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Reemployment Rights with the Successor in Interest

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

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Q: I am a Colonel in the Air Force Reserve and a life member of the Reserve Officers Association (ROA). For many years, I have read and utilized your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

In January 2006, I started a job with a major defense contractor—let's call it Daddy Warbucks International (DWI). Five years later (January 2011), I left my DWI to reenter active duty voluntarily, and I gave prior notice to DWI. My active duty period has been extended several times, and I have kept DWI informed about each extension. My current orders expire at the end of this fiscal year (September 30, 2015).

I worked for DWI at an Air Force Base, providing training to Air Force pilot trainees. DWI has had this contract for 30 years—on a series of three-year extensions. The current contract expires on September 30, the same day that I am scheduled to leave active duty on my current orders. No final decision has been made, but the word is out that the Air Force probably won't renew DWI's contract this time and will award the new contract for this training service to the XYZ Corporation.

The way I figure it, my five-year clock does not expire until January 2016, five years after I left my DWI job in January 2011. If I leave active duty on September 30 and promptly apply for reemployment at DWI, am I entitled to reemployment at this particular Air Force Base even if DWI has lost the training contract?

USERRA's conditions for reemployment

[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. The Reserve Officers Association (ROA) initiated this column in 1997.
[2] Captain Wright was the Director of ROA's Service Members Law Center from June 2009 through May 2015.

A: First, let us discuss whether you will meet the USERRA conditions for reemployment after you leave active duty this fall. As I have explained in Law Review 1281 and other articles, you must meet five simple conditions to have the right to reemployment under USERRA:

a. You must have left a civilian position of employment (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services, as defined by USERRA. You clearly did this in January 2011.
b. You must have given the employer prior oral or written notice. You clearly gave such notice.
c. You must not have exceeded the *cumulative* five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which you seek reemployment. I will discuss this criterion further below.
d. You must have been released from the period of service without having received a disqualifying bad discharge from the military. You will meet this criterion on September 30 unless you do something incredibly stupid in the next four months.
e. You must have made a timely application for reemployment with the pre-service employer after release from the period of service. After a period of service of more than 180 days, you have 90 days to apply for reemployment.[3] In your particular situation, I strongly recommend that you not wait 90 days to apply for reemployment. I suggest that you apply as soon as possible after you have been released from the period of service, and you should communicate with DWI now, to give the employer notice that you will be leaving active duty on September 30 and applying for reemployment shortly thereafter.

USERRA's five-year limit

It seems clear that you already meet condition (a) and condition (b), and you almost certainly will meet condition (d) and condition (e). The remaining issue is condition (c)—the five-year limit. The limit is set forth in section 4312(c) of USERRA, as follows:

> (c) Subsection (a) [the right to reemployment] 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

[3] 38 U.S.C. 4312(e)(1)(D). The citation refers to subsection (e)(1)(D) of section 4312 of title 38 of the United States Code. USERRA is codified in title 38 at sections 4301 through 4335 (38 U.S.C. 4301-4335).

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.[4]

The five-year limit is computed "with respect to the employer relationship for which a person seeks reemployment." This means that we must go back to January 2006 (when you began your DWI job) in determining whether you are within or outside the five-year limit with respect to your employer relationship with DWI. If all your active duty from January 2011 through September 2015 counts toward your five-year limit[5] you have only about three months of "head room" on your five-year limit. If you have more than three months of military service *that counts toward the limit* between January 2006 (when you began your DWI job) and January 2011 (when you began this current active duty period), you are beyond the five-year limit.

The escalator does not always ascend.

Let us assume that you did not use any of your five-year limit between January 2006 and January 2011 and that you meet USERRA's five conditions when you apply for reemployment in October 2015. In that case, DWI is required to reemploy you "in the position of employment in which the person [you] *would have been employed if the continuous employment of such person with the employer had not been interrupted by such service,* or a position of like seniority, status, and pay, the duties of which the person is qualified to perform."[6]

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

[5] Some of this active duty may not count toward exhausting your five-year limit with DWI. Please see Law Review 201 for a detailed discussion of what counts and what does not count toward exhausting your five-year limit.

[6] 38 U.S.C. 4313(a)(2)(A) (emphasis supplied).

The position that you *would have attained if you had been continuously employed* is not always the same as or equal to the position that you left. The position that you would have attained if you had been continuously employed may be better than the job you left, equal to the job you left, worse than the job you left, or no job at all, depending upon what would have happened if you had never left the job.[7] In determining what would have happened, we need to look at what has happened to your DWI colleagues (especially those who are employed in the same or similar jobs and who were hired about when you were hired) during the time that you have been away from your DWI job for military service.

