

LAW REVIEW 14074

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Right to Use Vacation Days for Military Service

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Q: I am the service member referred to in Law Review 14073, the immediately preceding article in this “Law Review” series.² I am a Colonel in the Army Reserve and an Individual Mobilization Augmentee (IMA). I will be on military duty in Florida for six weeks, from July 7 until August 15.

This is shaping up to be a tough summer. I will be working long days and weekends at my civilian job right up to the July 4 weekend, and then I will be on military duty for six weeks. After my military duty is over, I want to take the rest of the summer off, through September 1 (Labor Day). Since I will already be in Florida, I want my wife to bring our two young children down to Florida, and we can spend two weeks at Disney World and other Florida attractions.

I put in a request to take two weeks of leave at my civilian job, starting on August 19, the day after the end of my military duty. The boss said no, because I am already scheduled to be on military duty for six weeks and because several other employees have already scheduled leave for the end of August.

I think that I have read in your “Law Review” articles that I have the *right*, under the Uniformed Services Employment and Reemployment Rights Act (USERRA), to use vacation days during or in conjunction with my military duty. Is that correct?

A: You are referring to section 4316(d) of USERRA, which 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

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² We invite the reader’s attention to www.servicemembers-lawcenter.org. You will find almost 1,300 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. ROA initiated this column in 1997, and we add new articles each week.

such service. No employer may require any such person to use vacation, annual, or similar leave during such period of service.” 38 U.S.C. 4316(d) (emphasis supplied).³

Under section 4316(d), you have the *right* to use your accrued vacation days *during* your period of service. Because your period of service is scheduled to end on August 15, you do not have the right to use vacation days in the two weeks that follow your military duty.

Under general employment principles and your employment contract with your employer, you earn vacation days and have the right to use them, but you do not have the right to insist upon using them at a time of your choice. The employer has the right to ensure that there is adequate coverage to keep the business running, even in the last two weeks of summer. I think that the employer is within her rights in telling you that you cannot use vacation at the time you have requested, simply because other employees have already requested and have already been scheduled for vacation at that time.

Section 4311(a) of USERRA provides: “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) (emphasis supplied).

I think that the opportunity to use vacation days that you have earned qualifies as a “benefit of employment” that is protected by section 4311(a). It would be clearly unlawful for the employer to tell you that “you cannot use any more vacation this year because you already took off six weeks to play soldier.” You are not using any vacation days during your military duty—you are taking leave without pay, as you have the right to do under USERRA. You have the right to use the vacation days that you have earned, but you do not have the right to insist upon using them at a time when several other employees have already requested and been scheduled for vacation.⁴

Section 4316(d) gives you the right to use vacation days *during your period of service*—this means that you can receive double pay (your civilian pay plus your military pay) during part or all of your six weeks of military duty, by expending your vacation days.⁵ Of course, if you expend your vacation days in this way you will not have them to use later.

Using vacation days for your military duty is your choice, not the employer’s choice. The final sentence of section 4316(d) provides: “No employer may require any such person to use vacation, annual, or similar leave during such period of service.” 38 U.S.C. 4316(d).

³ The citation refers to section 4316(d) of title 38 of the United States Code.

⁴ During your period of service, you have a legally enforceable right to use vacation, because section 4316(d) explicitly provides that the service member *shall be permitted* to use leave or vacation *during* the period of service.

⁵ This assumes that you have sufficient vacation days in the bank before the start of the military duty. Section 4316(d) does not give you the right to go in the hole and use vacation days that you have not yet earned.

Q: Do I continue to earn vacation days from my employer during the time that I am away from work for military duty?

A: Generally speaking, no. See *Foster v. Dravo Corp.*, 420 U.S. 92 (1975).⁶ Earl R. Foster was employed by the Dravo Corp. until March 6, 1967, when he was drafted into the Army. He was honorably discharged about 18 months later and returned to work on October 2, 1968. He claimed that the reemployment statute's "escalator principle" entitled him to the vacation that he would have earned in 1967 and 1968 if he had been present for work for the entirety of both years, but the Supreme Court rejected his principal argument.

The Supreme Court enunciated the escalator principle in its first case construing the reemployment statute, 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).

In subsequent cases, the Supreme Court has refined the escalator principle.⁷ It does not apply to all that might have happened to the veteran if he or she had remained continuously employed. The escalator principle applies to "perquisites of seniority." A two-pronged test determines whether a benefit qualifies as a perquisite of seniority. First, the benefit must be something that was intended to be a reward for length of service, rather than short-term compensation for services rendered (or in this case not rendered, because the veteran was away from work for service during the period involved). Second, it must be reasonably certain (not necessarily absolutely certain) that the veteran would have attained the benefit if he or she had been continuously employed.

The Supreme Court held that Mr. Foster's claim for full vacation benefits for 1967 and 1968 failed under the first prong of this two-pronged test. An employee earns vacation by working. Mr. Foster was not entitled to vacation based on months that he did not work for the civilian employer in 1967 and 1968.

Thus, USERRA does not give you the right to continue accruing vacation days during your period of service. Just as the employer is not required to pay you salary or wages for the time you do not work because of service, so the employer is not required to give you vacation days that you did not work to earn. Of course, you may have the right to continue accruing vacation days under your contract with the employer or under the collective bargaining agreement between your union and the employer.⁸

⁶ The citation means that you can find this Supreme Court case in Volume 420 of *United States Reports*, starting on page 92. I discuss the implications of this case in detail in Law Review 0907 (February 2009).

⁷ The escalator principle is codified in section 4316(a) of USERRA, 38 U.S.C. 4316(a).

⁸ Under section 4302 of USERRA, 38 U.S.C. 4302, this law is a floor and not a ceiling on your rights. USERRA does not supersede or override the employment contract or collective agreement insofar as they provide you *greater or additional rights*, above and beyond your USERRA rights.