

## LAW REVIEW 16053<sup>1</sup>

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### Airline Must Comply with USERRA regarding Pensions

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Update on Sam Wright

- 1.1.2.3—USERRA applies to employees who have been laid off
- 1.3.1.1—Left job for service and gave prior notice
- 1.3.1.2—Character and duration of service
- 1.3.2.2—Continuous accumulation of seniority-escalator principle
- 1.3.2.3—Pension credit for service time

**Q: I recently retired from the Air National Guard (ANG) as a Lieutenant Colonel, and I am a life member of the Reserve Officers Association. For many years, I have been a pilot for United Air Lines (UAL). I am a member of and, along with all other UAL pilots, I am represented by the UAL Master Executive Council (MEC)<sup>3</sup> of the Air Line Pilots Association I have read some of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I have a complex USERRA question for you, but first let me explain the factual scenario.**

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<sup>1</sup> I invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find more than 1500 "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 1300 of the articles.

<sup>2</sup> 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, and for six years (2009-15) I was the Director of ROA's Service Members Law Center (SMLC). 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 34 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 October 13, 1994, President Bill Clinton signed into law Public Law 103-353, USERRA. The new law enacted in 1994 was 85% the same as the Webman-Wright draft. I have also dealt with the 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 for 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.

<sup>3</sup> A Master Executive Council (MEC) is a subordinate body to ALPA. The national union has an MEC for each airline that has pilots represented by ALPA.

**In May 1990, I graduated from the United States Air Force Academy and was commissioned a Second Lieutenant. I remained on active duty for ten years, until May 2000, when I was released from active duty and affiliated with the ANG. Shortly after I left active duty, I signed on with UAL as a rookie pilot.**

**At UAL and other unionized airlines, seniority (longevity with the airline) governs many important employment issues, including the individual pilot's work schedule. Each month, each individual pilot (captain or first officer) submits a proposed work schedule for the next month. A pilot with many years of seniority will generally get the schedule that he or she submitted, or something very similar. For a junior pilot with little seniority, the assigned schedule will usually bear little resemblance to the proposed schedule for which the pilot bid.**

**When there is a reduced demand for airline tickets, UAL readjusts its schedule and eliminates scheduled flights. Eliminated flights means the airline needs fewer pilots. At UAL and other unionized airlines, laying off pilots is done by seniority. The most junior pilots are the first to be laid off and the last to be called back.**

**On September 11, 2001, 19 terrorists crashed four airliners into three buildings and a field. As a result, the demand for airline tickets dropped, and at UAL and most other major airlines schedules were readjusted and flights were eliminated, and pilots were furloughed.<sup>4</sup> Because I had little seniority, I was furloughed in October 2001, and I was not called back to work until October 2006.**

**In November 2001, shortly after I was furloughed by UAL, the Air Force called up my unit, and I went on active duty for a year, from November 2001 until November 2002. Although the call-up was involuntary, it was a financial godsend, since it gave me a substantial income during the time that I was not flying for the airline. I did not notify UAL that I had been recalled to active duty. Giving such notice seemed pointless, since I had been furloughed.**

**After I completed that year of active duty, I was again unemployed, and it seemed that it might be years before UAL called me back to work. Accordingly, I volunteered for another year of active duty, from March 2003 to March 2004. Again, I gave no notice to UAL, because it seemed pointless to do so.**

**In September 2005, I volunteered for a two-year active duty period, from October 1, 2005 until September 30, 2007. Again, I gave no prior notice to UAL. In September 2006, UAL notified me that I was being recalled from furlough, effective October 1, 2006. At that time, I**

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<sup>4</sup> In the airline industry, when a reduced need for employees leads to employees being laid off temporarily, this situation is called a "furlough."

notified UAL that I was on active duty and would remain on active duty until September 30, 2007. The airline transferred my name from the furlough list to the “military leave” list.

