

LAW REVIEW 16026¹

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What Is Reasonable Certainty?

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Update on Sam Wright

1.3.2.2—Continuous accumulation of seniority—escalator principle

1.3.2.3—Pension credit for military service time

1.7—USERRA regulations

Q: I am a Commander in the Navy Reserve and a member of the Reserve Officers Association (ROA). I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I read with particular interest your Law Review 16025. Like the person asking questions in that article, I am a pilot in the Reserve and an airline pilot on the civilian side.

In Law Review 16025, you wrote that the pilot returning to work under USERRA after a period of uniformed service is entitled to insist that the employer make contributions to the pilot’s individual pension account, as if the pilot had been continuously employed, based on a percentage of what the pilot *would have earned* in the civilian job if he or she had remained continuously employed instead of going on active duty. You also wrote that the returning

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. USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-35). The Reserve Officers Association (ROA) initiated the “Law Review” 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 been dealing 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 new reemployment statute that President George H.W. Bush presented to Congress as his proposal in February 1991. On 10/13/1994, President Bill Clinton signed into law Public Law 103-353, USERRA, and that version was 85% the same as the Webman-Wright draft. I have also dealt with USERRA and the predecessor reemployment 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.

pilot must demonstrate with “reasonable certainty” what he or she would have earned in the civilian job if he or she had remained continuously employed. What does “reasonable certainty” mean?

A: As I have explained in Law Review 15067 (August 2015) and many other articles, Congress enacted USERRA in 1994 as a complete rewrite of the Veterans’ Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA’s 1994 legislative history addresses the “reasonable certainty” issue as follows:

The Committee [House Committee on Veterans’ Affairs] intends to affirm the interpretation of “reasonable certainty” as “a high probability” (*see Schilz v. City of Taylor, Michigan*, 825 F.2d 944, 946 (6th Cir. 1987)), which has sometimes been expressed in percentages. *See Montgomery v. Southern Electric Steel Corp.*, 410 F.2d 611, 613 (5th Cir. 1969) (90 percent success of probationary employees becoming permanent meets reasonable certainty test); *Pomrening v. United Air Lines, Inc.*, 448 F.2d 609, 615 (7th Cir. 1971) (86 percent pass rate of training class meets reasonable certainty test).³

Section 4331 of USERRA⁴ gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL published proposed regulations in the *Federal Register* for notice and comment in September 2004. After considering the comments received and making a few adjustments, DOL published the final USERRA Regulations in the *Federal Register* in December 2005. The DOL USERRA Regulations are codified in title 20 of the Code of Federal Regulations (C.F.R.), Part 1002.

The DOL USERRA Regulations address the “reasonable certainty” issue as follows:

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 if he or she had remained continuously employed received the right or benefit. The

³ House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2464.

⁴ 38 U.S.C. 4331.

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.⁵

⁵ 20 C.F.R. 1002.213 (bold question in original).