

Civilian Pension Credit for Long Period of Military Service

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

- 1.1.2.3—USERRA applies to employees who have been laid off
- 1.3.1.1—Left job for service and gave prior notice
- 1.3.1.2—Character and duration of service
- 1.3.2.2—Continuous accumulation of seniority-escalator principle
- 1.3.2.3—Pension credit for service time
- 1.8—Relationship between USERRA and other laws/policies

Q: I am a Lieutenant Colonel in the Air Force (recently retired). I graduated from the Air Force Academy in 1990 and was commissioned a Second Lieutenant. I remained on active duty for more than ten years, until late 2000, when I left active duty and affiliated with the Air Force Reserve. I was hired by a major airline in March 2001. Just six months later, 19 terrorists commandeered four airliners and crashed them into three buildings and a field, killing almost 3,000 Americans, on September 11, 2001.

After the terrorist attacks, my airline (like several other major airlines) cut back on the number of flights because the passenger base shrank. The reduced number of flights led to a lessened need for pilots, and I was furloughed by the airline in October 2001.

At my airline, like most major airlines, the pilots are unionized. Under the Collective Bargaining Agreement (CBA) between the airline and the union, furloughs and recalls from seniority are based strictly on seniority. Because I had only been working for the airline for six months at the time of the September 11 terrorist attacks, I was among the first pilots furloughed and among the last to be recalled from furlough. In November 2006, more than five years after I was furloughed, the airline sent me a notice saying that I had been recalled from furlough.

In January 2002, the Air Force recalled me to active duty for a year, until January 2003. The recall was involuntary, but it was a godsend because I was unemployed and financially hurting. I notified the airline's chief pilot by e-mail, but he did not respond. I reported to active duty as ordered. At the end of the involuntary call-up, the Air Force offered me the opportunity to stay on active duty indefinitely. Because I had no prospect of early recall to the airline or other civilian employment, I accepted the Air Force's offer. Again, I notified the airline's chief pilot by e-mail, and he did not respond.

When I received the airline's recall notice in November 2006, I responded by certified mail, saying that I wanted to return to the airline but that I was currently on active duty. The airline

sent me a letter, saying that I had been reinstated to the active pilot list and that I had been put on “military leave.”

By that time, I was getting tantalizingly close to qualification for a regular Air Force retirement, with 20 years of active duty. I remained on active duty until September 30, 2013, when I retired as a Lieutenant Colonel. I immediately applied for reemployment at the airline. The airline’s personnel office asked me for documentation, and I provided copies of all of my Air Force orders. The personnel office told me that my “five-year clock” expired in November 2011, five years after I received the airline’s recall notice and asked to be put on military leave.

The airline was looking for pilots in the fall of 2013 and agreed to hire me as a new hire. I restarted my airline career in November 2013, with no seniority or pension credit for my military service time. I am pleased to be back in the cockpit, and I plan to keep flying until I turn 65 and retire in 2033. But I am upset that I get no civilian pension credit for my active duty between November 2006 (when the airline sent me a recall notice) and September 2013 (when I left active duty and applied for reemployment with the airline).

I found and have read many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).¹ It seems to me that I should receive at least five years of airline pension credit for my active duty after the airline sent me a recall notice. Do you agree that my USERRA rights have been violated?

A: No. Unless you met the five USERRA conditions for reemployment in the fall of 2013, the airline is not obligated to treat you as if you had been continuously employed for pension and seniority purposes.

Section 4318 of USERRA governs pension benefits. The relevant subsection is as follows: “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.” 38 U.S.C. 4318(a)(2)(A) (emphasis supplied).

As I explained in Law Review 1281 and other articles, you must meet five conditions to have the right to reemployment under USERRA. If you meet all five conditions, the employer must reemploy you and must treat you (for pension and seniority purposes, after your return to work) as if you had been continuously employed during the time that you were away from work for uniformed service. If you fail to meet one or more of the five conditions, the employer is not required to reemploy you. If the employer chooses to rehire you, although you do not meet all

¹ We invite the reader’s attention to www.servicemembers-lawcenter.org. You will find 1,007 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 169 new articles in 2013.

five conditions, the employer is not required to treat you as if you had been continuously employed for pension and seniority purposes.

