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USERRA's Five-Year Limit and the Initial Period of Obligated Service

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.1.1.7—USERRA applies to state and local governments
1.1.3.2—USERRA applies to regular military service
1.3.1.1—Left job for service and gave prior notice
1.3.1.2—Character and duration of service
1.3.1.3—Timely application for reemployment
1.3.2.2—Continuous accumulation of seniority—escalator principle
1.3.2.3—Pension credit for military service time
1.4—USERRA enforcement
1.7—USERRA regulations

Q: I am a retired Navy Reserve Master Chief Petty Officer (E-9). I joined the Reserve Officers Association (ROA) recently, after you amended your constitution to make noncommissioned officers and petty officers eligible to join. For many years, I have served as a volunteer ombudsman for the Department of Defense (DOD) organization called "Employer Support of the Guard and Reserve" (ESGR). For many years, I have read and utilized your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I am contacting you now because a current ombudsman case has me stumped.

Let's call the claimant Joe Smith. He graduated from high school in 2006 and enlisted in the Army in 2008. He received a substantial bonus from the Army in exchange for his agreement to remain on active duty for six years. He entered active duty in December 2008 and left exactly six years later, in December 2014.

After he graduated from high school in 2006, Joe was hired by our city for an entry-level job in the Public Works Department. He worked there until late November 2008, when he informed his supervisor and the city's personnel department that he had enlisted in the Army and that he would be leaving shortly to report to basic training. After he left active duty in December 2014, he visited the city's personnel department and asked for reemployment. The personnel director asked the city attorney for advice, and the city attorney prepared a memorandum asserting that Smith was not entitled to reemployment for several reasons, including:

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[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1,300 "Law Review" 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. The Reserve Officers Association (ROA) initiated this column in 1997, and we add new articles each week.

[2] Captain Wright is the Director of ROA's Service Members Law Center (SMLC). He can be reached by telephone at (800) 809-9448, ext. 730. His e-mail is SWright@roa.org.

a. **USERRA does not apply to state and local governments.**
b. **USERRA does not apply to persons (like Smith) who serve in the regular military—it only applies to the National Guard and Reserve.**
c. **Smith did not request a military leave of absence and he told his supervisor and the personnel department that he intended to make the Army his career and that it was most unlikely that he would ever seek to return to city employment.**
d. **Smith's period of active duty was more than five years.**

Based on the city attorney's advice, the city denied Smith reemployment, but it did offer him a new entry-level job in the Public Works Department. Smith is back where he started almost nine years ago. He received no seniority or pension credit for the 18 months that he worked for the city before he enlisted or for the 72 months that he was on active duty.

Smith affiliated with the Army Reserve after he left active duty and joined a unit here in our city. In my ESGR capacity, I spoke to that unit recently, and Smith came up to speak to me after I finished my presentation. Do you think that Smith was entitled to reemployment with the city after he left active duty in December 2014?

A: Yes. Let me address the city attorney's assertions one at a time.

I will first address the city attorney's assertion that local governments are exempt from USERRA. As I have explained in Law Review 104 and other articles, Congress enacted USERRA (Public Law 103-353) and President Bill Clinton signed it into law on October 13, 1994. USERRA was a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act. The VRRA has applied to the Federal Government and to private employers since 1940. In December 1974, as part of the Vietnam Era Veterans Readjustment Assistance Act, Congress amended the VRRA to make it apply also to state and local governments. The city attorney's assertion that local governments are exempt from the reemployment statute is more than 40 years out of date.[3]

Second, USERRA and the VRRA most certainly apply to regular military service, as well as National Guard or Reserve service. I invite your attention to Law Review 0719 (May 2007), titled "Reemployment and regulars: USERRA supports recruitment of older individuals to meet higher active duty end-strength authorities."

