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One Year of Back Pay Is not Enough

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Q: I am a Lieutenant Colonel in the Army Reserve and a life member of ROA. For almost two decades, I have worked for a major corporation—let's call it XYZ Corp. In the spring of 2001, I was promoted to Vice President of XYZ and was put in charge of a major division of the corporation, with several hundred employees reporting to me. In the 11.5 years since the terrorist attacks of September 11, 2001, I have been called to active duty five times, on top of my standard weekend drills and annual training.

Many times over the last decade, the Chief Executive Officer (CEO) of ZYX has commented negatively (to me personally and also in meetings attended by myself and other company executives) about my Army Reserve service (and the absences from work necessitated by such service). The CEO has told me on many occasions that I must choose between being an executive at XYZ and "playing soldier." For many years, I have read with great interest your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) in the ROA magazine and on the Service Members Law Center (SMLC) website.[1]

My most recent involuntary call to active duty was for 12 months, from January 2012 to January 2013. I very carefully documented my compliance with each of the five USERRA conditions for reemployment, as you explained in Law Review 1281 and other articles. I gave four months of advance notice, both orally and in writing (by certified mail), to the CEO and personnel office of XYZ. I have not exceeded the five-year limit, and since this was an involuntary call-up it does not count toward my five-year limit. I served honorably and was released from active duty on January 15, 2013, without a disqualifying bad discharge. The very next day, I applied for reemployment in person and also by certified mail.

When I was called to active duty in January 2012, the company put Mary Jones (my deputy) in charge of the division that I had been running since 2001. Not surprisingly (since I trained her well), Mary did a fine job, and the CEO has made her the Vice President, instead of me, in June 2012, while I was in Afghanistan. I am back on the payroll with the same salary I had been making, but the CEO put me in a "broom closet" office, with no employees reporting to me and no duties for me to perform. The CEO never misses an opportunity to harass me and bad-mouth me in front of the other Vice Presidents—he is clearly trying to get me to quit. I would like to quit, but I do not think that I can find another job, outside XYZ, that pays even half of what I make at this company.

I have complained that my USERRA rights are being violated, but the CEO and the General Counsel insist that USERRA does not apply to executive-level company officers like me. Is that true?

The General Counsel sent me a letter offering me one year of salary as a severance payment, in exchange for my resignation from the company and my signature on a release document that he prepared, releasing the company from all liability, in exchange for the severance payment. The General Counsel insisted that under USERRA the company is only required to reemploy me for one year, so the severance pay should be limited to one year of salary.[2] I have not resigned and have not signed the release. I figure that I am still at least 15 years away from the age when I will want to retire, and I think that just one year of salary does not come close to compensating me for what I have lost because I was called to the colors and because this company does not honor military service and USERRA. How do you suggest that I proceed?

Does USERRA apply to corporate vice presidents? Yes.

A: Let me address the coverage question first. Section 4331 of USERRA (38 U.S.C. 4331) gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. The Department of Labor (DOL) published draft USERRA Regulations, for notice and comment, in the *Federal Register* in September 2004. After considering the comments received and making a few adjustments, DOL published the final USERRA Regulations in the *Federal Register* in December 2005. The Regulations are now published in Part 1002 of title 20 of the *Code of Federal Regulations* (20 C.F.R. Part 1002). These regulations have the force and effect of law.

The DOL USERRA Regulations specifically contradict XYZ Corporation's assertion that executive level personnel are excluded from USERRA coverage. "**Does an individual have rights under USERRA even if he or she is an executive, managerial, or professional employee?** Yes. USERRA applies to all employees. There is no exclusion for executive, managerial, or professional employees." 20 C.F.R. 1002.43 (bold question in original).

Your USERRA right to reemployment in January 2013

It is clear that in January 2013 you met the USERRA eligibility criteria for reemployment. You gave the employer prior notice. You have not exceeded the cumulative five-year limit, and since this was an involuntary call-up it does not count toward your limit. You served honorably, and you did not receive a disqualifying bad discharge from the Army. After your release from active duty, you applied for reemployment the next day, well within the 90-day deadline set forth at 38 U.S.C. 4312(e)(1)(D).