As I have explained in Law Review 104 and other articles, Congress enacted USERRA[8] and President Bill Clinton signed it into law on October 13, 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. There have been 16 United States Supreme Court cases under the VRRA and one under USERRA. In its first case construing the VRRA, 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."[9] The escalator principle is codified in section 4316(a) of USERRA.[10]

The escalator does not always ascend. If you had not left your DWI job for military service in January 2011, DWI still would have lost this particular training contract to XYZ. If the other DWI employees on this particular contract are terminated by DWI and receive severance pay or supplemental unemployment benefits, that is the "escalated reinstatement position" to which you are entitled—no job, but severance pay or supplemental unemployment benefits.[11]

You may have reemployment rights at XYZ as the successor in interest to DWI on this training contract.

Q: DWI has a similar training contract at another Air Force Base about 1,000 miles away, and that contract was recently renewed. When DWI loses the training contract where I had been employed, it is likely that the other DWI instructors on that contract will be offered similar DWI training jobs at the other base that is 1,000 miles away, and I suppose that it is likely that I will be offered the same opportunity.

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[7] 20 C.F.R. 1002.194. The citation refers to title 20 of the Code of Federal Regulations, section 1002.194.

[8] Public Law 103-353.

[9] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946). The citation means that you can find the *Fishgold* case in Volume 328 of *United States Reports* and the case starts on page 275. The particular language quoted can be found at the bottom of page 284 and the top of page 285. I invite the reader's attention to Law Review 0803 (January 2008) for a detailed discussion of the *Fishgold* case.

[10] 38 U.S.C. 4316(a).

[11] The determination of the *amount* of your severance payment or supplemental unemployment benefit will likely be made based upon seniority—your number of years of service with DWI. In this determination, you are entitled to be treated *as if you had been continuously employed by DWI* during the period that you were away from work for service (January 2011 through October 2015). *See Accardi v. Pennsylvania Railroad Co.,* 383 U.S. 225 (1966) (severance pay) and *Coffy v. Republic Steel Corp.,* 447 U.S. 191 (1980) (supplemental unemployment benefits. I discuss *Accardi* in Law Review 0861 (December 2008) and *Coffy* in Law Review 0919 (May 2009).

The problem is that I don't want to move 1,000 miles away.[12] My wife has a good job in this community, and we own a house here. Our two children are in high school here, and I want to give them the opportunity to graduate from high school at their current school. If I must move 1,000 miles away to remain employed by DWI, I will probably forego reemployment and look for a new job with a new employer in this community where my family lives now.

In the government contracting field, it is not unusual for a company to lose a contract to a competing company. When this happens, the new company with the contract traditionally offers (by custom or sometimes under its contract with the government) employment to the employees of the old contractor who had been working on that specific contract. If most or all of my DWI colleagues on the training contract are offered jobs at XYZ after the transition of the contract, am I entitled to reemployment at XYZ so that I can remain in this community?

A: Yes. In this situation, you can argue that XYZ is the *successor in interest* to DWI on this training contract and that you are entitled to reemployment at XYZ.

Section 4303 of USERRA defines 16 terms used in this law, including the term "employer" which is defined as follows:

> (4)
> (A) Except as provided in subparagraphs (B) and (C), the term "employer" means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including--
> (i) a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities;
> (ii) the Federal Government;
> (iii) a State;
> *(iv) any successor in interest to a person, institution, organization, or other entity referred to in this subparagraph;* and
> (v) a person, institution, organization, or other entity that has denied initial employment in violation of section 4311.
> (B) In the case of a National Guard technician employed under section 709 of title 32, the term "employer" means the adjutant general of the State in which the technician is employed.
> (C) Except as an actual employer of employees, an employee pension benefit plan described in section 3(2) of the Employee Retirement Income Security Act of 1974 shall be deemed to be an employer only with respect to the obligation to provide benefits

[12] Location (commuting area) is part of the "status" to which you are entitled as a returning veteran who meets the eligibility criteria for reemployment. *See Armstrong v. Cleaner Services, Inc.,* 79 LRRM 2921, 2923 (M.D. Tenn. 1972). I discuss location as an aspect of status in Law Review 0829 (June 2008). But the comparison must be to the job that you *would have attained if you had been continuously employed,* not the job you left. 20 C.F.R. 1002.194. In your situation, DWI would have moved you to that other base 1,000 miles away even if you had not been away from work for service, so reemploying you at the distant location is not a violation of USERRA under these particular facts.

described in section 4318.

(*D) (i) Whether the term "successor in interest" applies with respect to an entity described in subparagraph (A) for purposes of clause (iv) of such subparagraph shall be determined on a case-by-case basis using a multi-factor test that considers the following factors:*

(I) Substantial continuity of business operations.

