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What Is the Escalator Principle?

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

1.3.2.2—Continuous accumulation of seniority-escalator principle

Q: I have read with great interest your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). In many of your articles, you discuss the "escalator principle." Please explain the meaning of that term.

A: In its first case construing the reemployment statute,[3] 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."[4] The escalator principle is codified in two sections of USERRA.

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[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.

[3] As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA in 1994, as a long overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940.

[4] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946). The citation means that you can find this case in Volume 328 of *United States Reports.* The decision starts on page 275, and the two sentences quoted can be found at the bottom of page 284 and the top of page 285.

Section 4313(a)(2)(A) provides that the returning service member who meets the five USERRA conditions[5] must be reemployed "in the position of employment in which the person *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] Section 4316(a) provides:

> A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services *plus the additional seniority and rights and benefits that such person would have attained* if the person had remained continuously employed.[7]

USERRA's 1994 legislative history explains the escalator principle as follows:

> Section 4315(a) [later renumbered 4316(a)] would recodify the "escalator" principle as it applies to seniority and all rights and benefits which flow from seniority, calculated as if the person had never left employment. For example, in determining how much vacation (length of vacation) a servicemember is entitled to in the years following reinstatement, all time away from work (period between leaving the job and entering military service, period of military service, and period between discharge or release from military service and reemployment) would be required to be considered under this section, together with the pre-military service period of employment. Thus, if vacations increase from one to two weeks after five years of company service, a serviceperson who worked for one year, served two years on active duty and has worked for two years after reemployment would be entitled to two weeks of vacation [per year] after these five years.[8]

There is a substantial body of case law (including Supreme Court decisions) about the escalator principle under the 1940 reemployment statute. That case law is still applicable under USERRA. The legislative history provides:

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[5] As I have explained in Law Review 1281 and many other articles, a person must meet five simple conditions to have the right to reemployment under USERRA. First, the person 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. Second, the person must have given the employer prior oral or written notice. Third, the person must not have exceeded the cumulative five-year limit on the duration of the period or periods of service, relating to the employer relationship for which the person seeks reemployment. As is explained in Law Review 201 (August 2005), there are nine exemptions—kinds of service that do not count toward exhausting the five-year limit. Fourth, the person must have served honorably and must have been released from the period of service without having received a disqualifying bad discharge from the military. Finally, the person must have made a timely application for reemployment after release from service.

[6] 38 U.S.C. 4313(a)(2)(A) (emphasis supplied). The citation means that this is subsection (a)(2)(A) of section 4313 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.

[7] 38 U.S.C. 4316(a) (emphasis supplied).

[8] House Report No. 103-65, 1994 *United States Code Congressional & Administrative News (USCCAN)* 2449, 2466.

> The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protections against employment-related discrimination, and the protection of certain other rights and benefits have been eminently successful for over fifty years. Therefore, the Committee [House Committee on Veterans' Affairs] wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act [USERRA], remains in full force and effect in interpreting these provisions. This is particularly true of the basic principle established by the Supreme Court that the Act is to be "liberally construed." *See Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946); *Alabama Power Co. v. Davis,* 431 U.S. 581, 584 (1977).[9]

Four consecutive sections of the Department of Labor (DOL) USERRA Regulations expound upon the escalator principle as follows:

> § 1002.210 **What seniority rights does an employee have when reemployed following a period of uniformed service?**
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> The employee is entitled to the seniority and seniority-based rights and benefits that he or she had on the date the uniformed service began, plus any seniority and seniority-based rights and benefits that the employee would have attained if he or she had remained continuously employed. In determining entitlement to seniority and seniority-based rights and benefits, the period of absence from employment due to or necessitated by uniformed service is not considered a break in employment. The rights and benefits protected by USERRA upon reemployment include those provided by the employer and those required by statute. For example, under USERRA, a reemployed service member would be eligible for leave under the Family and Medical Leave Act of 1993, 29 U.S.C. 2601-2654 (FMLA), if the number of months and the number of hours of work for which the service member was employed by the civilian employer, together with the number of months and the number of hours of work for which the service member would have been employed by the civilian employer during the period of uniformed service, meet FMLA's eligibility requirements. In the event that a service member is denied FMLA leave for failing to satisfy the FMLA's hours of work requirement due to absence from employment necessitated by uniformed service, the service member may have a cause of action under USERRA but not under the FMLA.[10]
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> § 1002.211 **Does USERRA require the employer to use a seniority system?**
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> No. USERRA does not require the employer to adopt a formal seniority system. USERRA

[9] 1994 *USCCAN* at 2452.

