(a).

It has always been the case that the "escalator" can descend as well as ascend. The descending escalator is particularly a problem during a serious recession. The point of the reemployment statute is to put the returning veteran (who meets the law's eligibility criteria) in the position that he or she *would have attained if continuously employed*. The reemployment law does not protect the veteran from a bad thing like a layoff or job elimination that *clearly would have happened anyway* even if the individual had not left the civilian job for uniformed service
The world has changed a great deal since the Supreme Court decided *Fishgold* in 1946. At the time, unions represented more than half of all private sector employees in the United States, but today that percentage is only 8%. When a union represents the workforce of a company, there is almost always a collective bargaining agreement (CBA) between the company and the union. The CBA generally provides that layoffs, when they are necessary, are to be based strictly on seniority, and recalls from layoff status are also based on seniority. Thus, the most recently hired employees will be the first to be laid off and the last to be called back from layoff.
When there is a union and a CBA, it is usually easy to determine the *escalated reinstatement position* of the returning veteran. Let us say that Joe Smith is our returning veteran. Bob Jones was hired by the company one day before Joe Smith was hired, and Mary Williams was hired one day after Smith. To determine Smith's escalated reinstatement position, we need only look to the position of Jones and Williams at the time that Smith returns from service.

As I explained in Law Review 13022 and other articles, the "big question" in many reemployment rights cases today is how to identify the position that the returning veteran *would have occupied* if he or she had remained continuously employed instead of going on active duty. In the absence of a system of seniority created by a CBA, identifying the specific position may be difficult but is not impossible. To the extent that there is doubt about the position, that doubt must be construed in favor of the returning veteran. In *Fishgold,* the Supreme Court held that the reemployment statute must be "liberally construed for the benefit of he who has laid aside his civilian pursuits to serve his country in its hour of great need." *Fishgold,* 328 U.S. at 285.[4]

Marriott concedes that Mr. Jones met the USERRA eligibility criteria in late 2009, when he returned from active duty. Nonetheless, Marriott denied him reemployment, claiming that the position that he had occupied when he was called to the colors in 2008 had been abolished during the time that he was on active duty. Even if it can be established that the specific position had been abolished, that does not necessarily mean that Mr. Jones *would have lost his job anyway*.

In answer to interrogatories and deposition questions, Marriott has conceded that other food service employees at the Marriott Marquis San Francisco were "redeployed" into Mr. Jones' position when Mr. Jones left the job to report to active duty. A change that was made *because Mr. Jones was called to the colors* cannot possibly be a change that *would have been made anyway*.

When Mr. Jones was called to the colors in 2008, Mr. Jhunery Battung worked for the Marriott Marquis San Francisco, in the food service department, in a position that was subordinate to Mr. Jones' position. Shortly after Mr. Jones was denied reemployment, Mr. Battung was promoted to a position that was superior to the position that Mr. Jones had held. The fact that Mr. Battung was still working for the Marriott Marquis San Francisco in the food service department in late 2009 and is still working there today (along with others who took over Mr. Jones' duties when he was called to the colors) tends to contradict Marriott's position that Mr. Jones' job would have gone anyway in any case, even if he had not been called to the colors.

The evidence adduced thus far in discovery seems to indicate that the Marriott Marquis San Francisco went through some economic hard times in 2008, after Mr. Jones was called to active duty, and 191 employees were laid off, but 185 of them have since been called back to work. It is by no means clear that Mr. Jones' job would have gone away in any case. This is a question of fact for the jury.

It should also be noted that Marriott has adamantly refused to look beyond the four walls of the Marriott Marquis San Francisco, although there is evidence that employees at one Marriott property frequently transfer to other

properties of the same company. Marriott Hotel Services, Inc., the defendant in this case, has 141 hotel properties, including another hotel in San Francisco. The court recently permitted Mr. Jones to amend his complaint and to name Marriott International as an additional defendant. Marriott International has thousands of hotels around the United States, and most of them have food service departments.

Both Mr. Jones and Marriott have moved for summary judgment, and Judge William H. Alsup has denied both motions. This case is set for trial in September 2013. Captain Jones is currently serving on active duty, but he is scheduled to leave active duty in July, in plenty of time for the September trial.

How Mr. Jones has mitigated his damages.

Under USERRA and other employment statutes, the plaintiff claiming unlawful firing or failure to reemploy has a *duty to mitigate damages*. After he was denied reemployment in January 2010, Mr. Jones diligently sought mitigating employment at other hotels and restaurants in San Francisco and elsewhere, but he was unable to find a civilian job. In order to mitigate his damages, and also in order to feed his family, Mr. Jones went back on active duty in April 2010 and has been on active duty since.