(II) Use of the same or similar facilities.

(III) Continuity of work force.

(IV) Similarity of jobs and working conditions.

(V) Similarity of supervisory personnel.

(VI) Similarity of machinery, equipment, and production methods.

(VII) Similarity of products or services.

(ii) The entity's lack of notice or awareness of a potential or pending claim under this chapter at the time of a merger, acquisition, or other form of succession shall not be considered when applying the multi-factor test under clause (i).[13]

In the situation that you describe, XYZ is the successor in interest to DWI, and XYZ has inherited DWI's obligation to reemploy you after you have left active duty and applied for reemployment. I strongly suggest that you apply for reemployment *both* at DWI and at XYZ in order to preserve your rights and maintain your flexibility.

I invite the reader's attention to *Coffman v. Chugach Support Services, Inc.*, 411 F.3d 1231 (11th Cir. 2005).[14] Here are the facts, as set forth in the published appellate decision. In October 1997, the Air Force awarded the Base Operating Support (BOS) contract for Tyndall Air Force Base, in Florida, to Del-Jen, Inc. (DJI). That same month, DJI hired Mr. Coffman as a Hazardous Materials Specialist.

Mr. Coffman remained employed by DJI until November 2001, when he was recalled to active duty for a year (until November 2002) in the Air Force Reserve. Mr. Coffman gave proper notice of his mobilization to DJI. In October 2002, while Mr. Coffman was still on active duty, the contract between the Air Force and DJI expired and was not renewed. The Air Force awarded the new BOS contract to Chugach Support Services, Inc. DJI became a subcontractor to Chugach for some of the functions that it had formerly performed as the prime contractor.

Mr. Coffman, the only DJI employee on active duty at the time of the contract transition, was aware of the impending Chugach takeover of the BOS contract, and he sent Chugach a letter and resume. Chugach sent in a transition team to interview the 100 DJI employees, including Mr. Coffman, and Chugach hired 97; Mr. Coffman was not hired.

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[13] 38 U.S.C. 4303(4) (emphasis supplied).

[14] This is a 2005 decision of the United States Court of Appeals for the 11th Circuit, the federal appellate court that sits in Atlanta and hears appeals from district courts in Alabama, Florida, and Georgia. The citation means that you can find this case in Volume 411 of *Federal Reporter Third Series* starting on page 1231. I discuss this case at length in Law Review 0634 (October 2006).

When Mr. Coffman was released from active duty in November 2002, he applied for reemployment with both DJI and Chugach, as I advised him to do. He was not hired by Chugach, but he did return to DJI, in a job much inferior to the job he had held before. The person DJI hired to perform Mr. Coffman's duties during his military service was then hired by Chugach when it took over the contract.

In Law Review 79, I wrote, "[I]t is reasonably clear that, at least as to the BOS contract at that base, [Chugach] is the successor in interest to [DJI]." I took the position that, under USERRA, it is not necessary to show a merger or transfer of assets in order to impose the obligation to reemploy upon the "successor" employer. Unfortunately, the 11th Circuit did not agree with me on this important point.

> While we agree with Coffman that a determination of successor liability under USERRA requires an analysis of the *Leib* factors as stated by Congress, such an analysis is unnecessary and improper when no merger or transfer of assets even transpired between the two subject companies. Generally, one of the fundamental requirements for consideration of the imposition of successor liability is a merger or transfer of assets between the predecessor and successor companies. … In the present case, indisputably, there was no merger or transfer of assets between Del-Jen and Chugach. … Because there is no predecessor-successor relationship between Del-Jen and Chugach, Chugach is not the successor in interest or successor employer to Del-Jen and, as such, owed no duty under sections 4312 and 4313 of USERRA to reemploy Coffman. Accordingly, we conclude that the district court properly granted summary judgment in favor of Chugach as to Coffman's reemployment claim.[15]

In 2010, Congress amended USERRA to change the result of cases like *Coffman.*[16] On October 13, 2010, President Obama signed into law the Veterans' Benefits Act of 2010 (VBA-2010), Public Law 111-275. This important new law makes several welcome amendments to USERRA and the Servicemembers Civil Relief Act (SCRA). Section 702 of VBA-2010 is titled "Clarification of the Definition of 'Successor in Interest.'"

There can be a successor in interest in two situations. The first and less controversial example is when there is a merger or acquisition. For example, Delta Airlines acquired Northwest Airlines and merged it into Delta. Let us assume that Joe Smith left his job at Northwest for military service and gave prior notice to Northwest. While Joe was on active duty, Delta acquired Northwest. A year after the acquisition, Joe left active duty and applied for reemployment at Delta. Joe met the USERRA conditions concerning prior notice to Northwest, not having exceeded the cumulative five-year limit, release from service under honorable conditions, and timely application for reemployment at Delta. Under these circumstances, Joe clearly has the

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[15] *Coffman,* 411 F.3d at 1237.

