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Location Is an Aspect of Status

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

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Q: I worked for a large national corporation at its office in Seattle from 2005 until 2011, when I was called to active duty for a year in the Marine Corps Reserve. I deployed to Afghanistan for a year. At the end of the year, I extended for two more years, voluntarily. I was released from active duty in December 2014 and promptly applied for reemployment at the Seattle office where I had worked.

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[1] [1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 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 more than 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.

In late 2013, while I was on active duty in Afghanistan, the large corporation where I had worked was purchased by an even larger corporation. After the merger, there was a lot of "shake-out" and hundreds of employees of the smaller corporation were laid off as regional offices of the two companies were consolidated. But the Seattle office was apparently not greatly affected by this turmoil, since the larger company did not have a significant presence in the Pacific Northwest before the merger.

When I left my job to report to active duty in late 2011, I recommended that Mary Jones (who had been working under me) be promoted to fill my position during my absence, and this happened. I don't know what happened to Mary—she apparently left the company sometime in 2013, and Bob Smith was then brought in to fill the job that Mary was holding and that I had held. He is still there, doing essentially the same job that I did from 2005 until 2011.

I applied for reemployment with the new, combined company in January 2015 and made clear that I wanted to return to the Seattle office. The company's personnel office made clear that there was no position for me in Seattle and insisted that I take a job at the company headquarters in Atlanta. I took the job reluctantly, but I am most unhappy. My wife has an excellent job, for a different company, in Seattle, and we own a house in Seattle, and my children are in high school in Seattle. My wife has remained in Seattle with the children, and I live in an apartment in Atlanta. I only get to see my family occasionally, and only at great expense and trouble.

I have read with great interest your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). Was I entitled to the Seattle job when I returned to work in early 2015? Is it too late to do something about this now?

A: I think that you were entitled to the Seattle job in early 2015 and that the company violated USERRA when it insisted that you go to Atlanta. But first we need to establish that you were entitled to reemployment under USERRA and that you were entitled to the Seattle job.

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 job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services.[3]
b. You must have given the employer prior oral or written *notice.* You do not need the employer's permission, and the employer does not get a veto.[4]

[3] It seems clear beyond any dispute that you met this condition.

[4] You were required to give prior notice to the employer in late 2011, or an appropriate officer of the Marine Corps could have given the notice for you. 38 U.S.C. 4312(a)(1). You were excused from the requirement to give prior

c. You must not have exceeded the *cumulative* five-year limit on the duration of the period or periods of uniformed service, related to the employer relationship for which you seek reemployment.[5]
d. You must have served honorably and must have been released from the period of service without having received one of the disqualifying bad discharges enumerated in section 4304 of USERRA.[6]
e. After release from the period of service, you must have made a timely application for reemployment.[7]

The company that you worked for from 2005 to 2011 no longer existed when you left active duty in late 2014. That is not a problem because the new consolidated company was clearly the "successor in interest" to the corporation you worked for previously, and your application for reemployment with that successor was clearly sufficient under USERRA. Section 4303 of USERRA defines 16 terms used in this law, including the term "employer." That term is defined as follows:

> (4)
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> (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--
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> (i) a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities;
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> (ii) the Federal Government;
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> (iii) a State;
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> (iv) *any successor in interest* to a person, institution, organization, or other entity referred to in this subparagraph; and
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> (v) a person, institution, organization, or other entity that has denied initial

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notice if doing so was precluded by military necessity or otherwise impossible or unreasonable. 38 U.S.C. 4312(b). You were not required to give notice to the employer when you voluntarily extended your active duty, at the end of the initial year of involuntary service. *See Sutton v. City of Chesapeake,* 713 F. Supp. 2d 547, 551 (E.D. Va. 2010). Please see Law Review 14040 (March 2014) for a discussion of this aspect of the *Sutton* case. I certainly would have advised you to keep the employer informed of extensions, but your failure to do so is not fatal to your case.

[5] As is explained in Law Review 201, there are nine exemptions to the five-year limit—kinds of service that do not count toward exhausting your limit. Your one year of involuntary service (2011-12) is exempt from the five-year limit under 38 U.S.C. 4312(c)(4)(A).Your two-year voluntary extension (2012-14) could be exempt, if your orders contain the "magic words" to the effect that the Secretary of the Navy has determined that your voluntary service was for a critical requirement of the Marine Corps. 38 U.S.C. 4312(c)(4)(D). For purposes of this article, I am assuming that your 2012-14 voluntary service, even if it counts toward the cumulative five-year limit, has not put you beyond the limit.

[6] 38 U.S.C. 4304. The fact that you are still in the Marine Corps Reserve conclusively shows that you did not receive one of the disqualifying bad discharges.

[7] After a period of service of 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service. It seems clear that you made a timely application for reemployment after you were released from active duty in late 2014.

employment in violation of section 4311 [38 USCS § 4311].