Because you met the conditions for reemployment, XYZ was required to reemploy you "in the position of employment in which the person [you] 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) (emphasis supplied).

It seems clear that the position that you *would have attained if you had been continuously employed* is the same position (Vice President) that you held from 2001 until January 2012, when you were called to the colors. Your deputy was put in charge in your absence and then was placed "permanently" in the position. This is excellent evidence that the position did not go away and if you had not been called to active duty you would have continued in the position. Thus, in this case, the comparison of your post-service position must be made with the Vice President position that you held until January 2012. It appears that you have been reemployed in a position with the appropriate salary, but not the appropriate *status*.

Definition of "status" under USERRA

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), which dates back to 1940.[3] The word "status" was also used in the VRRA, to describe the position to which the returning veteran is entitled. USERRA's 1994 legislative history contains an instructive paragraph on the meaning of "status."

"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 like 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 Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News (USCCAN)* 2449, 2464.

Although XYZ may still call you a "Vice President" and although your rate of salary may be correct, it is clear that the make-work position you have been offered after your military service is not of like status to the substantive position you held at the time you were called to the colors.

Does it matter that your position was filled when you were called? No.

Moreover, the fact that Mary Jones was promoted into the position while you were on active duty in no way defeats your right to the position, or another Vice President position for which you are qualified. The United States Court of Appeals for the Federal Circuit has eloquently addressed this issue:

"The department [Department of Veterans Affairs, the employer in the case] first argues that, in this case, Nichols' [Nichols was the returning veteran and the plaintiff] former position was 'unavailable' because it was occupied by another, and thus it was within the department's discretion to place Nichols in an equivalent position. This is incorrect. Nichols' former position is not unavailable because it still exists, even if occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. 'Employers must tailor their workforces to accommodate returning veterans' statutory rights to reemployment. Although such arrangements may produce temporary work dislocations for nonveteran employees, these hardships fall within the contemplation of the Act, which is to be construed liberally to benefit those who 'left private life to serve their country.' *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). *Goggin v. Lincoln St. Louis*, 702 F.2d 698, 704 (8th Cir. 1983). Although occupied by Walsh, Nichols' former position is not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him." *Nichols v. Department of Veterans Affairs*, 11 F.3d 160 (Fed. Cir. 1993).
For other cases holding that the lack of a current vacancy does not excuse the employer's failure to re-employ the returning veteran, I invite the reader's attention to *Cole v. Swint*, 961 F.2d 58 (5th Cir. 1992); *Fitz v. Board of Education of the Port Huron Area Schools*, 662 F. Supp. 10 (E.D. Mich. 1985); and *Green v. Oktibbeha County Hospital*, 526 F. Supp. 49 (N.D. Miss. 1981). There are circumstances in which the employer must displace the replacement in order to reemploy the returning veteran. I think that your situation is such a case.

Are your back pay damages limited to one year of salary? No.

Section 4316(c) of USERRA provides:

"(c) A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause—

(1) within one year after the date of such reemployment, if the person's period of service before the reemployment was more than 180 days; or

(2) within 180 days after the date of such reemployment, if the person's period of service before the reemployment was more than 30 days but less than 181 days."

38 U.S.C. 4316(c).

The General Counsel of XYZ is contending that section 4316(c) means that you are entitled to, at most, one year of salary, as a remedy. It is clear that the General Counsel is misconstruing this provision.

Since 1940, the reemployment statute has had this "special protection" provision. The enactment of USERRA, in 1994, tinkered with the computation of the duration of the special protection period but did not change the basic purpose and effect of this provision. USERRA's 1994 legislative history addresses the special protection provision as follows:

