LAW REVIEW 15074[1]
August 2015

Descending Escalator or Employer's Changed Circumstances?

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

1.1.1.9—USERRA applies to successors in interest
1.3.1.4—Affirmative defenses under USERRA
1.3.2.2—Continuous accumulation of seniority-escalator principle

Davis v. Crothall Services Group, Inc., 961 F. Supp. 2d 716 (W.D. Penn. 2013).[3]

Factual background

Terry L. Davis has been in the Army or Army Reserve since he originally enlisted in 1978. In 1988, he was hired by Kinetic Biomedical Services (KBS), and in 1995 he was promoted to the position of Regional Operations Manager (ROM) for KBS, with an office in Erie, Pennsylvania. At

[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find almost 1,400 "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.

[2] Captain Wright is the author or co-author of more than 1,200 of the almost 1,400 "Law Review" articles available at www.servicemembers-lawcenter.org. He has been dealing with the federal reemployment statute for 33 years and has made it the focus of his legal career. He developed the interest and expertise in this law during the decade (1982-92) that he worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), he largely drafted the interagency task force work product that President George H.W. Bush presented to Congress (as his proposal) in February 1991. On October 13, 1994, President Bill Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA), Public Law 103-353. The version that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. Wright has also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), and as an attorney in private practice, at Tully Rinckey PLLC. For the last six years (June 2009 through May 2015), he was the Director of ROA's Service Members Law Center (SMLC), as a full-time employee of ROA. In June 2015, he returned to Tully Rinckey PLLC, this time in an "of counsel" relationship. To schedule a consultation with Samuel F. Wright or another Tully Rinckey PLLC attorney concerning USERRA or other legal issues, please call Mr. Zachary Merriman of the firm's Client Relations Department at (518) 640-3538. Please mention Captain Wright when you call.

[3] This is a scholarly decision written by Judge Kim R. Gibson of the United States District Court for the Western District of Pennsylvania. He was appointed by President George W. Bush and confirmed by the Senate in 2003. He received his BS degree from the United States Military Academy (1970) and his law degree (*magna cum laude*) from the Dickinson School of Law (1976). He served on active duty as an armor officer and in the Army Reserve as a judge advocate, retiring as a Colonel in 1996. The citation means that you can find this case in Volume 961 of *Federal Supplement,* starting on page 716.

some point not made clear in the opinion, KBS was taken over by Crothall Services Group, Inc. (CSGI) as the successor in interest to KBS.

While employed by KBS and then CSGI, Davis was called to active duty and deployed three times by the Army Reserve. The last deployment, and the one that is relevant to this case, was from January 2006 until June 2007. It appears that this was an involuntary call-up, so this 17-month period does not count toward Davis' five-year limit with respect to his employer relationship with KBS and CSGI.[4]

Davis was released from active duty on June 20, 2007. Just two days later, CSGI "terminated his employment" based on his alleged "failure to return from leave of absence." This termination was clearly unlawful because Davis had 90 days, starting on the date of release from active duty, to apply for reemployment.[5]

Davis had the right to reemployment under USERRA.

It appears to be undisputed that Davis met the five USERRA conditions for reemployment in the summer of 2007.[6] Davis left his job for the purpose of performing uniformed service, and he gave prior oral or written notice to his civilian employer. His period of service did not exceed the cumulative five-year limit. He served honorably and was released from the period of service without having received one of the disqualifying bad discharges enumerated in section 4304 of USERRA.[7] After his release from active duty, he made a timely application for reemployment at CSGI, well within the 90-day deadline.

The escalator principle is a fundamental concept under USERRA, but this escalator goes both ways.

