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Do I Accrue Civilian Vacation while I Am away from my Civilian Job for Military Service?

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Q: I am a Captain in the Army Reserve and an employee of the State of Georgia. I was called to active duty and deployed to Afghanistan, from June 2012 until June 2013. I am ready to go back at work, but I have questions about my rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA). By doing an Internet search, I found some of your excellent "Law Review" articles[1] about that law.

I am not a member of the Reserve Officers Association (ROA). Am I eligible to receive information and assistance from your Service Members Law Center (SMLC)?

A: Most certainly, yes. The SMLC provides information to service members, military family members, attorneys, employers, Employer Support of the Guard and Reserve (ESGR) volunteers, Department of Labor (DOL) investigators, congressional staffers, reporters, and others, without regard to whether the person inquiring is a member of or eligible to join ROA.

We respond to more than 800 inquiries per month, on average. Our record was 1009 inquiries in May 2013. I am here answering e-mails and telephone calls during regular business hours and until 2200 Eastern on Mondays and Thursdays. I am available toll-free at 800-809-9448, extension 730. My e-mail is SWright@roa.org.

The point of the evening availability is to encourage Reserve Component (RC) personnel to call me or e-mail me from the privacy of their own homes, not from their civilian jobs. If you are calling to complain about your employer or to seek advice and assistance in dealing with the employer, it is most important that you *not* utilize the telephone, computer, or time that belong to the employer.

If your employer is annoyed with you because you have already been called to the colors at least once and are likely to be called again, and if the employer is looking for an excuse to fire you, the last thing that you should do is to give the employer the excuse that he or she is seeking. I think that this is so important that RC members not call or e-mail from work that I am

willing to give up two evenings per week to facilitate taking these calls outside business hours. ROA is unique in providing this after-hours service. Neither ESGR nor DOL provides the opportunity to speak to a live human being after 1700 local time.

You are certainly welcome to call me or e-mail me without being a member of ROA, but we sure would like for you to join. A one-year membership only costs $70. You can join on-line at www.roa.org or call us at 800-809-9448 with a credit card.

Q: When I was called to active duty in June 2012, I had 30 days of annual leave in the bank, and I sold that back to the state, in order to maximize my earnings and pay off some of my massive student loan debt. I figured that I would earn additional annual leave from the state while I was on active duty, but now the personnel office is telling me that I have a zero leave balance—that I must work for many months and build up leave before I can take any time off. Is the personnel office correct?

A: Probably yes. The Supreme Court has held that vacation days do not constitute a "perquisite of seniority" to which the returning veteran is entitled upon reemployment. *See Foster v. Dravo Corp.,* 420 U.S. 92 (1975).[2] Let me explain.[3]

As I explained in Law Review 104 (December 2003) 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. President Clinton signed USERRA (Public Law 103-353) on October 13, 1994. You can find most of USERRA's legislative history in the 1994 Volume of *United States Code Congressional & Administrative News (USCCAN),* at pages 2449 through 2515. The legislative history makes clear that VRRA case law is still valid in interpreting USERRA:

"The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protections 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, 584 (1977)." House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News (USCCAN)* 2449, 2452.

In *Fishgold,* 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,* 328 U.S. at 284-85.[4]

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 in the uniformed services 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) (emphasis supplied).

Under the VRRA, and now under USERRA, the escalator principle applies to *perquisites of seniority.* A two-part test determines whether a particular benefit qualifies as a perquisite of seniority:

1. It must have been intended to be a reward for length of service, rather than a form of short-term compensation.
2. It must be reasonably certain (not necessarily absolutely certain, but more than a possibility) that you would have received the benefit if you had been continuously employed.

In *Foster,* the Supreme Court determined that vacation days fail under the first part of this test. The Dravo Corporation was not required to pay Mr. Foster the salary or wages that he would have received if he had been continuously employed. Mr. Foster and other employees earned vacation days by working. Mr. Foster was not working for the civilian employer during the last nine months of 1967 and the first nine months of 1968 (when he was on active duty), so he did not earn vacation days from the Dravo Corporation during that time.[5]

I believe that *Foster* is still good law. You did not earn annual leave from the State of Georgia during the year that you were away from work for service.

A distinction must be made between *vacation days* (not a perquisite of seniority) and *the rate at which you earn vacation* (a perquisite of seniority). For example, let us assume that in your agency employees with less than five years of seniority earn four hours of annual leave per pay period, and employees with more than five years of seniority earn six hours of annual leave per pay period. Let us assume further that you worked for the agency for 4.5 years before you were called to the colors for a year. In this state of facts, you are entitled to start earning six hours of annual leave per pay period immediately upon your reemployment.

When you were called to the colors in June 2012, you exercised your rights under section 4316(d) of USERRA. That subsection provides: "Any person whose employment with an employer is interrupted by a period of service in the uniformed services shall be *permitted,* upon request of that person, to use during such period of service any vacation, annual, or similar leave with pay accrued by the person before the commencement of such service. No employer may require any such person to use vacation, annual, or similar leave with pay during such period of service." 38 U.S.C. 4316(d) (emphasis supplied).