I left active duty as expected, on September 30, 2007. I immediately notified the airline that I was off active duty and ready to return to work, and I did return to work in October 2007. An economic downturn led to a new round of furloughs at UAL, and I was furloughed again in October 2009. I was not recalled to work until October 2013, four years later.

Again, I responded to the temporary loss of my airline job by volunteering to return to active duty, this time for four years, from October 1, 2010 until September 30, 2014. Again, I gave no prior notice to UAL, because it seemed pointless. In September 2013, UAL notified me that I was being recalled from furlough, effective October 1, 2013. I notified the airline that I was on active duty and would remain on active duty until September 30, 2014. I left active duty a year later, as scheduled, and I promptly applied for reemployment and returned to work in October 2014.

UAL has a defined contribution pension plan. The airline contributes 16% of my earnings to my pension account,<sup>5</sup> an individual account in my name, and that money is invested. The amount of money available for my retirement depends upon the amount of money put into my account by the airline and the performance of the investments.

From reading your articles, I think that I understand that the employer must treat me as having been continuously employed in the civilian job, for seniority and pension purposes, when I return to work after a period of active duty. I have two periods when I was recalled to work from furlough but was unable to return to work because I was on active duty. The first period was from October 1, 2006 until September 30, 2007, and the second period was from October 1, 2013 until September 30, 2014. Is UAL required to make payments to my individual pension account based on what I *would have earned* from the airline if I had been working during those two periods, instead of being on active duty?

*A: Yes, provided you can establish that you met the five USERRA conditions for each period.*

As I have explained in Law Review 15116 (December 2015) and many other articles, you are entitled to reemployment after a period of uniformed service if you meet five simple conditions:

- a. You left a civilian position of employment (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services.

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<sup>5</sup> For example, if I earn \$100,000 from the airline for a year, the airline contributes an additional \$16,000 to my pension account.

- b. You gave the employer prior oral or written notice.
- c. You have not exceeded the cumulative five-year limit on the duration of the period or period of uniformed service, relating to the employer relationship for which you seek reemployment.<sup>6</sup>
- d. You were released from the period of service without having received a disqualifying bad discharge from the military.
- e. After release from the period of service, you made a timely application for reemployment.<sup>7</sup>

It is clear that you left a position of employment to perform uniformed service, although you were on furlough from UAL. The Department of Labor (DOL) USERRA Regulations provide:

If an employee is laid off with recall rights, on strike, or on a leave of absence, he or she is an employee for purposes of USERRA. If the employee is on layoff and begins service in the uniformed services, or is laid off while performing service, he or she may be entitled to reemployment on return if the employer would have recalled the employee to employment during the period of service.<sup>8</sup>

Although you were in a furlough status when you entered active duty several times, you still held a position of employment for USERRA purposes, and you left that position (furlough status) for the purpose of performing uniformed service. It is equally clear that you served honorably and left active duty each time without having received a disqualifying bad discharge from the Air Force and you made a timely application for reemployment at UAL, well within the 90-day period for doing so.

Your situation gives rise to two interesting and important questions:

- a. When you left furlough status at UAL to reenter active duty in the Air Force, were you required to give prior notice to UAL?
- b. Do the periods when you were on active duty while on a UAL furlough status count toward your five-year limit at UAL?

Although there is no case law on these questions, I am asked them frequently. I have recently rethought the answers that I have given, both orally and in writing, in the “Law Review” column. I think that it is important to address these questions in detail, because these questions frequently arise, especially among airline pilots who are members of the National Guard or Reserve.

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<sup>6</sup> Please see Law Review 16043 (May 2016) for a detailed discussion of USERRA’s five-year limit and the nine exemptions—kinds of service that do not count toward exhausting your limit.

<sup>7</sup> 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.

<sup>8</sup> 20 C.F.R. 1002.42(a).

