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The Limit on Duration of Service only Includes Service after Starting the Relevant Job

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

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Sykes v. Columbus & Greenville Railway, 117 F.3d 287[1] (5th Cir. 1997).[2]

Background

As I explained in Law Review 104[3] and other articles, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA—Public Law 103-353) on October 13, 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRRA), which can be traced back to 1940. Under USERRA's transition rules, the new law applies to "reemployments initiated" on or after December 12, 1994, and vested rights under the prior law are preserved.[4] This case was decided by the 5th Circuit almost three years after Congress enacted USERRA, but the VRRRA and not USERRA governs this case.

Alvin G. Sykes first enlisted in the United States Marine Corps (USMC) on June 2, 1982, and he did not work for the defendant Columbus & Greenville Railway (CGR) prior to that enlistment. He remained on active duty until July 1, 1988, when he was honorably discharged. CGR hired Sykes as a conductor-trainee on July 25, 1988. After nine months on the job, Sykes informed CGR that he intended to reenlist in the USMC. He did so and served on active duty from April 26, 1989 to April 25, 1993, when he was again honorably discharged. After his discharge, Sykes promptly applied for reemployment at CGR and was denied.

Sykes' resignation letter did not defeat his right to reemployment.

When Sykes informed the railroad of his intention to reenlist, CGR drafted a letter and insisted that Sykes sign it. The letter stated that Sykes was resigning "effective April 14, 1989" and purported to "give up contractual rights." CGR denied Sykes' application for reemployment based on the resignation letter and also based on the company's contention that Sykes had exceeded the VRRRA's four-year limit on the duration of service in the military.

In the unanimous decision of a three-judge panel, Judge William L. Garwood of the 5th Circuit wrote: "It is beyond dispute that a resignation from a civilian job, whether verbal or written, does not waive reemployment rights under the VRRRA. See *Green v. Oktibbeha County Hospital*, 526 F. Supp. 49, 54 (N.D. Miss. 1981); *Bottger v. Doss Aeronautical Services, Inc.*, 609 F. Supp. 583 (N.D. Ala. 1985). See also *Winders v. People Express Airlines, Inc.*, 595 F. Supp. 1512, 1518 (D.N.J. 1984) (stating that where an employee communicates that he is entering active military duty even the word 'resign' in a communication sent to the employer cannot waive reemployment rights." *Sykes*, 117 F.3d at 296-97.[5]

Sykes did not exceed the VRRRA's four-year limit.

Under the VRRRA, there was a four-year limit on the duration of the period or periods of uniformed service. The enactment of USERRA in 1994 raised the limit to five years. Both laws have exemptions—kinds of service that do not count toward the limit.

CGR argued that all periods of service performed by the individual should count toward the four-year VRRRA limit. Sykes' period of service after he left his CGR job in 1989 was exactly four years—it did not exceed the four-year limit. The railroad argued that Sykes' original period of service, from June 1982 to July 1988 should also count toward the four-year limit, although Sykes did not work for the railroad before he enlisted in 1982.

The language of section 2024(a) of the VRRRA was somewhat ambiguous—it was capable of the interpretation that the four-year limit only related to the one employer with respect to which the veteran sought reemployment, but it was also capable of the interpretation that *all* active duty that the individual had performed would count toward the four-year limit.

Judge Garwood and the two other judges who joined his opinion chose the interpretation that only active duty performed *after starting the relevant civilian job* counts toward the four-year limit. They relied on several factors, including the legislative history of section 2024(a) and the Supreme Court's admonition that the VRRRA should be "liberally construed for he who has laid aside his civilian pursuits to serve his country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). Judge Garwood's decision also cited with approval the 1970 and 1988 editions of the *VRR Handbook*, published by the Department of Labor (DOL).^[6] *Sykes*, 117 F.3d at 294.

Under USERRA, it is unambiguously clear that the five-year limit only includes uniformed service that the individual has performed with respect to the employer from which reemployment is sought. The pertinent USERRA language is as follows: "Subsection (a) [the right to reemployment] shall apply to a person *who is absent from a position of employment* by reason of service in the uniformed services if such person's cumulative period of service in the uniformed services, *with respect to the employer relationship for which a person seeks reemployment*, does not exceed five years, except that any such period of service does not include any service-- ... [nine exemptions to the five-year limit]." 38 U.S.C. 4312(c) (emphasis supplied).

In some circumstances, an individual can start a new *employer relationship* with an employer by which the individual had been employed earlier in the individual's lifetime. In such circumstances, the individual gets a fresh five-year limit upon starting the new employer relationship. Please see Law Review 1102 (January 2011).

Resolution of this case

The United States District Court for the Northern District of Mississippi granted summary judgment for the railroad, based on the holding that Sykes' 1989 resignation letter defeated his right to reemployment in 1993 and also based on the holding that Sykes had exceeded the four-year VRRRA limit on the duration of service. Sykes appealed to the 5th Circuit, which reversed the summary judgment for the employer and granted summary judgment for Sykes, the veteran. I did a computer search, and there is no subsequent history of this case. That means that the railroad did not apply to the 5th Circuit for rehearing *en banc* and did not apply to the Supreme Court for *certiorari* (discretionary review). The 5th Circuit remanded the case to the Northern District of Mississippi to determine the back pay and other relief owed to Sykes. There is no published decision on remand. This means that the parties reached a settlement, after the 5th Circuit decision.

How this case was brought

Under the VRRRA and under USERRA, a reemployment rights claimant can make a formal complaint to DOL, seeking assistance in securing reemployment rights. Sykes did that, and DOL referred the case to the Department of Justice (DOJ) after the employer refused to comply. In the appellate court, Sykes was represented by DOL attorney William H. Berger^[7] and DOJ attorneys Mark Christopher Niles and Michael Jay Singer. I congratulate them for their imaginative, diligent, and effective representation of this veteran.

Implications of this case

This case is not new, and it was brought under the prior reemployment statute, but it established some important principles that are still relevant today. USERRA's legislative history provides: "The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protection against employment-related discrimination, and the protection of certain other rights and benefits have been eminently successful for over fifty years. Therefore, the Committee [House Committee on Veterans' Affairs] wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act [USERRA], remains in full force and effect in interpreting these provisions. This is particularly true of the basic principle established by the Supreme Court that the Act is to be 'liberally construed.' See *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); *Alabama Power Co. v. Davis*, 431 U.S. 581, 184 (1977)." House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2452.

[1] This citation means that you can find the *Sykes* case in Volume 117 of *Federal Reporter Third Series* starting on page 287.

[2] The Fifth Circuit is the federal appellate court that sits in New Orleans and hears appeals from district courts in Louisiana, Mississippi, and Texas.

[3] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 859 articles about 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.

[4] Please see Law Review 12103 (October 2012) for a detailed discussion of the USERRA transition rules.

[5] Similarly, under USERRA, an employee's resignation does not defeat his or her right to reemployment. Please see Law Review 63 (January-February 2003).

[6] Section 4331 of USERRA gives the Secretary of Labor the authority to promulgate regulations on the application of USERRA to state and local governments and private employers. The VRRRA did not have a similar provision authorizing rulemaking, but several courts, including the Supreme Court, accorded a "measure of weight" to the *VRR Handbook* and other DOL publications about the VRRRA.

[7] I remember William H. Berger quite well, from my own 1982-92 employment as a DOL attorney.