Because Davis met the USERRA conditions, the employer had a duty to reemploy him promptly[8] "in the position of employment in which the person [Davis] *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."[9] The "$64,000 question" in this case is *where would Davis be if he had not been called to the colors in January 2006?*

As is explained in Law Review 15067 and other articles, Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally

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[4] *See* 38 U.S.C. 4312(c)(4)(A). Please see Law Review 201 for a detailed discussion of USERRA's five-year limit.
[5] After a period of service of 181 days or more, the returning service member has 90 days to apply for reemployment. *See* 38 U.S.C. 4312(e)(1)(D).
[6] Please see Law Review 1281 for a detailed discussion of the five conditions.
[7] 38 U.S.C. 4304.
[8] The employer should have had Davis back on the payroll within 14 days after his application for reemployment. *See* 20 C.F.R. 1002.181 (Department of Labor USERRA Regulation).
[9] 38 U.S.C. 4313(a)(2)(A).

enacted in 1940. There have been 16 Supreme Court cases under the VRRA and one (so far) under USERRA.[10] 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."[11] The escalator principle is codified in sections 4313(a)(2)(A) and 4316(a) of USERRA.[12]

The escalator goes both ways—it can ascend or descend. This point is made clear in the Department of Labor (DOL) USERRA Regulations, as follows:

> § 1002.194. **Can the application of the escalator principle result in adverse consequences when the employee is reemployed?**
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> Yes. The Act does not prohibit lawful adverse job consequences that result from the employee's restoration on the seniority ladder. Depending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated. For example, if an employee's seniority or job classification would have resulted in the employee being laid off during the period of service, and the layoff continued after the date of reemployment, reemployment would reinstate the employee to layoff status. Similarly, the status of the reemployment position requires the employer to assess what would have happened to such factors as the employee's opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he or she had remained continuously employed. The reemployment position may involve transfer to another shift or location, more or less strenuous working conditions, or changed opportunities for advancement, depending upon the application of the escalator principle.[13]

Davis is not exempt from an unfavorable development (a downgrading of his position, a layoff, etc.) that *clearly would have happened anyway* even if Davis had not been away from his civilian job from January 2006 through June 2007. While Davis was on active duty, CSGI eliminated the position that he had been holding—the ROM position in Erie. What is not clear is *why* the company eliminated that position.

Perhaps the company eliminated the position *because Davis had been called to the colors.* When Davis left his job for military service, the employer needed to make other arrangements to cover the work in his absence. The company could have promoted another employee to fill Davis' ROM position on an "acting" basis. The company could have hired a new ROM in Erie. Or the company could have rearranged its regional offices because Davis had been called to active duty, and perhaps this is what happened. If the elimination of the Erie ROM position occurred *because* Davis had left the job for service, *this is not a change that would have happened*

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[10] Please see Category 10.1 in our Subject Index for a case note on each of these 17 cases.
[11] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946).
[12] 38 U.S.C. 4313(a)(2)(A), 4316(a).
[13] 20 C.F.R. 1002.194 (bold question in original).

anyway. In that case, Davis is entitled to be reemployed in the Erie ROM position or another position for which he is qualified that is of like seniority, status, and pay.

It appears that CSGI was suffering a decline in business and that some regional offices were eliminated simply because there was no longer a need for them. Let us assume that the company can show that because of declining business several regional offices were abolished, not just the Erie office, and that Davis' ROM position in Erie would have been abolished *even if Davis had not been called to the colors.* In that case, Davis is not entitled to the Erie position because the position would have been eliminated in any case, but that does not necessarily mean that Davis would have been unemployed. What does the evidence show about the usual practice of CSGI when an ROM position is abolished? Does the affected incumbent get a lesser position at some other location? Does the affected incumbent receive severance pay or supplemental unemployment benefits? We need to determine what *would have happened* to Davis if he had not gone on active duty in January 2006. Making that determination may be difficult and controversial.

When the Supreme Court first enunciated the escalator principle in 1946, more than half of our country's private sector workforce was unionized. Today, that figure is only 6.5%. When there is a union and a collective bargaining agreement (CBA), it will generally be easy to determine what would have happened to our returning service member if he or she had never left the civilian job for service. In the absence of a union, a CBA, and a formal system of seniority, making such a determination may be much more difficult and controversial, but that does not relieve the court from the obligation to make that determination.

Let us assume that we have a unionized situation with a formal system of seniority based on date of hire. Our returning service member was hired on June 15, 2008. She is one place behind Mary Jones (hired June 14, 2008) and one place ahead of Joe Smith (hired June 16, 2008). What would have happened to our service member if she had remained continuously employed? We need only look to what has happened to Jones and Smith in order to make that determination.