[10] 20 C.F.R. 1002.210 (bold question in original). The citation refers to section 1002.210 of title 20 of the Code of Federal Regulations.

defines seniority as longevity in employment together with any employment benefits that accrue with, or are determined by, longevity in employment. In the absence of a formal seniority system, such as one established through collective bargaining, USERRA looks to the custom and practice in the place of employment to determine the employee's entitlement to any employment benefits that accrue with, or are determined by, longevity in employment.[11]

§ 1002.212 **How does a person know whether a particular right or benefit is a seniority-based right or benefit?**

A seniority-based right or benefit is one that accrues with, or is determined by, longevity in employment. Generally, whether a right or benefit is seniority-based depends on three factors:

(a) Whether the right or benefit is a reward for length of service rather than a form of short-term compensation for work performed;

(b) Whether it is reasonably certain that the employee would have received the right or benefit if he or she had remained continuously employed during the period of service; and,

(c) Whether it is the employer's actual custom or practice to provide or withhold the right or benefit as a reward for length of service. Provisions of an employment contract or policies in the employee handbook are not controlling if the employer's actual custom or practice is different from what is written in the contract or handbook.[12]

§ 1002.213 **How can the employee demonstrate a reasonable certainty that he or she would have received the seniority right or benefit if he or she had remained continuously employed during the period of service?**

A reasonable certainty is a high probability that the employee would have received the seniority or seniority-based right or benefit if he or she had been continuously employed. The employee does not have to establish that he or she would have received the benefit as an absolute certainty. The employee can demonstrate a reasonable certainty that he or she would have received the seniority right or benefit by showing that other employees with seniority similar to that which the employee would have had

[11] 20 C.F.R. 1002.211 (bold question in original).
[12] 20 C.F.R. 1002.212 (bold question in original).

> if he or she had remained continuously employed received the right or benefit. The employer cannot withhold the right or benefit based on an assumption that a series of unlikely events could have prevented the employee from gaining the right or benefit.[13]

The application of the escalator principle can affect the returning veteran's civilian career even many years after he or she has completed the period of service and returned to the civilian job. In this regard, I invite the reader's attention to *Accardi v. Pennsylvania Railroad Co.*[14]

Pasquale J. Accardi, Jacob Grubesick, Alfred J. Seevers, Anthony J. Vassallo, Abraham S. Hoffman, and Frank D. Pryor (the plaintiffs) were hired as tugboat firemen by the Pennsylvania Railroad in 1941 and 1942 and left their jobs to enter active duty during World War II. All were honorably discharged at the end of the war and reemployed by the railroad as tugboat firemen. In accordance with the "escalator principle" enunciated by the Supreme Court in *Fishgold v. Sullivan Drydock & Repair Corp.,* each returning veteran received the seniority he had before he was called to the colors plus the additional seniority he would have received had he remained continuously employed.

In the 1950s, diesel tugboats replaced steam-powered tugboats, and the position of fireman (the employee who shoveled coal onto the fire) became obsolete. The railroad sought to abolish the position of fireman, and a strike ensued in 1959. In 1960, the union and the railroad settled the strike. The settlement agreement provided for firemen with more than 20 years of seniority to remain employed if they wished. Firemen with less than 20 years of seniority, and those with more than 20 years of seniority who wished to leave, were given a severance payment as compensation for the loss of employment.

Under the agreement, a formula determined the amount of each employee's severance payment. The formula credited months of "compensated service" for the railroad. Mr. Accardi and the other five plaintiffs were not given credit for the time (approximately three years) when they were away from work for World War II active duty. As a result, each plaintiff's severance payment was $1,242.60 less than it would have been if the military service time had been credited. The parties stipulated that if it were held that these plaintiffs were entitled to that military service credit, the amount of the judgment for each should be $1,242.60.

The District Court held that the plaintiffs were entitled to have their military service time included in computing the amount of "compensated service" in the severance pay formula. The Court of Appeals reversed, holding that the severance pay did not come within the concepts of "seniority, status, and pay" protected by the reemployment statute. *Accardi v. Pennsylvania*

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[13] 20 C.F.R. 1002.213 (bold question in original).
[14] 383 U.S. 225 (1966).

Railroad Co., 341 F.2d 72 (2d Cir. 1965). The Supreme Court granted *certiorari* and reversed the Court of Appeals. The plaintiffs were entitled to credit for the time they were away from work for World War II military service in determining the amount of their severance payments in the early 1960s, almost 20 years later.

