LAW REVIEW 13136
October 2013

Does USERRA's Escalator Principle Apply to Defined Contribution Pension Plans?

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1.3.2.2—Continuous accumulation of seniority, escalator principle
1.3.2.3—Pension credit for military service time

Q: I am a Lieutenant Colonel in the Air National Guard and a member of ROA. I have found your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) to be most informative and useful.[1]

I am a commercial airline pilot, and I serve as the "military liaison" for my union with respect to the problems faced by union members (pilots) who are also Reserve Component (RC) members. This is a volunteer position within the union. About 10% of our pilots are currently serving RC members, primarily in the Air National Guard, the Air Force Reserve, and the Navy Reserve.

At a recent meeting, an attorney for the employer asserted that USERRA's "escalator principle" does not apply to our company's pension plan because it is a defined contribution plan (DCP)—he said that the escalator principle only applies to defined benefit plans (DBPs). He said that making up missed pension plan contributions when a pilot returns to work after a period of military service is not required by federal law, and that the company does this as a matter of grace. Is the attorney correct?

A: No. Section 4318 of USERRA explicitly applies to both DBPs and DCPs. Here is the text of that section:

(a)
(1)
(A) Except as provided in subparagraph (B), in the case of a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974) or a right provided under any Federal or

[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find 958 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. Captain Wright initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012 and another 136 so far in 2013.

State law governing pension benefits for governmental employees, the right to pension benefits of a person reemployed under this chapter shall be determined under this section.
(B) In the case of benefits under the Thrift Savings Plan, the rights of a person reemployed under this chapter shall be those rights provided in section 8432b of title 5. The first sentence of this subparagraph shall not be construed to affect any other right or benefit under this chapter.
(2)
(A) A person reemployed under this chapter shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services.
(B) Each period served by a person in the uniformed services shall, upon reemployment under this chapter, be deemed to constitute service with the employer or employers maintaining the plan for the purpose of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan.
(b)
(1) An employer reemploying a person under this chapter shall, with respect to a period of service described in subsection (a)(2)(B), be liable to an employee pension benefit plan for funding any obligation of the plan to provide the benefits described in subsection (a)(2) and shall allocate the amount of any employer contribution for the person in the same manner and to the same extent the allocation occurs for other employees during the period of service. For purposes of determining the amount of such liability and any obligation of the plan, earnings and forfeitures shall not be included. For purposes of determining the amount of such liability and for purposes of section 515 of the Employee Retirement Income Security Act of 1974 or any similar Federal or State law governing pension benefits for governmental employees, service in the uniformed services that is deemed under subsection (a) to be service with the employer shall be deemed to be service with the employer under the terms of the plan or any applicable collective bargaining agreement. In the case of a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability of the plan described in this paragraph shall be allocated—
(A) by the plan in such manner as the sponsor maintaining the plan shall provide; or
(B) if the sponsor does not provide—
(i) to the last employer employing the person before the period served by the person in the uniformed services, or
(ii) if such last employer is no longer functional, to the plan.
(2) A person reemployed under this chapter shall be entitled to accrued benefits pursuant to subsection (a) that are contingent on the making of, or derived from, employee contributions or elective deferrals (as defined in section 402(g)(3) of the Internal Revenue Code of 1986) only to the extent the person makes payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of service described in subsection (a)(2)(B). Any payment to the plan described in this paragraph shall be made during the period beginning with the date of reemployment and whose duration is three times the period of the person's service in the uniformed services, such payment period not to exceed five years.

(3) For purposes of computing an employer's liability under paragraph (1) or the employee's contributions under paragraph (2), the employee's compensation during the period of service described in subsection (a)(2)(B) shall be computed—
(A) at the rate the employee would have received but for the period of service described in subsection (a)(2)(B), or
(B) in the case that the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).
(c) Any employer who reemploys a person under this chapter and who is an employer contributing to a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter, shall, within 30 days after the date of such reemployment, provide information, in writing, of such reemployment to the administrator of such plan.
Source
(Added Pub. L. 103–353, § 2(a),Oct. 13, 1994, 108 Stat. 3162; amended Pub. L. 104–275, title III, § 311(8),Oct. 9, 1996, 110 Stat. 3335.)

Sections 3 and 515 of the Employee Retirement Income Security Act of 1974, referred to in subsecs. (a)(1)(A), (b)(1), and (c), are classified to sections 1002 and 1145, respectively, of Title 29, Labor.
Section 402(g)(3) of the Internal Revenue Code of 1986, referred to in subsec. (b)(2), is classified to section 402(g)(3) of Title 26, Internal Revenue Code.
Amendments

1996—Subsec. (b)(2). Pub. L. 104–275 substituted "services, such payment period" for "services," in last sentence.
Effective Date of 1996 Amendment
Amendment by Pub. L. 104–275 effective Oct. 13, 1994, see section 313 of Pub. L. 104–275, set out as a note under section 4301 of this title.
Effective Date
Section effective with respect to reemployments initiated on or after the first day after the 60-day period beginning Oct. 13, 1994, with transition rules, except that an employee pension benefit plan not in compliance with this section or section 8(h)(1) of Pub. L. 103–353 on Oct. 13, 1994, has two years to come into compliance, see section 8 of Pub. L. 103–353, set out as a note under section 4301 of this title.