USERRA and the escalator principle apply to non-unionized as well as unionized situations, and to discretionary as well as automatic moves up and down the escalator.[14] Determining what would have happened to Davis' job if he had remained continuously employed will not be easy or non-controversial, but it must be done.

It is unclear which party has the burden of proof in a case like this. Is Davis required to prove that if he had not been called to the colors he would have remained continuously employed at CSGI (albeit perhaps in a lesser position)? Or is the employer required to prove that even if Davis had not gone away for military service his job still would have been eliminated

[14] *See Rivera-Melendez v. Pfizer Pharmaceuticals LLC,* 730 F.3d 49 (1st Cir. 2013). This is a 2013 decision of the United States Court of Appeals for the First Circuit, the federal appellate court that sits in Boston and hears appeals from district courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island. I discuss this case in detail in Law Review 13127 (September 2013).

altogether? In a case like this, the allocation of the burden of proof is likely to determine the outcome. I would argue that the employer has the burden of proof because the employer has better access to the relevant information upon which the "what would have happened" determination must be made.

Affirmative defense—not required to reemploy if doing so is impossible or unreasonable because of the employer's changed circumstances

Section 4312(d) of USERRA establishes three affirmative defenses, including the following: "An employer is not required to reemploy a person under this chapter if—the employer's circumstances have so changed as to make such reemployment impossible or unreasonable."[15]

Essentially the same "impossible or unreasonable because of the employer's changed circumstances" language appeared in the VRRA, the reemployment statute that was superseded by the enactment of USERRA in 1994. USERRA's 1994 legislative history includes the following two paragraphs about the "changed circumstances" affirmative defense:

> The only other exceptions to the unqualified right to reemployment [of the returning service member who meets the five USERRA conditions] would be the provisions of subsection (d), which provide that the employer need not reemploy the person if the employer's circumstances have so changed as to make it impossible or unreasonable to reemploy or, in the case of a person not qualified after reasonable efforts, if reemployment would create an undue hardship.[16]
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> The very limited exception of unreasonable or impossible, which is in the nature of an affirmative defense, and for which the employer has the burden of proof (*see Watkins Motor Lines, Inc. v. deGalliford,* 167 F.2d 274, 275 (5th Cir. 1948); *Davis v. Halifax County School System,* 508 F. Supp. 966, 969 (E.D.N.C. 1981)), is only applicable "where reinstatement would require creation of a useless job or where there has been a reduction in the work force that reasonably would have included the veteran." *Davis, supra,* 508 F. Supp. at 968. "It is also not sufficient excuse that another person has been

[15] 38 U.S.C. 4312(d)(1)(A). Section 4312(d) goes on to provide that: "In any proceeding involving an issue of whether—any reemployment referred to in paragraph (1) is impossible or unreasonable because of a change in the employer's circumstances, … the employer shall have the burden of proving the impossibility or unreasonableness." 38 U.S.C. 4312(d)(2)(A).

[16] This "undue hardship" affirmative defense applies to the situation of the returning veteran who has serious disabilities incurred or aggravated during the period of service and who meets the USERRA conditions for reemployment. The employer is required to make reasonable efforts to reemploy the returning disabled veteran. If the disabled veteran cannot qualify, even with reasonable employer efforts, for the position that he or she would have attained if continuously employed (usually but not always the position the person left), the employer is required to reemploy the returning disabled veteran in another position for which he or she is qualified or can become qualified with reasonable employer efforts. If making those employer efforts would impose an "undue hardship" on the employer, the employer is excused from the obligation to make the effort. Please see Law Review 0854 with respect to the employer's obligations to the returning disabled veteran.