[16] The 2010 amendment does not change the result of the *Coffman* case itself or get Mr. Coffman his job back. When Congress amends a law, the amendment almost always applies only *prospectively,* not retroactively. A 2010 amendment by Congress does not change the result of a case that became final in 2005.

right to reemployment at Delta, as the successor in interest to the former Northwest Airlines. Delta likely would not try to deny that it is the successor in interest.[17]

The second and more controversial application of the successor in interest concept is to the *functional successor in interest.* For example, I believe that Chugach was the functional successor in interest to DJI when it took over the BOS contract at Tyndall AFB and hired 97 of DJI's 100 employees. Unfortunately, the district court and the 11th Circuit rejected the functional successor in interest concept. I believe that the purpose and effect of the 2010 USERRA amendment was to impose successor in interest liability on functional successors as well as merger or acquisition successors. Since the 2010 amendment applies to your case, I believe that you can have reemployment rights at XYZ.

USERRA's 1994 legislative history addresses the successor in interest issue as follows:

> This provision [section 4304(4)] would also have the effect of placing liability on a *successor in interest*, as is true under current law [the VRRA]. The Committee [House Committee on Veterans' Affairs] intends that the multi-factor analysis utilized by the court in *Leib v. Georgia-Pacific Corp.,* 925 F.2d 240 (8th Cir. 1991) is to be the model for successor in interest issues, *except that the successor's notice or awareness of a reemployment rights claim at the time of merger or acquisition should not be a factor in this analysis.* In actual practice, it is possible that the successor would not have notice that one or more employees are absent from employment because of military responsibilities and a returning serviceperson should not be penalized because of that lack of notice.[18]

The Department of Labor (DOL) promulgated its final USERRA Regulations on December 19, 2005, five years before Congress enacted VBA-2010. The USERRA Regulations contain two sections about the liability of successors in interest, as follows:

> § 1002.35 **Is a successor in interest an employer covered by USERRA?**
>
> USERRA's definition of 'employer' includes a successor in interest. In general, an employer is a successor in interest where there is a substantial continuity in operations, facilities, and workforce from the former employer. The determination whether an employer is a successor in interest must be made on a case-by-case basis using a multi-factor test that considers the following:
>
> (a) Whether there has been a substantial continuity of business operations from the former to the current employer;
>
> (b) Whether the current employer uses the same or similar facilities, machinery, equipment, and methods of production;

[17] Please see Law Review 1043 (July 2010).
[18] 1994 *United States Code Congressional & Administrative News* 2449, 2454 (emphasis supplied).

(c) Whether there has been a substantial continuity of employees;

(d) Whether there is a similarity of jobs and working conditions;

(e) Whether there is a similarity of supervisors or managers; and,

(f) Whether there is a similarity of products or services.[19]

§ 1002.36 **Can an employer be liable as a successor in interest if it was unaware that an employee may claim reemployment rights when the employer acquired the business?**

Yes. In order to be a successor in interest, *it is not necessary for an employer to have notice of a potential reemployment clai*m at the time of merger, acquisition, or other form of succession.[20]

Q: I was commissioned a Second Lieutenant in May 1988, when I graduated from the United States Air Force Academy. Hence, my Mandatory Retirement Date (MRD), based on 30 years of commissioned service, does not arrive until May 2018. It is possible that I will be selected for promotion to Brigadier General, which would extend my MRD still later. I want to continue serving in the Air Force Reserve, but I recognize that I only have about three months of "head room" in my five-year limit. If I go to work for XYZ instead of DWI, do I get a fresh five-year limit at XYZ?

A: No. Please see Law Review 1043 (July 2010).

If XYZ is the successor in interest to DWI, then you have the right to reemployment at XYZ—this is a continuation of the same employer relationship, and you do not receive a fresh five-year limit. You cannot have it both ways. You cannot simultaneously argue that XYZ is the successor, so you have reemployment rights, but also argue that this is a new employer relationship, so you get a fresh five-year limit.

If you go to work for XYZ as the successor in interest, or if you return to work for DWI at the distant base where the company has a similar contract, you need to be very careful going forward to ensure that any additional military duty that you perform will be exempt from the computation of your cumulative five-year limit. Please see Law Review 201 for a detailed discussion of what counts and what does not count toward exhausting your five-year limit.

[19] 20 C.F.R. 1002.35 (bold question in original).
[20] 20 C.F.R. 1002.36 (bold question in original, emphasis by italics supplied).