"Section 4315(d) [later renumbered as 4316(d)] would relate the period of special protection against discharge without cause to the length, and not the type, of military service or training. … Under this provision, the protection would begin only upon proper and complete reinstatement. *See O'Mara v. Peterson Sand & Gravel Co.,* 498 F.2d 896, 898 (7th Cir. 1974).
The purpose of this special protection is to ensure that the returning serviceperson has a reasonable time to regain civilian skills and to guard against a bad faith or pro forma reinstatement. As expressed in *Carter v. United States,* 407 F.2d 1238, 1244 (D.C. Cir. 1968), 'cause' must meet two criteria: (1) it is reasonable to discharge employees because of certain conduct and (2) the employee had notice, express or fairly implied, that such conduct would be notice [presumably 'cause' was intended] for discharge. The burden of proof to show that the discharge was for cause is on the employer. *See Simmons v. Didario,* 796 F. Supp. 166, 172 (E.D. Pa. 1992).
The limitation upon the duration of the period of special protection should not be considered to be a limitation upon the duration of other rights under chapter 43 [USERRA]. *See Oakley v. Louisville & Nashville Railway Co.,* 338 U.S. 278, 284-85 (1949). Similarly, the expiration of the period of special protection does not end the protection against discrimination contained in proposed section 4311. It is to be understood, however, that good cause exists if the 'escalator' principle would have eliminated a person's job or placed that person on layoff in the normal course."

House Rep. No. 103-65, 1994 *USCCAN* at 2468.

The DOL USERRA Regulations provide as follows concerning the special protection period:

"The employee may be discharged for cause based either on conduct or, in some circumstances, because of the application of other legitimate nondiscriminatory reasons. (a) In a discharge action based on conduct, the employer bears the burden of proving that it is reasonable to discharge the employee for the conduct in question, and that he or she had notice, which was express or can be fairly implied, that the conduct would constitute cause for discharge. (b) If, based on the application of other legitimate nondiscriminatory reasons, the employee's job position is eliminated, or the employee is placed on layoff status, either of these situations would constitute cause for purposes of USERRA. The employer bears the burden of proving that the employee's job would have been eliminated or that he or she would have been laid off."

20 C.F.R. 1002.248.

In your case, the XYZ Corp. clearly has breached its duty to reemploy you *properly*—you have not been reinstated into the position that you would have attained if you had been continuously employed, and the make-work position that you are holding is clearly of lesser status than the position to which you are entitled. Moreover, XYZ clearly has not dealt with you in good faith. The company clearly seeks to force you out, rather than putting you in the position that you left and clearly would have continued to hold, but for your call to the colors.

If the company waits a year and a day and then fires you, the special protection period *will not have expired because it never started running. See O'Mara, supra.* The one-year period of special protection does not *start* running until the veteran is *properly* reinstated.

Section 4311 of USERRA forbids discrimination

Moreover, even after the period of special protection has expired you still are protected by section 4311(a), which provides as follows: "A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment,

reemployment, *retention in employment,* promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation." 38 U.S.C. 4311(a).

Under section 4311(c), you need not prove that your military service or obligation for service was the sole reason for the firing—it is sufficient to prove that your past service and obligation to perform future service constituted *a motivating factor* in the employer's decision to terminate your employment. If you prove that, the *burden of proof* (not just the burden of going forward with the evidence) shifts to the employer, to prove that it would have fired you anyway, even in the absence of these protected factors.

In a recent case, the United States Court of Appeals for the 6th Circuit[4] set forth a good explanation of how one can prove a violation of section 4311:

"Discriminatory motivation may be inferred from a variety of considerations, including proximity in time between the employee's military activity and the adverse employment action, inconsistencies between the employer's conduct and the proffered reason for its actions, the employer's expressed hostility toward military members together with knowledge of the employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses. If Bobo carries the initial burden to show by a preponderance [of the evidence] that his protected status was a motivating factor in his discharge from employment, the burden shifts to UPS to prove affirmatively that it would have taken the same employment action in the absence of Bobo's protected status." *Bobo v. United Parcel Service,* 665 F.3d 741, 754 (6th Cir. 2012).

Don't settle too cheap

If the company fires you, you have plenty of ammunition to challenge the firing under section 4316(c) and/or 4311(a). Thus, the settlement value of this case is not limited to one year of salary. If you sue and win, the court will order XYZ Corp. to compensate you for the pay you lose from the date of firing to the date of judgment. If for whatever reason you are not reinstated at XYZ, the company should have to pay you front pay—the present value of all the salary and benefits that you would have reasonably earned from XYZ through the regular retirement age (65 or perhaps older), less the amount that you can reasonably be expected to earn from mitigating employment.[5]

Remedies available under USERRA

Q: If I sue XYZ and when, what remedies can the court award?