> hired to fill the position vacated by the veteran[17] nor that no opening exists at the time of application." *Davis, supra. See also Fitz v. Board of Education of Port Huron,* 662 F. Supp. 1011, 1015 (E.D. Mich. 1985), *affirmed,* 802 F.2d 457 (6th Cir. 1986); *Anthony v. Basic American Foods,* 600 F. Supp. 352, 357 (N.D. Cal. 1984); *Goggin v. Lincoln St. Louis,* 702 F.2d 698, 709 (8th Cir. 1983).[18]

The DOL USERRA Regulations include a paragraph about the "changed circumstances" affirmative defense:

> Even if the employee is otherwise eligible for reemployment benefits, the employer is not required to reemploy him or her if the employer establishes that its circumstances have so changed as to make reemployment impossible or unreasonable. For example, an employer may be excused from reemploying the employee where there has been an intervening reduction in force that would have included that employee. The employer may not, however, refuse to reemploy the employee on the basis that another employee was hired to fill the reemployment position during the employee's absence, even if the reemployment might require the termination of that replacement employee.[19]

The VRRA did not give DOL rulemaking authority, but DOL published the *Veterans' Reemployment Rights Handbook* in 1956, 1970, and 1988, and several courts, including the Supreme Court, accorded a "measure of weight" to the *Handbook*'s interpretations.[20] The 1970 *Handbook* has an entire chapter (Chapter VIII) about the "changed circumstances" affirmative defense, and here are six paragraphs from that chapter:

> The statutory obligation to reemploy exists "unless the employer's circumstances have so changed as to make it impossible or unreasonable" to reemploy the veteran. In view of the remedial purposes of the Act, this exception must be narrowly construed and the burden of proving its applicability is on the employer. It was included in the Act primarily to relieve the preservice employer, or his successor in interest, of the obligation to create an unnecessary job in order to accommodate the veteran. …
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> The change must be in the employer's circumstances, as distinguished from the circumstances of the other employees. If a position exists to which the veteran is otherwise entitled under the law, the fact that other employees may be disadvantaged by his reinstatement does not make it impossible or unreasonable to reinstate him.
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> The impossibility or unreasonableness of reemployment is determined as of the time the veteran applies for reinstatement. Conditions existing at some time during his

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[17] Please see Law Review 15072 (August 2015) for additional discussion and case law on this important point, that the employer is required to reemploy the returning veteran *even if that means displacing a high-performing replacement employee.*

[18] House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2458.

[19] 20 C.F.R. 1002.139(a).

[20] *See Monroe v. Standard Oil Co.,* 452 U.S. 549, 563 n. 14 (1981); *Leonard v. United Airlines,* 972 F.2d 155, 159-60 (7th Cir. 1992); *Shadle v. Superwood Corp.,* 858 F.2d 437, 440 (8th Cir. 1988); *Dyer v. Hinky-Dinky, Inc.,* 710 F.2d 1348, 1352 (8th Cir. 1983); *Smith v. Industrial Employers and Distributors Association,* 546 F.2d 314, 319 (9th Cir. 1976), *cert. denied,* 431 U.S. 965 (1977); *Helton v. Mercury Freight Lines, Inc.,* 444 F.2d 365, 368 n. 4 (5th Cir. 1971).

absence, but no longer existing at the time of his return, would not make it impossible or unreasonable to reemploy him.

For reemployment rights to be barred under the "changed circumstances" provision, the impossibility or unreasonableness must apply not only to the position the veteran left for military service but also to any position he would have attained but for his military absence and to all positions of like seniority, status, and pay.

The "changed circumstances" provision may come into play in some situations where there has been a sale, transfer, or reorganization of all or a part of the employer's business, where the business has changed drastically in nature or in size, or where the veteran's old job has been abolished.

The incorporation, reorganization, sale, transfer, or merger of the preservice employer's business is not ordinarily such a change in the employer's circumstances as to make it impossible or unreasonable to reemploy the veteran. If the business still exists with substantially the same activity on substantially the same scale and requires services substantially similar to those rendered by the veteran, it is not impossible or unreasonable to reinstate him.[21]

The 1970 *Veterans' Reemployment Rights Handbook* has examples in each chapter, illustrating the legal principles discussed in the text of the chapter. Chapter VIII has ten examples, and here are six of them:

(1) Announcer A leaves his position with Radio Station FM to enter military service. During his absence in military service, FM is sold to an new owner who converts it from a classical music station to one which emphasizes rock-and-roll music and newscasts. As attrition occurs among the announcers, the new owner replaces them with disc jockey types, and by the time A returns from military service all of his former fellow announcers have quit for employment elsewhere.