**When you left furlough status to report to active duty, were you required to give prior notice to UAL?**

USERRA sets forth the prior notice requirement as follows:

Subject to subsections (b), (c), and (d) and to section 4304, any person *whose absence from a position of employment is necessitated by reason of service in the uniformed services* shall be entitled to reemployment rights and benefits and other employment benefits of this chapter if—

(1)the person (or an appropriate officer of the uniformed service in which the service is performed) has given advance written or verbal notice of such service to such person's employer. ...<sup>9</sup>

You clearly held a position of employment at UAL (in a furlough status) when you entered active duty in 2001, 2003, 2005, and 2010, but I am prepared to argue that you were already absent from that position of employment *because of the furlough*. Thus, your absence from your UAL job was not “necessitated by reason of service in the uniformed services” and no prior notice to UAL was required under these circumstances.

I am also prepared to make an alternative argument under section 4312(b), which provides:

No notice is required under subsection (a)(1) if the giving of such notice is precluded by military necessity or, under all of the relevant circumstances, *the giving of such notice is otherwise impossible or unreasonable*. A determination of military necessity for the purposes of this subsection shall be made pursuant to regulations prescribed by the Secretary of Defense and shall not be subject to judicial review.<sup>10</sup>

Military necessity did not preclude you from giving prior notice to UAL when you left furlough status to go on active duty, and it would not have been impossible for you to give such notice.<sup>11</sup> Nonetheless, I am prepared to argue that it would have been *unreasonable* for you to have given such notice or to have realized that such notice was required. Because you were on furlough, UAL had no operational need to know that you were reentering active duty.

Going forward, I urge you and others similarly situated to give notice to the civilian employer when you enter or reenter military service *even if you are on furlough or layoff status at the time*. It is easier and cheaper to give the notice than it is to argue that such notice was not

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<sup>9</sup> 38 U.S.C. 4312(a)(1) (emphasis supplied).

<sup>10</sup> 38 U.S.C. 4312(b) (emphasis supplied).

<sup>11</sup> You were not required to give the notice in person. You could have done so by mail, by e-mail, by telephone, or by some other means.

required. If you had given the notice, there would now be no need to argue about whether such notice was required.

**Do your active duty periods, while on UAL furlough, count toward your five-year limit at UAL?**

You were on active duty as a cadet at the Air Force Academy from June 1986 until May 1990, when you graduated and were commissioned a Second Lieutenant. You were then on active duty as a commissioned officer for the next ten years, until May 1990, when you left active duty and affiliated with the ANG. That 14-year period of active duty does not count toward your five-year limit at UAL because it was before you began your UAL career in 2000.<sup>12</sup>

You began your UAL career in 2000, but you were furloughed by the airline in October 2001. In November 2001, you were involuntarily recalled to active duty by the Air Force for one year (November 2001 to November 2002). That year of active duty does not count toward your five-year limit because it was involuntary.<sup>13</sup>

You were also on *voluntary* active duty from March of 2003 to March of 2004 (one year), from October 2005 to September 2007 (two years), and from October 2010 to September 2014 (four years). Let us assume (for purposes of this article) that these three active duty periods are not exempt from the five-year limit under any of the subsections of section 4312(c) of USERRA.<sup>14</sup> These three voluntary active duty periods add up to seven years. You are beyond the five-year limit, and you did not have the right to reemployment in October 2014, unless we can show that the periods when *you would not have been working for UAL anyway, because you had been furloughed*, do not count toward your five-year limit at UAL.

During your year of active duty, from March 2003 to March 2004, you would not have been working for UAL in any case, because you had been furloughed. Similarly, you would not have been working for UAL for the year between October 1, 2005 and October 1, 2006, when UAL recalled you from furlough. And you would not have been working for UAL between October 1, 2010 and October 1, 2013, when UAL recalled you from the second furlough. If these five years of service do not count toward your five-year limit at UAL, you were well within the five-year limit when you returned to work at UAL in October 2014.

Section 4312(c) of USERRA sets forth the five-year limit, as follows:

Subsection (a) [the right to reemployment] shall apply to a person *who is absent from a position of employment by reason of service in the uniformed services* if such person's

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<sup>12</sup> 38 U.S.C. 4312(c).