A: Section 4323 of USERRA sets forth the remedies that the court can award to the successful plaintiff:

"(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 (as it certainly should) that the position in which you were reemployed was lesser in status to the position you would have attained if you had been continuously employed, the court can exercise its power under section 4323(d)(1)(A) to order the employer to put you in the proper position, even if that means displacing Mary

Jones. Such a court order is enforced through the court's injunction powers—an individual who violates an injunction can quite literally go to jail for contempt of court.[6] The court can also use its equity powers to order the CEO and other XYZ officials to cease and desist from harassing you about your Army Reserve service.[7]

If you file suit through private counsel and prevail, the court can also award you reasonable attorney fees. *See* 38 U.S.C. 4323(h)(2).

Q: Can the court award me money damages for the harassment and for the improper position of reemployment in January 2013?

A: No. The damages available under section 4323(d)(2) appear to be limited to *pecuniary* damages. If you receive less money than you are entitled to, the court will award you back pay. If the employer's USERRA violation means that you have to pay money out of your pocket for something like health insurance coverage, the court can certainly order the employer to compensate you for that out-of-pocket expense. These are called *pecuniary* damages. Paying you for the harassment or the improper status is not authorized by USERRA as currently written, but you can get the court to use its equity powers to fix such a violation.

Proposed USERRA amendment on remedies

Q: What would it take, by way of an amendment to USERRA, to authorize *non-pecuniary* damages?

A: Title VII of the Civil Rights Act of 1964 made it unlawful for an employer to discriminate, in employment, on the basis of race, color, sex, religion, or national origin. The Civil Rights Act of 1991 (Public Law 102-166) made some important amendments to Title VII. One amendment expanded the kind of damages that can be awarded for a proven Title VII violation. Between 1964 and 1991, the damages that could be awarded were limited to pecuniary damages, like lost pay. The 1991 amendment expanded the remedies provision to authorize the awarding of non-pecuniary damages, like emotional distress, as well as punitive damages for egregious violations. We can utilize the language of the Civil Rights Act of 1991 to draft an appropriate USERRA amendment to authorize the award of non-pecuniary damages.

What does mootness mean? Is there a danger of my case becoming moot?

Q: I am actively seeking employment with other companies in the industry. If I find and accept a job with another employer that pays as much or more than the XYZ job, what effect does that have on my USERRA case?

A: Such a development could make your whole case moot, meaning that the judge would dismiss it. If you are no longer working for XYZ and not seeking reinstatement, there is no occasion for the court to use its equity powers to require the employer to cease the harassment and to put you in a position of appropriate status. If because of new things that have happened you cannot get equitable relief and cannot get money damages, then your case is moot and should be dismissed.

USERRA enforcement through private counsel

Q: Am I required to file a complaint with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS) before filing suit?

A: If you want free legal representation from the United States Department of Justice (DOJ), you must first file a formal written complaint with DOL-VETS and give that agency the opportunity to conduct its investigation, but USERRA has no "exhaustion of remedies" rule and you do not need a "right to sue letter" from DOL-VETS or anybody else. If you have private counsel, you can sue XYZ Corp. in the United States District Court for any district where the company maintains a place of business. 38 U.S.C. 4323(c)(2).

In a case like this, I think that you are much better off with private counsel, and I know several lawyers who take such cases on a contingent fee basis.

The most likely outcome in your case is a negotiated settlement, and you need a lawyer who is a good negotiator. You should not settle your case for one year of salary, but if the offer goes up to ten years of salary you should probably accept the offer and move on with your life.

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[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find 867 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. Captain Wright initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012.

[2] It appears to me that the General Counsel is intentionally misconstruing section 4316(c) of USERRA, in an attempt to minimize the cost to the company to resolve your case. I will discuss this issue at length below.

[3] The VRRA was enacted in 1940, as part of the Selective Training and Service Act (STSA). The STSA is the law that led to the drafting of millions of young men, including my late father, for World War II.

[4] The 6th Circuit is the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee.

[5] Please see Law Review 172 (June 2005) for a detailed discussion of front pay under USERRA.

[6] When it becomes clear that the XYZ CEO may be required to spend weekends in jail for contempt, that prospect will increase exponentially the settlement value of your case.

[7] Please see Law Review 1211 (January 2012).