The new owner inherits the old owner's reemployment obligation as a successor in interest for that purpose. A is entitled to a reasonable time to demonstrate proficiency as a disc jockey or newscaster. These jobs are not so different from what he was doing before military service that it would be impossible or unreasonable to reemploy him.

(2) B is the only embalmer employed by P & Q Funeral Directors, a partnership, in Flatville, a Midwestern farming community. B is drafted into military service[22] and C is hired to replace him. Later P and Q, realizing that most of their potential prospects are moving to the cities or retiring to Florida, consolidate their operations with those of R, a funeral director in an adjacent county, forming PQR Funeral Parlors, a corporation, which will do all of its embalming at R's establishment in Tuxedo Junction. R has been employing two embalmers, D and E, but PQR needs only two embalmers altogether and it is agreed that each component firm shall supply one of

[21] 1970 *Veterans' Reemployment Rights Handbook,* published by the United States Department of Labor, page 39.

[22] Congress abolished the draft and established the All-Volunteer Military in 1973, three years after this *Handbook* was published. The reemployment statute has always applied to both voluntary and involuntary military service.

them, so C and E are kept on the rolls of PQR and D is dropped inasmuch as R considers him less competent than E. This is the situation when B returns from military service and applies to PQR for reemployment.

B is entitled to reinstatement. PQR Corporation is the successor in interest of the P and Q partnership. The bringing in of an additional owner, the change in the location of the job, and the hardship on C and E that may result from B's reemployment are not enough, separately or cumulatively, to make it impossible or unreasonable to reinstate B.

(3) S Pharmaceutical Company loses Chemist F to the military when he is drafted. While he is gone, an extremely tight labor market develops in F's particular specialty, and in order to keep the position filled S lures Chemist G away from a competitor by giving him a two-year contract of employment. F returns from military service and applies for reemployment at a time when G's contract still has a year to run. S Company cannot use them both and if it lets G go it will have to pay him a year's salary.

The existence of the contract with G cannot bar F's statutory reemployment rights on the ground that his reemployment would be impossible or unreasonable. The basic purpose of the statute cannot be frustrated by a practice of entering into employment contracts with other employees.

(6) One division of W Packing Company operates a tuna cannery in a seacoast town, and another division of W Company operates a vegetable cannery 25 miles inland. K, a production line employee at the tuna cannery, leaves for military service. While he is in service, W Company goes out of the tuna business because of Japanese competition and puts its seacoast cannery up for sale. In closing out that operation, W Company agrees with the union that the employees of the tuna cannery will be given priority, in line with their seniority at the tuna plant, for openings at the vegetable cannery in jobs for which they are qualified. If hired there they are to come in as new employees, and if not hired there within six months after the closing of the tuna cannery, whether through lack of openings or by their own choice, they are to receive severance pay in the amount of three months' wages. K returns from military service and contacts W Company for reemployment eight months after the tuna operation has ceased. Of the five canners who had been junior to him at the tuna plant, two were hired on the production line at the vegetable cannery and three elected to take severance pay.

K is entitled to choose between the job he would have had and the severance pay he could have received. The reemployment obligation rests on the company as a whole and not just on the division where he had worked before military service. The fact that he was in military service throughout the contractual period for making a choice prevents it from being considered impossible or unreasonable to allow him to make his choice after that period has expired.

(7) Route Salesman L, who is compensated strictly on a commission basis plus expenses, operates out of X Cosmetics Company's regional headquarters in Bigtown, calling on retailers in several counties in the northwestern part of the state. He leaves for military service after training a new employee to take over his route and introducing him to the

customers. During his absence X Company's business expands and the territories of the various route salesmen are subdivided and realigned. The salesmen build up personal followings in their new territories, gaining new customers and losing some old ones to the competition. When L returns from military service and applies for reemployment, his former route no longer exists, and those of his former customers who still buy X's products are spread over the territories of three other salesmen.

It is not impossible or unreasonable to reinstate L in this situation. Although his exact former position is no longer identifiable in the changed circumstances, other positions exists which are of like seniority, status, and pay, and he is entitled to a route which will provide him with earnings opportunities comparable to those he would have had if his employment had continued uninterruptedly.

