

What Is Seniority?

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Update on Sam Wright

1.3.2.2—Continuous accumulation of seniority—escalator principle

1.8—Relationship between USERRA and other laws/policies

Q: I am a Lieutenant Colonel in the Air Force Reserve and a life member of the Reserve Officers Association (ROA). For many years, I have read with great interest your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).³ In Law Review 15116 (December 2015), you wrote that a person who meets the five USERRA eligibility conditions⁴ must be promptly reemployed in the position that he or she would have

¹ I invite the reader’s attention to www.servicemembers-lawcenter.org. You will find more than 1400 “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. I am the author of more than 1200 of the articles.

² BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General’s Corps officer and retired in 2007. I am a life member of ROA. From 2009 to 2015, I served as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA. I invite the reader’s attention to Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. I have dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the predecessor reemployment statute (enacted in 1940) for more than 33 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed rewrite of the 1940 reemployment statute. President George H.W. Bush transmitted our draft to Congress, as his proposal, in February 1991. On October 13, 1994, President Bill Clinton signed into law Public Law 103-353, USERRA. The 1994 version of USERRA was 85% the same as the Webman-Wright draft. I have also dealt with USERRA and the predecessor statute as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense organization called “Employer Support of the Guard and Reserve” (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice at Tully Rinckey PLLC, and as SMLC Director. After ROA disestablished the SMLC last year, I returned to Tully Rinckey PLLC, this time in an “Of Counsel” role. To arrange a consultation with me or another Tully Rinckey PLLC attorney, please call Ms. JoAnne Perniciaro (the firm’s Client Relations Director) at (518) 640-3538. Please mention Captain Wright when you call.

³ USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35).

⁴ As I have explained in Law Review 15116 and other articles, a person must meet five simple conditions to have the right to reemployment under USERRA. 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, as defined by USERRA. The person must have given the employer prior oral or written notice. The person must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to that employer relationship. The person must have been released from the period of service without having received a disqualifying bad discharge from the military. After release, the person must have made a timely application for reemployment.

attained if continuously employed or, at the employer's option, in another position for which the person is qualified and that is of like *seniority*, status, and pay. What is *seniority*?

A: As I have explained in Law Review 15067 and other articles, Congress enacted USERRA and President Bill Clinton signed it into law⁵ on October 13, 1994. USERRA is a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA).⁶

The VRRRA did not contain definitions. Section 4303 of USERRA defines 16 terms. The term "seniority" is defined as follows:

The term "seniority" means longevity in employment together with any benefits of employment which accrue with or are determined by longevity in employment.⁷

There have been 16 United States Supreme Court decisions about the VRRRA and one (so far) about USERRA.⁸ In a 1966 decision, the Supreme Court elaborated upon the broad meaning of "seniority" as follows:

The term "seniority" is nowhere defined in the Act [VRRRA], but it derives its content from private employment practices and agreements. This does not mean, however, that employers and unions are empowered by the use of transparent labels and definitions to deprive a veteran of substantial rights guaranteed by the Act. As we [the Supreme Court] said in *Fishgold v. Sullivan Drydock & Repair Corp.* [328 U.S. 275 (1946)], "No practice of employers or agreements between employers and unions can cut down the service adjustment benefits that Congress has secured the veteran under the Act." *Fishgold*, 328 U.S. at 285. The term "seniority" is not to be limited by a narrow, technical definition but must be given a meaning that is consonant with the intention of Congress as expressed in the 1940 Act. That intention was to preserve for the returning veterans the rights and benefits that would have automatically accrued to them had they remained in private employment rather than responding to the call of their country. In this case there can be no doubt that the amounts of the severance payments were based primarily on the employees' length of service with the railroad.⁹

⁵ Public Law 103-353.

⁶ The STSA is the law that led to the drafting of more than ten million young men (including my late father) for World War II.

⁷ 38 U.S.C. 4303(12).

⁸ Please see Category 10.1 in our Subject Index. You will find a case note about each of these 17 Supreme Court decisions.

⁹ *Accardi v. Pennsylvania Railroad*, 383 U.S. 225, 229-30 (1966). The citation means that you can find this decision in Volume 383 of *United States Reports*, starting on page 225. The specific quoted language can be found at the bottom of page 229 and the top of page 230. I discuss *Accardi* in detail in Law Review 0861 (December 2008).

USERRA's 1994 legislative history indicates that the VRRRA case law is still valid in interpreting USERRA:

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." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); *Alabama Power Co. v. Davis*, 431 U.S. 581, 584 (1977).¹⁰

Q: My employer insists that the employer's obligation to treat the returning veteran as if he or she had been continuously employed, for seniority purposes, only applies to circumstances that exist when the returning veteran returns to work after military service. My employer insists that this obligation does not apply to circumstances that arise later, months or years after the veteran has returned to work. What do you think?

A: The obligation to treat the returning veteran as if he or she had been continuously employed applies to circumstances that exist on the day the veteran returns to work and it also applies to circumstances that come into existence many years later, during the veteran's career with that employer. For example, I invite the reader's attention to *Accardi v. Pennsylvania Railroad*, the Supreme Court case cited and quoted above.

Mr. Accardi and the other plaintiffs were hired by the Pennsylvania Railroad as tugboat firemen¹¹ in 1941 and 1942. Shortly thereafter, their careers with the company were interrupted when they were drafted or voluntarily enlisted¹² for World War II service. The war ended in 1945, and the plaintiffs were honorably discharged from military service. The plaintiffs made timely applications for reemployment, and they were reemployed, in accordance with the VRRRA. Upon reemployment, they were given seniority credit for their pre-service employment with the railroad and also for the months that they were away from their civilian jobs for military service.

More than a decade later, in the late 1950s, diesel tugboats replaced steam-powered tugboats. This technological advance rendered the fireman position obsolete, and the railroad sought to

¹⁰ House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2452.

¹¹ The fireman was the employee who shoveled coal onto the fire of the steam-powered tugboat.

¹² Like USERRA, the VRRRA applied to voluntary as well as involuntary military service.

abolish the fireman position and to displace all the employees working as firemen on tugboats. This attempt resulted in a bitter and protracted strike in 1959.

The strike settled in 1960. Under the settlement, firemen with more than 20 years of service were allowed to remain on the payroll until retirement if they chose to do so. Firemen with less than 20 years of seniority, and those with more than 20 years who chose to leave, received severance payments under a formula set forth in the agreement. The formula considered the individual's "months of Pennsylvania Railroad compensated service."

Mr. Accardi and the other plaintiffs were not given credit for their World War II military service in applying the formula to determine the amount of their severance payments. The railroad argued and the Court of Appeals agreed that credit for the purpose of determining the amount of the severance payment did not fall within the definition of "seniority" for VRRRA purposes. The Supreme Court granted *certiorari* (discretionary review) and reversed the Court of Appeals.

Under the VRRRA as well as USERRA, the returning veteran who met the eligibility criteria for reemployment must be treated as if he or she had been continuously employed, for purposes of circumstances arising years after the date of reemployment as well as circumstances that existed upon reemployment.