Third, Smith was not required to "request military leave" when he left his job in November 2008 to report to basic training, and Smith's statements at the time to the effect that he intended to make the Army his career are irrelevant and do not defeat his right to

[3] Including state and local governments in USERRA coverage is very important because ten percent of Reserve Component members have civilian jobs for state governments and another eleven percent for local governments. *See* Susan M. Gates, "Too Much to Ask? Supporting Employers in an Operational Reserve Era," *The Officer,* November-December 2013, pages 32-40.

reemployment. I invite your attention to two pertinent sections of the Department of Labor (DOL) USERRA regulations:

§ 1002.87 **Is the employee required to get permission from his or her employer before leaving to perform service in the uniformed services?**

No. The employee is not required to ask for or get his or her employer's permission to leave to perform service in the uniformed services. The employee is only required to give the employer notice of pending service.

20 C.F.R. 1002.87 (bold question in original).

§ 1002.88 **Is the employee required to tell his or her civilian employer that he or she intends to seek reemployment after completing uniformed service before the employee leaves to perform service in the uniformed services?**

No. When the employee leaves the employment position to begin a period of service, he or she is not required to tell the civilian employer that he or she intends to seek reemployment after completing uniformed service. *Even if the employee tells the employer before entering or completing uniformed service that he or she does not intend to seek reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment after completing service. The employee is not required to decide in advance of leaving the civilian employment position whether he or she will seek reemployment after completing uniformed service.*

20 C.F.R. 1002.88 (bold question in original) (emphasis by italics supplied).

This statement in the USERRA Regulations, to the effect that the service member is not required (upon giving notice of an impending period of uniformed service) to predict that he or she will return to the civilian employer and seek reemployment is buttressed by a paragraph in USERRA's 1994 legislative history:

> The Committee [House Committee on Veterans' Affairs] does not intend that the requirement to give notice to one's employer in advance of service in the uniformed services be construed to require the employee to decide, at the time the person leaves a job, whether he or she will seek reemployment upon release from active service. One of the basic purposes of the reemployment statute is to maintain the servicemember's civilian job as an "unburned bridge." Not until the individual's discharge or release from service and/or transportation back home, which triggers the application time, does the servicemember have to decide whether to recross that bridge. *See Fishgold, supra,* 328 U.S. at 284: "He is not pressed for a decision immediately on his discharge, but has the opportunity to make plans for the future and readjust himself to civilian life."

House Report No. 103-65, 1994 *United States Code Congressional & Administrative News (USCCAN)* 2449, 2459 (report of the House Committee on Veterans Affairs) (hereinafter "1994 *USCCAN").*

Now let me turn to the city attorney's final assertion, that Smith did not have active duty when he applied in December 2014 because he had been on active duty for more than five years. USERRA's section 4312(c) sets forth the five-year limit and the nine exemptions to the limit, as follows:

(c) Subsection (a) shall apply to a person who is absent from a position of employment by reason of service in the uniformed services if such person's cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment, does not exceed five years, except that any such period of service shall not include any service--

(1) *that is required, beyond five years, to complete an initial period of obligated service*;

(2) during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;

(3) performed as required pursuant to section 10147 of title 10, under section 502(a) or 503 of title 32, or to fulfill additional training requirements determined and certified in writing by the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining; or

(4) performed by a member of a uniformed service who is--

(A) ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12302, 12304, or 12305 of title 10 or under section 331, 332, 359, 360, 367, or 712 of title 14;

(B) ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;

(C) ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section 12304 of title 10;

(D) ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services;

(E) called into Federal service as a member of the National Guard under chapter 15 of title 10 or under section 12406 of title 10; or

(F) ordered to full-time National Guard duty (other than for training) under section 502(f)(2)(A) of title 32 when authorized by the President or the Secretary of Defense for the purpose of responding to a national emergency declared by the President and supported by Federal funds, as determined by the Secretary concerned.

38 U.S.C. 4312(c) (emphasis supplied).[4]

[4] Please see Law Review 201 (August 2005) for a detailed discussion of USERRA's five-year limit and the exemptions.