(10) Mr. SR operates the Star Shoe Repair Shop. His only employee, O, leaves for military service and SR hires FG to replace him. FG is a family man with eight children and a sick wife and is also a steadier and more careful workman than O. O completes his military service and makes a timely application for reinstatement, but SR pleads that he needs only one employee and that it would be unfair and unreasonable to reemploy O and throw FG out on the street.

The impossibility or unreasonableness of reemployment must relate to changes in the employer's circumstances and not to hardships on other employees. The fact that the incumbent is a more satisfactory employee does not defeat the veteran's rights. O is entitled to the job.[23]

Relationship between the descending escalator concept and the "changed circumstances" affirmative defense

There is a confusing "belt and suspenders" redundancy between the concept of the descending escalator and the affirmative defense for changed circumstances. Under the affirmative defense, the employer is not required to reemploy the returning veteran if the evidence shows that the veteran *would have lost the job anyway* even if he or she had not left the job for military service. But if the veteran would have lost the job anyway he or she is not entitled to reemployment in an active job—in this case the descending escalator has carried the veteran out onto the street.

Outcome of the *Davis* case

The plaintiff (Davis) avoided a summary judgment for the employer and achieved a partial summary judgment for himself. The next step is a trial, unless the parties settle.[24] It is difficult to see how the defendant employer can win, either under the escalator principle or under the "changed circumstances" affirmative defense.

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[23] 1970 *Veterans' Reemployment Rights Handbook,* pages 41-44.

[24] LEXIS, a computerized legal research service, shows no further activity in this case, after this published 2013 decision. It is likely that the parties have already settled and that this case is over.

DEPARTMENT OF THE AIR FORCE
WASHINGTON, D.C. 20330-1000

OFFICE OF THE ASSISTANT SECRETARY

13 JUL 2015

MEMORANDUM FOR THE CHIEF OF STAFF OF THE AIR FORCE
DIRECTOR, AIR NATIONAL GUARD
CHIEF, AIR FORCE RESERVE

FROM: Principal Deputy Assistant Secretary of the Air Force (Manpower and Reserve Affairs)

SUBJECT: Civilian Reemployment Protections for Air Force Military Personnel

References: (a) DODI 1205.12, *"Civilian Employment and Reemployment Rights of applicants for, and Service Members and Former Service Members of the Uniformed Services", 04/04/1996, Incorporating Change 1, 04/16/1997*

(b) SAF/MR Memorandum, Subject, *"Reemployment Protections for Activated Reserve Component Members", 12/07/1996*

(c) SAF/MR Memorandum, Subject, *"Civilian Reemployment Protections for Air Force Military Personnel", 10/25/2011*

This memorandum incorporates, clarifies and supersedes references (b), and (c). Current policy regarding members' rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA), Title 38, United States Code (U.S.C.), Chapter 43, is clarified by this memorandum. USERRA provisions provide protection to anyone absent from a position of civilian employment because of uniformed service if a number of conditions are met, one of which is that the cumulative length of absences from civilian employment does not exceed five years. In addition, USERRA exempts certain periods of active duty performed by a member of the uniformed services from the five year cumulative service limit. Enclosure 2, paragraph E2.3 of the Department of Defense Instruction (DoDI) 1205.12 provides a list of periods of service that are exempt from the five year period.

USERRA and DoDI 1205.12 provide authority for the Secretary of the Air Force to designate certain other periods of service as exempt from the five year limit. This memorandum addresses designated exemptions given under my authority, acting on behalf of the Secretary of the Air Force.