<sup>13</sup> 38 U.S.C. 4312(c)(4)(A).

<sup>14</sup> 38 U.S.C. 4312(c).

cumulative period of uniformed service, with respect to the employer relationship for which the person seeks reemployment, does not exceed five years, except that any such period of service shall not include-- ...<sup>15</sup>

I am prepared to argue that you were not absent from your UAL position of employment by reason of uniformed service during the periods of March 2003 to March 2004, October 2005 to October 2006, and October 2010 to September 2013. During those periods, you were absent from your UAL employment *because you had been furloughed*. Thus, I am prepared to argue, these periods do not count toward your five-year limit at UAL.

It would be prudent for a person in this situation to assume that the furlough periods count toward the five-year limit. If you are within the five-year limit even if the furlough periods count, you will not need to bet your job on the legal argument that the furlough periods do not count.

**Q: Let us assume that I was entitled to reemployment in October 2007 and again in October 2014. Was UAL required to make retroactive payments to my individual pension account? How should the required amounts of those payments be computed?**

**A:** Under section 4318(b)(2) of USERRA,<sup>16</sup> UAL was required to make retroactive payments to your pension account when you returned to UAL employment, after military service, in October 2007 and again in October 2014. The method for computing the amount of those contributions is set forth in section 4318(b)(3), as follows:

For purposes of computing an employer's liability under paragraph (1) or the employee's contributions under paragraph (2), the employee's compensation during the period of service described in subsection (a)(2)(B) shall be computed—  
(A)at the rate the employee *would have received but for the period of service* described in subsection (a)(2)(B), or  
(B)*in the case that the determination of such rate is not reasonably certain*, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).<sup>17</sup>

It is clear that you would not have received UAL compensation during your year of active duty, from November 2001 to November 2002, because you were on UAL furlough during that period. Accordingly, UAL is not required to make a retroactive payment to you based on what you would have earned from the airline during that period. What you would have earned from

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<sup>15</sup> 38 U.S.C. 4312(c) (emphasis supplied).

<sup>16</sup> 38 U.S.C. 4318(b)(2).

<sup>17</sup> 38 U.S.C. 4318(b)(3) (emphasis supplied).

the airline is zero, and 16% of zero is zero, so no retroactive payment is required. Similarly, no UAL retroactive payment is due for the period of March 2003 to March 2004, October 2005 to September 2006, or October 2010 to September 2013.

You would have received UAL compensation during the period of October 2006 (when UAL recalled you from furlough) to October 2007 (when you were released from active duty and returned to work at UAL) and from October 2013 (when UAL recalled you from furlough) until October 2014 (when you completed your active duty period and returned to work for the airline). UAL is required to compute what you *would have earned* from UAL for each of these periods and then to contribute 16% of that amount to your individual pension account.

As I have explained in Law Review 16032 (April 2016), it is possible (at a unionized airline like UAL) to determine what you would have earned but for having been away from the job for military service. At a unionized airline, each pilot has a specific number on the seniority roster, based on the pilot's date of hire. Let us assume that your UAL seniority number is 8915, based on your date of hire in 2000. Mary Jones (number 8914) is one step ahead of you, and Bob Smith (number 8916) is one step behind you. Jones and Smith were among your classmates in 2000, at the UAL rookie pilot school. How much would you have earned from UAL during the period of October 2006 to September 2007 and during the period of October 2013 to September 2014? We can get a very good estimate of what you would have earned by looking at what Jones and Smith earned during those periods.

In your situation, it is definitely not to your advantage to utilize the alternative compensation method under section 4318(b)(3)(B).<sup>18</sup> You had no UAL earnings during the 12-month period of October 1, 2004 to September 30, 2005, when you returned to active duty. Similarly, you had no UAL earnings during the 12-month period of October 1, 2009 to September 30, 2010. You had no earnings from the airline during those periods because you had been furloughed.

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<sup>18</sup> 38 U.S.C. 4318(b)(3)(B).