Smith's six-year period of active duty, from December 2008 to December 2014, was his initial period of active service. Accordingly, the part of this initial period that was beyond five years (December 2013 to December 2014) does not count toward his five-year limit, under section 4312(c)(1). USERRA's legislative history explains the purpose and effect of section 4312(c)(1) as follows:

> H.R. 995 [USERRA] would establish a basic five-year limitation on total military service during the period of employment with the employer against whom reemployment rights are asserted. … In order, however, to ensure that the Armed Forces have an adequate supply of trained personnel, certain exceptions to the five years basic limitation would be established by the Committee bill. Section 4312(c)(1) would provide that the cumulative period of service may exceed five years if the additional time is necessary to complete an initial obligated service requirement. Because of the very high training costs for some military specialties, such as the Navy's nuclear power program, the services sometimes impose initial active service obligations exceeding five years upon persons serving in those specialties. The intent of this section is to ensure that a person leaving active duty upon completion of his or her initial active service obligation should have reemployment rights even if his or her period of continuous active service exceeds five years.

1994 *USCCAN* at 2460.

Smith's situation is very similar to that of the Navy nuclear power sailor, as mentioned in USERRA's legislative history. It is clear beyond any doubt that Smith's sixth year of active duty, from December 2013 to December 2014, does not count toward his five-year limit. Smith has not exceeded the five-year limit imposed by section 4312(c) of USERRA.

As I have explained in detail in Law Review 1281 and other articles, an individual must meet five simple conditions to have the right to reemployment under USERRA:

a. Must have left a civilian job for the purpose of performing service in the uniformed services. It is clear that Smith did this in late 2008.
b. Must have given the employer prior oral or written notice. It is clear that Smith gave such notice.
c. Must not have exceeded the cumulative five-year limit. It is clear that Smith has not exceeded the limit.
d. Must have been released from the period of service without having received a disqualifying bad discharge from the military. The fact that Smith affiliated with the Army Reserve after he left active duty clearly shows that he did not receive a bad discharge.
e. Must have made a timely application for reemployment after release from the period of service. Because Smith's period of service exceeded 180 days, he had 90 days (starting

on the date of release) to apply for reemployment.[5] It is clear that Smith applied for reemployment and returned to work well within the 90-day deadline.

Because Smith met the five USERRA conditions, the city was required to reemploy him in the position of employment that he *would have attained if he had been continuously employed.*[6] The position that Smith would have attained is certainly well superior to the position in which he began his city career, back in 2006. The city violated USERRA by reemploying Smith in the entry-level position that he left, not the much better position that he would have attained if he had been continuously employed. Smith is entitled to a court order requiring the city to upgrade Smith into the appropriate position of employment, with the appropriate rate of pay.[7]

It appears that Smith has been paid insufficiently since he returned to work in December 2014. Smith is entitled to a court order requiring the city to compensate Smith for the pay that he has lost because of the city's USERRA violation.[8] If Smith can prove that the city violated USERRA willfully, he is entitled to double back pay as "liquidated damages."[9]

Because Smith met the USERRA conditions, he is entitled to be treated *as if he had been continuously employed* by the city during the 18 months that he worked for the city before his enlistment and the 72 months that he was away from work for military service, for seniority and pension purposes.[10] If necessary, he can get the court to order the city to make this happen.

Q: I shared with the city attorney the authorities that you have cited. He said that section 4312(c)(1) does not apply to Smith because he received a substantial cash bonus from the Army, at the time of his enlistment, in exchange for agreeing to remain on active duty for at least six years. Do you think that it matters that Smith received a substantial cash bonus when he enlisted in the Army?

A: I think that the bonus that Smith received from the Army, upon enlisting, is totally irrelevant.

