

LAW REVIEW 16023¹

April 2016

What Is Status?

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

Update on Sam Wright

1.3.2.4—Status of the returning veteran

Q: In Law Review 15116 (December 2015), you stated that if I meet the five conditions for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA)³ I am entitled to prompt reemployment in the position of employment that I would have attained if I had been continuously employed or, at the employer's option, in another position for which I am qualified that is of like seniority, status, and pay. What is status?

¹ I invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1400 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other 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. For six years (2009-15), I served as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA. Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. I have dealt with USERRA and the predecessor reemployment statute 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 10/13/1994, President Bill Clinton signed into law Public Law 103-353, USERRA. The 1994 enacted version 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). As I have explained in Law Review 15116 and other articles, you must meet five conditions to have the right to reemployment. 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, as defined by USERRA. You must have given the employer prior oral or written notice. Your cumulative period or periods of uniformed service, relating to that employer relationship, must not have exceeded five years. You must have been released from the period of service without having received a disqualifying bad discharge from the military. After release from service, you must have made a timely application for reemployment.

A: If you meet the five USERRA conditions, and if the period of service lasted fewer than 91 days, you are entitled to prompt reinstatement “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.”⁴ If the period of service lasted 91 days or more, the employer has the option to reemploy you in “a position of like seniority, *status*, and pay, the duties of which the person is qualified to perform.”⁵

The position that you would have attained if you had been continuously employed is usually *but not always* the position that you left. The position that you would have attained may be a better position, the same position, a similar position, a lesser position, or no position at all, depending upon what would have happened if you had remained continuously employed. In determining what would have happened, we must examine what has happened to your colleagues at work during the time that you were away from work for uniformed service.⁶

We call the position that you would have attained if continuously employed your “escalated reinstatement position” (ERP). If upon your reemployment you are offered a position other than the ERP, we must compare the offered position with the ERP to determine if the offered position is of like status as well as seniority and rate of pay.

As I have explained in Law Review 15067 (August 2015) and many 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. The VRRA did not contain a definitions section, but section 4303 of USERRA⁷ defines 16 terms used in this law.

The term “status” is not one of the 16 defined terms, probably because the VRRA also used the word “status” and there is VRRA case law on the meaning of that term. USERRA’s 1994 legislative history addresses the issue of “status” 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) P11,050 (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

⁴ 38 U.S.C. 4313(a)(1)(A).

⁵ 38 U.S.C. 4313(a)(2)(A) (emphasis supplied).

⁶ See 20 C.F.R. 1002.194. The citation is to title 20 of the Code of Federal Regulations, section 1002.194. Section 4331 of USERRA, 38 U.S.C. 4331, gives DOL the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL promulgated the final USERRA regulations in December 2005.

⁷ 38 U.S.C. 4303.

(M.D. Tenn. 1972)) as would reinstatement in a position which does not allow for the use of specialized skills in a unique situation.⁸

The DOL USERRA Regulations address the issue of “status” only very tersely, as follows:

In particular, the employee’s status in the reemployment position could include opportunities for advancement, general working conditions, job location, shift assignment, rank, responsibility, and geographical location.⁹

The VRRA did not give DOL rulemaking authority, but DOL published the *VRR Handbook* in 1957, 1970, and 1988.¹⁰ Several courts, including the Supreme Court, gave a “measure of weight” to the interpretations set forth in the *VRR Handbook*.¹¹ The *VRR Handbook* includes the following paragraph about status:

The statutory concept of “status” is broad enough to include both pay and seniority, as well as other attributes of the position, such as working conditions, opportunities for advancement, job location, shift assignment, rank or responsibility, etc. Where such matters are not controlled by seniority, or where no established system of seniority exists, they can be viewed as matters of “status.” In a determination of whether an alternative position offered is of “like seniority, status, and pay,” all the features that make up its “status” must be considered in addition to the seniority and rate of pay that are involved.¹²

Here are two cases wherein the position offered to the returning veteran was determined to be insufficient with regard to status, although the location and rate of pay were the same. *Ryan v. Rush-Presbyterian-St. Luke’s Medical Center*, 15 F.3d 697 (7th Cir. 1994) involved a nurse (Ryan) who was the nurse-manager of a medical facility and a Nurse Corps officer in the Navy Reserve. She was called to the colors for the First Gulf War (1990-91). Upon her return, she was reinstated as the Assistant Nurse Manager of the same facility, with the same salary. The Seventh Circuit¹³ held that the Assistant Nurse Manager position was not of like status to the Nurse Manager position.

⁸ House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2464.

⁹ 20 C.F.R. 1002.193(a).

¹⁰ I largely drafted the 1988 *VRR Handbook* along with one other DOL attorney, Billie Jane Spencer.

¹¹ See *Monroe v. Standard Oil Co.*, 452 U.S. 549, 563 n. 14 (1981); *Leonard v. United Air Lines*, 972 F.2d 155, 159 (7th Cir. 1992); *Dyer v. Hinky-Dinky, Inc.*, 710 F.2d 1348, 1352 (8th Cir. 1986); *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).

¹² 1988 *VRR Handbook*, pages 11-1 through 11-2.

¹³ The Seventh Circuit is the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.

Nichols v. Department of Veterans Affairs, 11 F.3d 160 (Fed. Cir. 1993) involved a GS-13 chaplain for the United States Department of Veterans Affairs (VA). Before his military service, Chaplain Nichols was the supervisory chaplain at a VA medical center. When he returned from service, Nichols was reinstated as a GS-13 chaplain at the same medical center, but the VA refused to reinstate him as the supervisory chaplain. The Federal Circuit¹⁴ held that the VA was required to reinstate Nichols as the supervisory chaplain even though that meant displacing another GS-13 chaplain who was doing a good job.

¹⁴ The Federal Circuit is the specialized federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from the Merit Systems Protection Board (MSPB).