I categorically approve the following exemptions from the five-year limit:

a. Periods of service performed by an ARC member ordered to or retained on active duty under 10 U.S.C. §12301(d) on or after September 14, 2001, for the purpose of providing direct or indirect support of missions and operations associated with the National Emergency by Reason of Certain Terrorist Attacks, declared by Presidential Proclamation 7463, dated September 14, 2001, and successive continuations.

b. Periods of service performed by a member of the Regular Air Force retained on active duty under 10 U.S.C. § 12305 or other provision of the law on or after September 14th, 2001, for the purpose of providing direct or indirect support of missions and operations associated with the National Emergency by Reason of Certain Terrorist Attacks, declared by Presidential Proclamation 7463, dated September 14, 2001, and successive continuations.

c. Periods of service performed by an ARC member for the purpose of fulfilling training requirements necessary for professional development through in-residence Developmental Education (DE).[1]

d. Periods of service when an ARC member performs duty to fulfill additional training requirements necessary for professional development not specifically exempted above, or for the completion of skill training or retraining, to include "Seasoning Training" after the completion of AFSC awarding training. This categorical exemption is for duty performed for all Technical and Professional training based at school houses or formal courseware listed in the Air Force Education and Training Course Announcements. This includes AFSC awarding courses and required supplemental training. Members will have the following statement included on their orders: "The periods of service under these orders is exempt from the five-year limit as provided in 38 U.S.C. § 4312 (c)(3)." ARC members enrolled in sister service courses must apply to SAF/MR for a USERRA exemption, unless the sister service is the executive agent for a mandatory course for members prior to deployment.

Exemptions a. and b. above, are specifically based on the authority of 38 U.S.C. § 4312 (c)(4)(B) which exempts the service of a member who is "ordered to or retained on active duty (other than for training) under any provision of the law ***because*** of a war or national emergency..." (emphasis added). In other words, the basis for the order must be linked to the war or national emergency.[2] Members who meet this criterion shall have the following statement included in the orders: "The period of service under these orders is exempt from the five-year limit as provided in 38 U.S.C. § 4312 (c)(4)(B)." If this statement should have been but was not included in the activation orders, the statement should be included in a separate document and retained in the service member's personnel file. Periods of service that would occur regardless of war or national emergency are not automatically exempt. The Director, Air National Guard (NGB/CF) and Chief, Air Force Reserve (AF/RE) shall provide additional procedural direction and guidance regarding the specific positions that meet exemption criteria and other policy guidance as they determine appropriate.

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[1] Approved in-resident DE are listed in Attachment 2, *Officer/Civilian DE Institutions and Programs* in AFI 36-2301, Developmental Education (16 July 2010).

[2] Linkage to the National Emergency may be shown by one or more various 'indicia', including citation to Presidential Proclamation 7463; or, to Executive Order 13223; or to a named operational mission associated with the National Emergency; or to the funding sources that support named operations or missions associated with the National Emergency. In most cases, members ordered to duty under 10 U.S.C. §12301(d), but serving under U.S.C. §12310 (AGR duty), 10 U.S.C. § 10211, or 10 U.S.C. §12402 will not fit this criteria.

Exemption c. above, is specifically based on the authority of 38 U.S.C. §4312 (c)(3) which exempts the service of a member who is performing duty "necessary for professional development" and certifies the approved DE in accordance with Reference (a).

Exemption d. above, is specifically based on the authority of 38 U.S.C. §4312 (c)(3) which exempts the service of a member who is performing duty "for completion of skill training or retraining."

Exemptions for periods of service when an ARC member is ordered to active duty in support of a critical mission or requirement (as defined in DoDI 1205.12, Enclosure 1, paragraphs E1.1.1 and E1.1.2) of the uniformed services must be approved by SAF/MR. The designation of a critical requirement to gain necessary experience to qualify for key leadership positions must be employed judiciously. This exemption will not be used to routinely extend reemployment rights or to extend individuals in repeated statutory or AGR tours.

Commanders must remain vigilant to potential hardships to employers when approving short notice orders for military duty. Employers understand their obligation. I ask each commander to consider the impact on the employer and whether the training must be accomplished during peak work cycles within various industries and employment sectors. Requests for exemptions should be routed to NGB/CF or AF/RE, as appropriate, for initial review and consideration. NGB/CF and AF/RE may disapprove requests. All subsequent USERRA exemption requests will be staffed through SAF/MRR and AF/JAA for a recommendation to the Assistant Secretary of the Air Force (Manpower and Reserve Affairs) (SAF/MR).

DANIEL R. SITTERLY
Principal Deputy Assistant Secretary
(Manpower and Reserve Affairs)