All military service is voluntary. Congress abolished the draft and established the All-Volunteer Military (AVM) in 1973, 42 years ago. To make the AVM work, Congress has provided for substantial cash bonuses and other incentives to encourage qualified young men and women to enlist. In some years, bonuses are much more available and generous than in other years, depending upon the difficulty of the overall recruiting environment in a particular year. Bonuses are offered to fill hard-to-fill military specialties and to encourage young men and women to sign up for longer periods.

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[5] 38 U.S.C. 4312(e)(1)(D).
[6] 38 U.S.C. 4313(a)(2)(A).
[7] 38 U.S.C. 4323(d)(1)(A).
[8] 38 U.S.C. 4323(d)(1)(B).
[9] 38 U.S.C. 4323(d)(1)(C).
[10] 38 U.S.C. 4316(a), 4318.

What is relevant is that Smith's initial active duty obligation was for six years. How he came to have a longer period of obligated service is not relevant to Smith's reemployment rights with the city.

Q: How much head-room does Smith have in the five-year limit?

A: None. Under section 4312(c)(1)(A), only the part of his initial active duty period that exceeds five years is exempted from Smith's five-year limit. Smith has used every day of his five-year limit.

Q: Now that Smith is off active duty and has affiliated with the Army Reserve how is he to participate in the Army Reserve with no head room in his five-year limit?

A: Smith's regularly scheduled active duty for training (annual training) and inactive duty training (drills) do not count toward his five-year limit.[11] If Smith goes on an extended Reserve training course like Officer Candidate School, that period of service will be exempted from the computation of his five-year limit with respect to the city if the Secretary of the Army determines and certifies in writing that the additional training is necessary for Smith's professional development or for skill training or retraining.[12] If Smith is involuntarily called to active duty (as in a mobilization), that period of involuntary service will not count toward Smith's five-year limit.[13] If Smith volunteers for additional active duty, that period can be exempted from his five-year limit if the Secretary of the Army makes the necessary determination and certification.[14]

Going forward, Smith needs to be exceedingly careful to ensure that any additional military periods are exempt from the five-year limit.

Q: Is there a way for Smith to get out from under the five-year limit?

A: Yes. The five-year limit is cumulative with respect to the employer relationship for which the person seeks reemployment. If Smith finds a new job with a new employer, he gets a fresh five-year limit in the new job.

Q: If Smith leaves the public works department and finds a job at the city library, does he get a fresh five-year limit?

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[11] 38 U.S.C. 4312(c)(3).
[12] *Id.*
[13] 38 U.S.C. 4312(c)(4)(A).
[14] 38 U.S.C. 4312(c)(4)(B), (C), and (D). Such a secretarial determination needs to be memorialized in Smith's orders or his DD-214 for the relevant period of service. Please see Law Review 201 for a detailed discussion of the exceptions to USERRA's five-year limit.

A: No. If Smith goes from one city department to another and takes his city seniority and pension credit with him that is not a new employer relationship. That would amount to a continuing employer relationship and a new position of employment.

Q: I have another USERRA claimant, and let's call her Mary Jones. She graduated from high school in our city in 1999, and she enlisted in the Army in 2001, after the September 11 terrorist attacks. She served on active duty for five years and left active duty in 2006, when she affiliated with the Army Reserve and took a new civilian job with our city government. From 2006 to 2009, she was a traditional Army Reservist. In late 2008, she applied for and was accepted for the Army's Active Guard & Reserve (AGR) Program. She gave prior notice to the city and left her city job for AGR active duty in March 2009. She served on active duty for six years, until March 2015, when she applied for reemployment with the city. The city's personnel director said that Mary is not entitled to reemployment because her active duty period, after leaving her city job in 2009, exceeded five years. Is the personnel director correct?

A: Yes, in this instance. Jones' situation is different from Smith's. This was not Jones' *initial* active duty period—her initial active duty period was from 2001 to 2006. Neither section 4312(c)(1) nor any other subsection of section 4312(c) exempts voluntary AGR duty from the computation of the individual's five-year limit. Jones is beyond the five-year limit and is not entitled to reemployment with the city.