It was use your choice to use your civilian annual leave during the first few weeks of service. Having used up your 30 days of leave at that time, and not having earned any additional annual leave from the State of Georgia during the year that you were on active duty, you will be returning to work with a zero balance in annual leave.

Q: It's not fair! I was in heavy combat for most of the year that I was on active duty. I need at least a few weeks to decompress before I return to my high-pressure state job as a police officer. Help!

A: Because your period of service was more than 180 days, you have 90 days to apply for reemployment with the state agency. *See* 38 U.S.C. 4312(e)(1)(D). If you need some time off, I suggest that you delay applying for reemployment.[6]

Please understand that the 90 days is the *deadline for you to apply for reemployment*—the law does not give you a 90-day vacation. Once you apply for reemployment, you have rendered moot the question of the 90-day period. If you need some readjustment time, *do not apply for reemployment until you are ready to return to work,* but certainly apply before the 90-day deadline has expired. In the meantime, I suggest that you send your civilian supervisor a polite note to the effect that "I am home safe but I need some readjustment time and I am not yet applying for reemployment."

Q: On your SMLC website, I found the "state leave laws" section. In the Georgia section you quote Georgia Code section 38-2-279. Subsection (d) of that section provides:

"(d) Employment rights. Time during which a public officer or employee is absent pursuant to subsections (b) and (c) of this Code section shall not constitute an interruption of continuous employment and, notwithstanding any general, special, or local law or any city charter, no such officer or employee shall be subjected directly or indirectly to any loss or diminution of time, service, increment, *vacation*, holiday privileges, or any other right or privilege by reason of such absence or be prejudiced with reference to continuance in office or employment, reappointment to office, reemployment, reinstatement, transfer, or promotion by reason of such absence."

Georgia Code, section 38-2-279(d) (emphasis supplied).

I think that this subsection means that it is unlawful for the state agency to subject me to "loss or diminution of … vacation" because of my military service. What do you think of my theory? What is the relationship between USERRA and state law?

A: You are starting to think like a lawyer. Maybe you should go to law school. The problem is that there are tens of thousands of young and not-so-young lawyers out there who are unemployed or underemployed and who have massive student loan debt. I find it difficult to recommend that any young person go to law school unless he or she has won the Publisher's Clearinghouse Sweepstakes.

USERRA's second section explains the relationship between USERRA and other laws, practices, agreements, or other matters:

"(a) Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.

(b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit." 38 U.S.C. 4302.

Under this section, USERRA is a floor and not a ceiling on the rights of veterans, reservists, and National Guard members. If the Georgia state law gives you the right to continue accruing civilian annual leave while you are away from work for military service, that state law claim is not preempted or precluded by USERRA.

The problem will be to find a place to make that argument. Unfortunately, your state's intermediate appellate court has held that Georgia state agencies have sovereign immunity and cannot be sued for violating USERRA. *Anstadt v. Board of Regents of the University System of Georgia,* 303 Ga. App. 483, 693 S.E.2d 868 (2010).[7]

If you are claiming rights *under USERRA* you can complain to DOL, and DOL will refer your case to the United States Department of Justice (DOJ), which will bring your case in federal court *in the name of the United States as plaintiff* and this gets around the state sovereign immunity problem. But DOJ will not and cannot bring a state law claim on your behalf. So there is no place for you to make this argument.

I suggest that you send a polite, respectful letter to the head of your state agency and to Governor Nathan Deal.[8] You have nothing to lose by asking politely. Please let me know how they respond, if at all

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[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find 909 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. Captain Wright initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012 and another 87 so far in 2013.

[2] This citation means that you can find the *Foster* case in Volume 420 of *United States Reports,* starting on page 92. I invite the reader's attention to Law Review 0907 (February 2009) for a detailed description of *Foster* and its implications.

[3] For purposes of this article, I am assuming that you meet or will soon meet the five conditions for reemployment under USERRA. You left your job for the purpose of performing service in the uniformed services, and you gave the employer prior notice. Because this was an involuntary call-up, it does not count toward your cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which you seek reemployment. *See* 38 U.S.C. 4312(c)(4)(A). You were released from the period of service without having received a disqualifying bad discharge. Because your period of service was more than 180 days, you have 90 days (starting on the date of release) to apply for reemployment. *See* 38 U.S.C. 4312(e)(1)(D). You have not yet applied for reemployment with the State of Georgia, but you still have plenty of time to do so.

[4] In Law Review 803 (January 2008), I discuss *Fishgold* and its implications in great detail.

[5] On remand, after the Supreme Court decision, Mr. Foster received a *pro rata* share of his 1967 and 1968 civilian vacation. Mr. Foster worked for the company during the first few weeks of 1967, before he reported for induction, and during the last few weeks of 1968, after his honorable discharge. Please see Law Review 0907.

[6] Of course, you will not be paid by the Army or by the State of Georgia during the period of time after you are released from active duty.

[7] I discuss *Anstadt* and its implications in detail in Law Review 1140 (May 2011).

[8] Governor Deal earned his law degree in 1966 and then served in the Army as a judge advocate, attaining the grade of Captain. Perhaps he would be sympathetic to your claim.