There was an even longer delay between the military service and the impact on the civilian career in *Alabama Power Co. v. Davis.*[15] Raymond E. Davis worked for the Alabama Power Company from Aug. 16, 1936, until June 1, 1971, when he retired. His long career with the company was interrupted by 30 months of World War II active duty, from March 1943 until September 1945, when he was honorably discharged at the end of the war.

On July 1, 1944, while Mr. Davis was on active duty, the company established a defined benefit pension plan that rewarded company service both before and after that date. When the company computed Mr. Davis' monthly pension entitlement upon his retirement in 1971, the company excluded the 30 months that he was away from work for military service. This exclusion cost Mr. Davis $18 per month in pension benefits.

Mr. Davis sued, claiming that he was entitled to pension credit for his military service time under the "escalator principle" enunciated by the Supreme Court in *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946). The District Court ruled in his favor. *Davis v. Alabama Power Co.,* 383 F. Supp. 880 (N.D. Ala. 1974). The employer appealed, and the Court of Appeals affirmed the District Court's judgment in a brief *per curiam* decision. *Davis v. Alabama Power Co.,* 542 F.2d 650 (5th Cir. 1976).

The Supreme Court granted *certiorari* (discretionary review) and affirmed, in a unanimous decision written by Justice Thurgood Marshall. The Court held that Mr. Davis was entitled to pension credit for the 30 months that he was away from work for military service, because the pension benefit met the two-pronged test as a perquisite of seniority. A pension benefit is intended to be a reward for length of service rather than a form of short-term compensation for services, and it is reasonably certain that Mr. Davis would have received the 30 months of pension credit if his career with the company had not been interrupted by military service. Justice Marshall's opinion contains an interesting and useful survey of the Supreme Court cases about the escalator principle.

It is important to note that the pension plan at issue in this case was a defined benefit plan. The Court set aside and did not answer how the escalator principle might or might not apply to defined contribution plans. "Petitioner's plan is a 'defined benefit' plan, under which the benefits to be received by employees are fixed and the employer's contribution is adjusted to

[15] 431 U.S. 581 (1977).

whatever level is necessary to provide those benefits. The other basic type of pension is a 'defined contribution' plan, under which the employer's contribution is fixed and the employee receives whatever level of benefits the amount contributed on his behalf will provide. See 29 U.S.C. 1002 (34) (35) (1970 ed., Supp. V); Note, Fiduciary Standards and the Prudent Man Rule under the Employee Retirement Income Security Act of 1974, 88 Harvard Law Review 960, 961-963 (1975). We intimate no views on whether defined contribution plans are to be treated differently from defined benefit plans under the [reemployment statute]." *Alabama Power Co. v. Davis,* 431 U.S. 581, 593 n. 18 (1977).

Section 4318 of the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4318, applies to both defined benefit plans and defined contribution plans, but slightly less generously in the case of defined contribution plans.[16] Congress enacted USERRA in 1994 as a complete recodification of the 1940 reemployment statute. USERRA applies to "reemployments initiated" on or after December 12, 1994. It is still very much of an open question as to how the escalator principle applies to a defined contribution plan in the case of military service prior to the effective date of USERRA.

Q: I work for Daddy Warbucks International (DWI), a non-union company. There is no union representing the workers at DWI, and no collective bargaining agreement (CBA) establishes a system of seniority governing promotions, pay raises, layoffs, etc. Since there is no union and no CBA, the escalator principle does not apply, right?

A: Wrong. USERRA and the escalator principle apply to non-union as well as union situations, but in a non-union situation it is typically much more difficult to determine what *would have happened* to the service member's job if he or she had remained continuously employed instead of leaving the job for military service. Fifty years ago, nearly a third of U.S. workers belonged to a union.[17] Today, it's one in ten.[18]

Just two years ago, the 1st Circuit[19] forcefully reversed a decision of the United States District Court for the District of Puerto Rico, which had held that the escalator principle only applied to "automatic" promotions or pay raises under union-employer CBAs:

> The district court held that Rivera's attempt to invoke the escalator principle was improper because "[a]n escalator position is a promotion that is based solely on

[16] Please see Law Review 14022 (February 2014), Law Review 14016(January 2014), and Law Review 14015 (January 2014) for a detailed discussion of section 4318 of USERRA.

[17] The figure may have been more than one half 70 years ago, when the Supreme Court decided *Fishgold* and first enunciated the escalator principle.