Mr. Jones' active military service from April 2010 to July 2013 (when he expects to leave active duty) does not count toward his five-year limit with respect to his employment relationship with Marriott, because this 2010-13 active duty has been for the purpose of mitigating his damages. This means that if Mr. Jones applies for reemployment with Marriott after he leaves active duty in July, he will be entitled to reemployment all over again. *See* 20 C.F.R. 1002.103(b).

Remedies and damages available to Mr. Jones if he wins.

Let us assume that this case goes to trial in September 2013 (as scheduled) and Mr. Jones prevails. What money damages and other remedies are available to him?

Section 4323(d)(1) of USERRA provides for remedies that a federal court can award to a successful USERRA plaintiff, as follows:

(1) In any action under this section, the court may award relief as follows:

(A) The court may require the employer to comply with the provisions of this chapter.

(B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.

(C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.

38 U.S.C. 4323(d)(1).

If the court determines that Marriott had a duty to reemploy Mr. Jones in January 2010 and breached that duty, the court will order the company to reinstate Mr. Jones and to amend the company records to show that he was continuously employed by Marriott from January 2010 through the time of the court's judgment. Moreover, the court will order Marriott to compensate Mr. Jones for the pay and benefits that he lost during the time between January 2010 and the time of judgment.

The back pay owing to Mr. Jones must be computed on a pay period by pay period basis. *See Dyer v. Hinky-Dinky, Inc.,* 710 F.2d 1348 (8th Cir. 1983).

In computing the back pay, the court should compare earnings for *comparable hours of employment*. If the veteran-plaintiff worked overtime in the mitigating employment, the overtime earnings should not be considered in computing back pay, because to do so would be to reward the lawbreaking employer for the veteran's extra effort, above and beyond the hours that he or she would have worked in the job to which he or she was entitled. *See Helton v. Mercury Freight Lines, Inc.,* 444 F.2d 365 (5th Cir. 1971).

Mr. Jones went back on active duty in April 2010 and has been on active duty the entire time from April 2010 to July 2013, when he expects to leave active duty. While on active duty as a First Lieutenant and more recently as a Captain, he has earned substantially more in each pay period from the Marine Corps than he would have earned from Marriott if he had been continuously employed in the civilian job, as he should have been under USERRA. But Mr. Jones has also been working a hugely greater number of hours per week. It is not unusual for junior officers on active duty to work 80 or more hours per week, especially when they are deployed.

More importantly, Mr. Jones has faced enormously greater risk of loss of life or limb while on active duty than he would have faced if he had remained continuously employed at Marriott Marquis San Francisco or another Marriott hotel. If Mr. Jones had remained in San Francisco, his risk of death or serious injury was the background risk that all big city residents face. While on active duty within the United States, Mr. Jones has faced a somewhat greater risk. While serving in a place like Kuwait, where he presently serves, his risk has been significantly greater. While serving in Afghanistan, he has faced risks that have been orders of magnitude greater than the risks that he faced in San Francisco.

I propose that Mr. Jones is entitled to a mathematical adjustment to account for the greater number of hours worked and greater risks endured while on active duty, as compared to the hours that he would have worked and the risks that he would have incurred as a Banquet Chef in San Francisco. For the pay periods that Mr. Jones has been on active duty and serving within the United States, I propose that only 70% of his military pay should be deducted from what he would have earned at Marriott. For the pay periods that Mr. Jones has been serving in a place like Kuwait, only 50% of his military pay should be considered in making the back pay computation. For the pay periods when Mr. Jones has been serving in Afghanistan, only 20% of his military pay should be considered.

I did a computer search on *Helton,* but I did not find a case directly on point. This is apparently an issue of first impression. But the principle is to make Mr. Jones whole for what he has lost because Marriott violated USERRA.

I also believe that it can be established that Marriott has violated USERRA *willfully,* so his back pay damages should be doubled (as liquidated damages) under section 4323(d)(1)(C) of USERRA, 38 U.S.C. 4323(d)(1)(C).

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[1] Please see Law Review 201 for a definitive discussion of what counts and what does not count toward the exhaustion of an individual's five-year limit. I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 853 articles about USERRA and other laws that are especially pertinent to those who serve our country 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. We added 122 new articles in 2012.

[2] After a period of service of more than 180 days, the returning veteran has 90 days to apply for reemployment.

[3] I invite the reader's attention to Law Review 0803 (January 2008) for a detailed discussion of *Fishgold* and its implications.

[4] USERRA's 1994 legislative history makes clear that the pre-1994 case law under the VRRA is to be considered still relevant under USERRA, and this applies especially to the "liberally construed" requirement of *Fishgold* and *Alabama Power Co. v. Davis,* 431 U.S. 581, 584 (1977). *See* House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2452.