38 U.S.C. 4318.

As is explained in Law Review 104 and other articles, Congress enacted USERRA (Public Law 103-353) and President Clinton signed it into law on October 13, 1994. Under the USERRA transition rules (referred to above), USERRA applies to "reemployments initiated" after the end of the 60-day period following the date of enactment. In other words, the effective date for most USERRA provisions is December 12, 1994.

The transition rules do not state when a reemployment is "initiated." It is reasonable to conclude that a reemployment is "initiated" when the individual applies for reemployment, after having been released from the relevant period of uniformed service. Thus, the VRRA, not USERRA, applies to an individual who completed his or her relevant period of uniformed service and applied for reemployment prior to December 12, 1994. The transition rules make clear that vested rights under the VRRA are preserved, with respect to persons who initiated their reemployments prior to December 12, 1994.

USERRA was a long-overdue rewrite of the VRRA, which was formerly codified at 38 U.S.C. 2021-27 (1988 edition of the United States Code). Congress enacted the VRRA 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. The VRRA served our nation well for more than half a century, but numerous piecemeal amendments rendered the law confusing and cumbersome. When there was a significant call-up of RC personnel in 1990-91, for *Operation Desert Storm,* it became clear that a rewrite was necessary. As an attorney for the United States Department of Labor, I participated in the drafting of USERRA.

The VRRA did not specifically mention pension plans, but in 1977 the United States Supreme Court applied the VRRA's "escalator principle" to pension plan entitlements. *Alabama Power Co. v. Davis,* 431 U.S. 581 (1977).[2]

Raymond E. Davis worked for the Alabama Power Company from August 16, 1936, until June 1, 1971, when he retired. His long career with the company was interrupted by 30 months of World War II active duty, from March 1943 until September 1945, when he was honorably discharged at the end of the war and promptly returned to his civilian job.

On July 1, 1944, while Mr. Davis was on active duty, the company established a defined benefit pension plan that rewarded company service both before and after that date. When the company computed Mr. Davis' monthly pension entitlement upon his retirement in 1971, the company excluded the 30 months that he was away from work for military service. This exclusion cost Mr. Davis $18 per month in pension benefits.

Mr. Davis sued, claiming that he was entitled to pension credit for his military service time under the "escalator principle" enunciated by the Supreme Court in *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946). The District Court ruled in his favor. *Davis v. Alabama Power Co.,* 383 F. Supp. 880 (N.D. Ala. 1974). The employer appealed, and the Court of Appeals affirmed the District Court's judgment in a brief *per curiam* decision. *Davis v. Alabama Power Co.,* 542 F.2d 650 (5th Cir. 1976).

The Supreme Court granted *certiorari* and affirmed, in a unanimous decision written by Justice Thurgood Marshall. The Court held that Mr. Davis was entitled to pension credit for the 30

[2] The citation means that you can find the *Alabama Power Co.* case in Volume 431 of *United States Reports,* starting on page 581. Only United States Supreme Court decisions are published in *United States Reports.*

months that he was away from work for military service, because the pension benefit met the two-pronged test as a perquisite of seniority. A pension benefit is intended to be a reward for length of service rather than a form of short-term compensation for services, and it is reasonably certain that Mr. Davis would have received the 30 months of pension credit if his career with the company had not been interrupted by military service. Justice Marshall's opinion contains an interesting and useful survey of the Supreme Court cases about the escalator principle.

It is important to note that the pension plan at issue in this case was a defined benefit plan. The Court set aside and did not answer how the escalator principle might or might not apply to defined contribution plans. "Petitioner's plan is a 'defined benefit' plan, under which the benefits to be received by employees are fixed and the employer's contribution is adjusted to whatever level is necessary to provide those benefits. The other basic type of pension is a 'defined contribution' plan, under which the employer's contribution is fixed and the employee receives whatever level of benefits the amount contributed on his behalf will provide. See 29 U.S.C. 1002 (34) (35) (1970 ed., Supp. V); Note, Fiduciary Standards and the Prudent Man Rule under the Employee Retirement Income Security Act of 1974, 88 Harv. L. Rev. 960, 961-963 (1975). We intimate no views on whether defined contribution plans are to be treated differently from defined benefit plans under the [reemployment statute]." *Alabama Power Co. v. Davis,* 431 U.S. 581, 593 n. 18 (1977).

The Supreme Court never made clear how, if at all, the VRRA applies to DCPs, but that issue was largely but not entirely mooted by the enactment of USERRA in 1994. Let us say that Joe Smith, a very senior pilot at your airline, began his career at your airline in 1989. After Saddam Hussein's Iraq invaded and occupied Kuwait on August 2, 1990, Joe was recalled to active duty by the Navy Reserve, from September 1990 to September 1991. After he was released from his year of active duty, Joe promptly applied for reemployment and returned to work at the airline in October 1991, three years before Congress enacted USERRA in October 1994. Joe's reemployment and pension rights, with respect to his year of active duty for the First Gulf War, are governed by the VRRA, not USERRA.

With respect to Joe, the issue of the applicability of the escalator principle to DCPs is still very much an issue. For the other 99% of your RC pilot members, the 1994 enactment of USERRA effectively mooted this question.