[18] *See http://www.npr.org/sections/money/2015/02/23/385843576/50-years-of-shrinking-union-membership-in-one-map.*

[19] The 1st Circuit is the federal appellate court that sits in Boston and hears appeals from district courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.

employee seniority. . . . [and] does not include an appointment to a position that is not automatic, but instead depends on the employee's fitness and ability and the employer's exercise of discretion." Dist. Ct. Op. at 17-18 (citation omitted) (internal quotation marks omitted). In concluding that the escalator principle and the reasonable certainty test do not apply to non-automatic promotions, the district court relied primarily upon *McKinney v. Missouri-Kansas Texas Railroad Co.,* 357 U.S. 265 (1958), a case in which the Supreme Court interpreted the Universal Military Training and Service Act of 1951. There the Court held that a returning veteran seeking reemployment "is not entitled to demand that he be assigned a position higher than that he formerly held when promotion to such a position depends, not simply on seniority or some other form of automatic progression, but on the exercise of discretion by the employer." Id. at 272. Accordingly, the district court found that "the purpose of the escalator principle is to 'assure that those changes and advancements that would necessarily have occurred simply by virtue of continued employment will not be denied the veteran because of his absence in the military service,'" Dist. Ct. Op. at 18 (quoting *McKinney*, 357 U.S. at 272) (emphasis added), and that the principle therefore had no applicability to the facts of Rivera's case.

In citing the precedential authority of *McKinney,* the district court failed to consider the subsequently decided Supreme Court case of *Tilton v. Missouri Pacific Railroad Co.,* 376 U.S. 169 (1964). In *Tilton,* reemployed veterans claimed that they were deprived of seniority rights to which they were entitled under the Universal Military Training and Service Act when their employer assigned them seniority based upon the date that they returned from military service and completed the training necessary to advance to the higher position, rather than the date that they would have completed the training if they had not been called into service. *Id.* at 173-74. The Eighth Circuit had relied upon *McKinney* to deny the claims, as the promotion at issue "was subject to certain contingencies or 'variables'" and therefore was not automatic. *Id.* at 178-79. The Supreme Court reversed, finding that *McKinney* "did not adopt a rule of absolute foreseeability," id. at 179, and that "[t]o exact such certainty as a condition for insuring a ve[]teran's seniority rights would render these statutorily protected rights without real meaning," *id.* at 180. The Court concluded that Congress intended a reemployed veteran . . . to enjoy the seniority status which he would have acquired by virtue of continued employment but for his absence in military service. This requirement is met if, as a matter of foresight, it was reasonably certain that advancement would have occurred, and if, as a matter of hindsight, it did in fact occur.Id. at 181. Read together, *McKinney* and *Tilton* suggest that the appropriate inquiry in determining the proper reemployment position for a returning servicemember is not whether an advancement or promotion was automatic, but rather whether it was reasonably certain that the returning servicemember would have attained the higher position but for his absence due to

> military service. The Department has certainly adopted this construction of the regulations and the relevant precedents. *See* 70 Fed. Reg. 75,246-01, 75,272 (stating that "general principles regarding the application of the escalator provision . . . require that a service member receive a missed promotion upon reemployment if there is a reasonable certainty that the promotion would have been granted" (citing *Tilton*, 376 U.S. at 177; *McKinney*, 357 U.S. at 274)); see also 20 C.F.R. § 1002.191. We accord this interpretation substantial deference. *See Massachusetts v. U.S. Nuclear Regulatory Commission,* 708 F.3d 63, 73 (1st Cir. 2013) (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).[20]

Even more recently, Judge John D. Bates of the United States District Court for the District of Columbia has expounded upon *Rivera-Melendez* as follows:

> As an initial matter, GM argues that the inherent discretion in the transfer and termination decisions shields them from liability, because "the escalator principle is only intended to encompass promotions that are 'automatic' and 'based solely on employee seniority.'" MSJ at 8 (quoting *Rivera-Meléndez v. Pfizer Pharmaceuticals, Inc.*, No. 10-1012 (MEL), 2011 U.S. Dist. LEXIS 121841, 2011 WL 5025930, at *8 (D.P.R. Oct. 21, 2011); reversed 730 F.3d 49, 2013 U.S. App. LEXIS 19398, 2013 WL 5290017 (1st Cir. 2013)**)**. Vahey disagrees, arguing that the escalator principle "protects those changes and benefits which are reasonably certain to accrue," and that "it is intended to encompass changes such as transfers." Pl.'s Opp'n to MSJ at 34.
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> Vahey is correct. He was entitled to any "reasonably certain" employment benefits that would have accrued during his military absence, including promotions and transfers. The fact that discretion was involved in such decisions—while surely making the fact-finder's job more difficult—does not decide the matter in favor of GM. In support of its "discretion" argument, GM relies almost exclusively on one case, *Rivera-Meléndez v. Pfizer Pharmaceuticals, Inc.,* No. 10-1012, 2011 U.S. Dist. LEXIS 121841, 2011 WL 5025930 (D.P.R. Oct. 21, 2011). But that decision was recently reversed in a persuasive opinion by the First Circuit, at the urging of the Department of Labor as amicus curiae. *See Rivera-Meléndez***,** 730 F.3d 49, 2013 U.S. App. LEXIS 19398, 2013 WL 5290017, at *6. The First Circuit held that "the appropriate inquiry in determining the proper reemployment position for a returning servicemember is not whether an advancement or promotion was automatic, but rather whether it was reasonably certain that the returning servicemember would have attained the higher position but for his absence due to military service." *Id.* In doing so, the First Circuit showed "substantial deference" to the Department of Labor's interpretation of its own regulations, according to which "general principles regarding the application of the escalator position . . . require that a

[20] *Rivera-Melendez v. Pfizer Pharmaceuticals LLC,* 730 F.3d 49, 56-57 (1st Cir. 2013) (footnotes omitted).

service member receive a missed promotion upon reemployment if there is a reasonable certainty that the promotion would have been granted." Id. (citing *Auer v. Robbins,* 519 U.S. 452, 461 (1997)); *see also* 20 C.F.R. § 1002.191 ("The escalator principle requires that the employee be reemployed in a position that reflects with reasonable certainty the pay, benefits, seniority, and other job perquisites, that he or she would have attained if not for the period of service."). Thus, the fact that GM exercised discretion in its termination and transfer decisions does not end the inquiry; the Court must determine whether there is a genuine factual dispute regarding whether GM would have terminated Vahey but for his military leave. It is to this task the Court now turns. In doing so, the Court notes that the discretionary nature of the decision actually weighs against summary judgment, because it makes it more difficult to resolve the factual dispute at the heart of this case.[21]

Q: Does the escalator always ascend?

A: No. The escalator can ascend, descend, or remain in place, depending upon what *would have happened* to the returning veteran if he or she had remained at the civilian job instead of leaving the job for service. This point is made clearly in the DOL USERRA Regulations:

> § 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.[22]

When there is a union and a CBA, there usually is a strict system of seniority, and that makes determining what *would have happened* to the service member, if he or she had remained

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[21] *Vahey v. General Motors Co.,* 985 F. Supp. 2d 51, 61-62 (D.D.C. 2013).
[22] 20 C.F.R. 1002.194 (bold question in original).

continuously employed, relatively simple. For example, let us assume that Mary Jones is part of the unionized work force at ABC Corporation. Mary leaves her job for military service, meets the five USERRA conditions, and returns to work at ABC after two years of military service.

At the time she was called to the colors, Mary's seniority number at ABC was 301, based on her hire date of July 1, 2008. Bob Williams (hired June 30, 2008) was number 300. Alice Andrews (hired July 2, 2008) was number 302. To determine what *would have happened* to Mary Jones if she had remained continuously employed, we only need to look to what happened to Bob Williams and Alice Andrews. In the absence of a union, a CBA, and a formal system of seniority, determining what *would have happened* to the service member is more difficult, but the difficulty does not mean that the employer and perhaps the court need not make the determination.

Q: I worked for the XYZ Corporation for two years, and then I was on active duty for two years. I met the USERRA conditions and returned to work at XYZ recently. At the company, employees earn two weeks of vacation per year. Upon my reemployment, I am entitled to four weeks of vacation, because I would have earned four weeks of vacation if I had been continuously employed. Right?

A: Wrong. Vacation days are not a perquisite of seniority—they are a form of compensation for services rendered. During the two years that you were away from work for service, you did not earn salary or wages from XYZ, and you did not earn vacation days.[23]

On the other hand, the *rate at which you earn vacation* is almost always a perquisite of seniority that the returning veteran is entitled to claim. Let us assume that at XYZ employees earn three weeks of vacation per year, rather than two, after they have five years of company service. You are entitled to have your two years of military service included in computing when you reach that five-year threshold.

[23] *See Foster v. Dravo Corp.,* 420 U.S. 92 (1975). I discuss *Foster* in detail in Law Review 0907 (February 2009).