The five conditions are as follows:

- a. You left a position of employment for the purpose of performing voluntary or involuntary service in the uniformed services.
- b. You gave the employer prior oral or written notice.
- c. Your cumulative period or periods of service, relating to the employer relationship for which you seek reemployment, has not exceeded five years.
- d. You have been released from the period of service without a disqualifying bad discharge from the military.
- e. After release, you made a timely application for reemployment with the pre-service employer.

Although you had been furloughed in October 2001, you still held a "position of employment" with the airline, and you left that position to go on active duty in January 2002. In its first case construing the 1940 reemployment statute, the Supreme Court held, "The 'position' to which the veteran is restored is the 'position' which he left plus cumulated seniority. Certainly he would not have been discharged from such position and unable to get it back, if at the time of his induction into the armed services he had been laid off by operation of a seniority system. Plainly he still held his 'position' when he was inducted." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 287-88 (1946). See also *Colon v. Shawnee County, Kansas*, 815 F.2d 594 (10th Cir. 1987); *Kelly v. Ford Instrument Co.*, 298 F.2d 399 (2d Cir. 1962); *Hall v. Chicago & Eastern Illinois Railroad Co.*, 240 F. Supp. 797 (N.D. Ill. 1964).

It is fortunate that you gave notice to the airline before you went on active duty in January 2002 and again before you voluntarily extended your involuntary recall in January 2003, because prior notice to the employer is one of the five conditions that you must meet in order to have the right to reemployment.² You cannot have it both ways. You cannot simultaneously argue that you hold a position of employment when you are on furlough, so that you have the right to reemployment, but that you do not hold a position of employment, so you are not required to give prior notice to the employer.

I think that your five-year clock started running in January 2002, when you reported to active duty. The first year (January 2002 to January 2003) does not count toward your five-year limit because it was involuntary.³ What about the period between January 2003 (when you completed the involuntary call-up) and November 2006 (when the airline recalled you from furlough)? That is a more difficult question, and there is no case law directly on point.

² I have heard from many airline pilots in this sort of situation. Many lost their reemployment rights by failing to give prior notice to the employer when leaving a furlough status for voluntary or involuntary active duty.

³ 38 U.S.C. 4312(c)(4)(A).

Section 4312(a)⁴ accords the right to reemployment to “any person whose absence from a position of employment is necessitated by reason of service in the uniformed services” and who meets the USERRA eligibility criteria. You can argue that between October 2001 (when the airline furloughed you) and November 2006 (when the airline recalled you from furlough), your absence from your civilian job was necessitated by the furlough, not by uniformed service, and that therefore your active duty prior to November 2006 does not count toward the five-year limit with the airline.

If your active duty after November 2006 exceeds the five-year limit, there is no need to determine if the period prior to November 2006 counts, and it seems likely that your active duty between November 2006 and September 2013 puts you over the limit. I invite your attention to Law Review 201 (August 2005) for a detailed discussion of what counts and what does not count toward exhausting your five-year limit. I would need to see all of your military orders to determine if you were within or beyond the five-year limit when you finally left active duty on September 30, 2013.

Q: What is the relationship between USERRA and the CBA between my union and the airline?

A: Under section 4302 of USERRA, this federal law is the floor and not the ceiling on the rights of persons who leave civilian jobs (federal, state, local, or private sector) for uniformed service. Here is the text of section 4302:

“(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 (emphasis supplied).

It is conceivable that the CBA gives you the right to airline pension credit for the period of active duty between November 2006 and September 2013, even if USERRA does not. If the CBA gives you greater or additional rights, it is not superseded by USERRA.

If you are claiming rights under the CBA and not USERRA, you must utilize the CBA enforcement mechanism, not the USERRA enforcement mechanism, to enforce your CBA rights. Your union probably has unfettered control over the CBA enforcement mechanism.

⁴ 38 U.S.C. 4312(a).