(B) In the case of a National Guard technician employed under section 709 of title 32 [32 USCS § 709], 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 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).[8]

It seems clear that the new consolidated company meets the standards set forth above and qualifies as the successor in interest to your pre-service employer. Under the final clause of subsection (4), the fact that the larger company was not aware (at the time of the acquisition) of the fact that you were away from your job and potentially would be claiming reemployment later does not defeat your right to reemployment with this successor in interest.[9]

Because you met the five USERRA conditions when you returned from active duty and applied for reemployment in late 2014, the company had the legal obligation 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."[10] I think that a good case can be made that if you had not been away from your job for active duty in the 2011-14 period you *would have remained* in the Seattle job. I acknowledge that the merger and the upheaval during the time that you were away from work

[8] 38 U.S.C. 4303(4) (emphasis supplied).
[9] 38 U.S.C. 4304(4)(D)(ii).
[10] 38 U.S.C. 4313(a)(2)(A) (emphasis supplied).

complicate matters. But the bottom line is that the job you held from 2005-11 still exists in Seattle, and that job is held by the man who replaced the woman who replaced you when you were called to the colors. These facts demonstrate a *reasonable certainty* that you would have remained in the Seattle job but for your active duty.

The company was not required to reemploy you in the exact job that you left in 2011, even if it can be shown that you would have remained in that job. The company has the option to reemploy you in another position for which you are qualified, but only if that position is of like seniority, *status,* and pay to the position that you left and would have maintained if you had been continuously employed.

USERRA does not define the word "status," but the word was used in the prior reemployment statute (the VRRA) and the issue of "status" is discussed in USERRA's 1994 legislative history, as follows:

> Although not the subject of frequent court decisions, courts have construed status to include "opportunities for advancement, general working conditions, *job location,* shift assignment, [and] rank and responsibility. *Monday v. Adams Packing Association, Inc.,* 85 LRRM 2341, 2343 (M.D. Fla. 1973). *See Hackett v. State of Minnesota,* 120 Labor Cases (CCH) P.11,050 (D. Minn. 1991). *A reinstatement offer in another city is particularly violative of like status (See Armstrong v. Cleaner Services, Inc.,* 79 LRRM 2921, 2923 (M.D. Tenn. 1972)), as would be reinstatement in a position which does not allow for the use of specialized skills in a unique situation.[11]

The Department of Labor (DOL) USERRA regulation addresses the issue of "status" as follows: "In particular, the [returning] employee's status in the reemployment position could include opportunities for advancement, general working conditions, job location, shift assignment, rank, responsibility, *and geographical location."*[12] Even if the Atlanta job was otherwise equal to or better than the Seattle job, the fact that it is located across the country means that it is not of like *status.* I think that it is clear that you are entitled to reemployment in Seattle.

I think that it is likely that the company wanted you to move to Atlanta is because the Seattle job is filled, and the man now holding that job is doing a fine job, but the fact that the job has been filled in no way detracts from your rights under USERRA. Allowing the hiring of another employee to defeat the reemployment rights of the returning veteran would render the reemployment statute largely meaningless, and it is clear that the lack of a current vacancy does not defeat the right of the veteran to return to his or her rightful position. This is established in the 1993 case styled *Nichols v. Department of Veterans Affairs:*

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[11] House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* (*USCCAN)* 2449, 2464 (emphasis supplied).

[12] 20 C.F.R. 1002.193(a) (emphasis supplied).

> The department [Department of Veterans Affairs, employer in the case] first argues that, in this case, Nichols' [the returning veteran and the plaintiff] former position was 'unavailable' because it was occupied by another, and thus it was within the department's discretion to place Nichols in an equivalent position. This is incorrect. Nichols' former position is not unavailable because it still exists, even if occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. … Although occupied by Walsh, Nichols' former position is not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him.[13]

It is not too late for you to complain about being reemployed in Atlanta rather than Seattle. There is no statute of limitations limiting the time within which a USERRA case can be brought.[14] If you sue the company and prevail, here is the USERRA provision for remedies that the court can award:

> (d) Remedies.
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> (1) In any action under this section, the court may award relief as follows:
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> (A) *The court may require the employer to comply with the provisions of this chapter.*
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> (B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.
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> (C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.
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> (2) (A) Any compensation awarded under subparagraph (B) or (C) of paragraph (1) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter.
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> (B) In the case of an action commenced in the name of the United States for which the relief includes compensation awarded under subparagraph (B) or (C) of paragraph (1), such compensation shall be held in a special deposit account and shall be paid, on order of the Attorney General, directly to the person. If the compensation is not paid to the person because of inability to do so within a period of 3 years, the compensation shall be covered into the Treasury of the United States as miscellaneous receipts.

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[13] *Nichols v. Department of Veterans Affairs,* 11 F.3d 160, 163 (Fed. Cir. 1993).
[14] 38 U.S.C. 4327(b).

(3) A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section.

(e) Equity powers. *The court shall use, in any case in which the court determines it is appropriate, its full equity powers*, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter.[15]

Perhaps you have not lost money, because the Atlanta job has paid you just as much as you were entitled to in Seattle. Nonetheless, the court can award you relief if you prevail in your lawsuit. The court can order the company to reinstate you to the job in Seattle, even if that means displacing the incumbent in that job. We cannot turn back the hands of time, but we can put you back in the Seattle job going forward and reunite your family.

[15] 38 U.S.C. 4323(d) and (e) (emphasis supplied).