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Pension Credit for Military Service—Multi-Employer Situation

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Q: I have read with great interest your "Law Review" articles, on the ROA Web site, which I found by doing an Internet search. I was particularly interested in your articles about the applicability of the Uniformed Services Employment and Reemployment Rights Act (USERRA) to pension entitlements. (Law Reviews 4, 9, 40, 74, 75, 76, 82, 107, and 119 are about pension entitlements.)

I am a member of the International Brotherhood of Electrical Workers (IBEW). For the past four decades, I have worked as an electrician on construction projects. Some projects last only a few days, and some last for many months. Whenever I complete a job assignment, I go back to the "hiring hall" operated by my IBEW local and get a new assignment. Like most of my colleagues in the local, I have made a whole career out of a series of short-term job assignments.

There are about 30 construction companies that use the hiring hall as the exclusive source for electricians. There has been some turnover, but it has been mostly the same companies since I started this work in 1964. I have worked for all of these companies at one time or another.

I want to retire this September (2004), with 40 years of service for pension purposes, but I have been told that I only have 36 years of creditable service for pension purposes. I have worked continuously in this industry, through the hiring hall, since September 1964, except for two years of active military service. I was drafted, and I served on active duty from March 1966 to March 1968. I served my year in Vietnam, from January 1967 to January 1968.

After my honorable discharge, I went back to work through the hiring hall about a week later, with no problem. Neither the union nor I raised the question of pension credit at that time. I was 23 years old, and retirement was not even on my radar screen.

The pension plan is a defined benefit plan. An electrician receives one pension "unit" for each "good year" of employment. A good year is defined as a year in which the electrician worked at least 1,500 hours of covered employment. The year is measured by the electrician's "anniversary date," the date when the individual started to work through the hiring hall. For me, that is September 1964.

I worked more than 1,500 hours between September 1964 and September 1965. Between September 1965 and March 1966 (when I was drafted), I worked about 1,000

hours, not enough to qualify as a good year. I did not do electrical work through the hiring hall while I was on active duty, except for a few hours in December 1966, when I was home on leave just before I went to Vietnam. I worked about 900 hours between March 1968, when I was honorably discharged from the Army, and September 1968. I have worked more than 1,500 hours each year since September 1968.

So my two years of Army service have deprived me of four good years for retirement purposes. This makes a substantial difference in my monthly pension check, and in my standard of living in retirement. It just isn't fair. The way I read your "Law Review" columns, USERRA requires the pension plan to treat me as if I had been continuously employed during my Army service. Please help me.

A: First, it should be noted that USERRA does not apply to your situation, because you completed your military service and were re-employed before USERRA went into effect on December 12, 1994. USERRA was a complete rewrite of and replacement for the Veterans' Reemployment Rights (VRR) law, which can be traced back to 1940. Please see Law Review 104 for a comprehensive history of the re-employment statute. In Law Review 89, I discuss the effective date of USERRA and the transition rules from the VRR law to USERRA. Vested rights under the prior law are preserved.

USERRA is codified in Title 38, United States Code, sections 4301-4333 (38 U.S.C. 4301-4333). The VRR law was formerly codified at 38 U.S.C. 2021-2026. In its first case construing the VRR law, 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).

Three decades later, the Supreme Court applied the escalator principle to pension entitlements under a defined benefit plan. See Alabama Power Co. v. Davis, 431 U.S. 581 (1977). Mr. Davis' career at the Alabama Power Company was interrupted by 1943–45 military service. He was re-employed in 1945, after his honorable discharge, and he retired from the company in 1971. The Supreme Court held that he was entitled to continuous pension credit from 1936 (when he began his career at the company) to 1971, because his 1943–45 military service should not interrupt his pension credit.

So the bottom line is that you are entitled to continuous seniority credit from September 1964 to September 2004, without interruption for your two years of active duty. This entitlement is under the VRR law, not USERRA.

Q: The pension plan administrator claims that Alabama Power Co. does not apply because, in this case, it is necessary to work at least 1,500 hours in a year in order to receive a "good year" for retirement purposes.

A: You worked more than 1,500 hours in your first year of employment, before you were drafted. In your second year of employment, you had already worked 1,000 hours in the first seven months, before you were drafted. You worked 900 hours between March 1968 and September 1968, after you returned from service. You have worked more than 1,500 hours each year since September 1968. It is reasonably certain that you would have worked the required number of hours in those years that were interrupted by your service, if the service had not intervened.

Q: The pension plan claims that there is no record that I gave prior notice to the union or the employer before I left for service. I recall that I gave such notice, but I do not know how I could prove that all these years later.

A: Under the VRR law, there was no prior notice requirement for active duty. See Lapine v. Town of Wellesley, 304 F.3d 90 (1st Cir. 2002). So you are not required to prove that you gave prior notice before you left your civilian work in March 1966.

Q: There are about 30 construction companies that utilize the IBEW local hiring hall to obtain electricians. The first company that I worked for in March 1968, after my honorable discharge, was not the same company that I last worked for in March 1966, before I was drafted. The pension plan administrator insists that I am not entitled to pension credit because I did not apply for re-employment with my pre-service employer in a timely manner.

A: The pension plan administrator is wrong. In a case like this, the entire group of construction companies is your employer, for re-employment rights purposes. All of the companies have delegated the job assignment function to the IBEW hiring hall. It was appropriate for you to submit your application for re-employment to the hiring hall, and that is exactly what you did. See Imel v. Laborers' Pension Trust of Northern California, 904 F.2d 1327 (9th Cir.), cert. denied, 498 U.S. 939 (1990); Akers v. Arnett, 597 F. Supp. 557 (S.D. Tex. 1983), affirmed, 748 F.2d 283 (5th Cir. 1984). While employed as an attorney for the U.S. Department of Labor, I had a hand in drafting the appellate briefs in both Imel and Akers.

The same result applies under USERRA, because the new law's legislative history cites Imel and Akers with approval. See House Rep. No. 103-65, 1994 United States Code Congressional & Administrative News 2449, 2454. I also invite your attention to Law Review 28, "Applying USERRA to Multi-Employer Situations."

Under the VRR law, you had 90 days, after your honorable discharge, to submit your application for re-employment. You were back at work well within that 90-day period, so it is clear that you must have made a timely application for re-employment.

Bottom line: I think that it is clear that you are entitled to the same monthly pension benefit that you would have received if you had never left for service. If the pension

plan administrator does not change her mind, you should sue, and I think that you will win.

*Military title used for purposes of identification only. The views expressed herein are the personal views of the authors and should not be attributed to the U.S. Marine Corps, the Department of the Navy, the Department of Defense, or the U.S. government. The best way to reach Captain Wright is by e-mail, at **samwright50@yahoo.com**.