LAW REVIEW 16067[1]
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USERRA's Five-Year Limit Applies to the *Employer Relationship*

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

Update on Sam Wright

1.3.1.2—Character and duration of service
1.8—Relationship between USERRA and other laws/policies

Q: I am a Lieutenant Colonel in the Army National Guard (ARNG) and a life 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).

In late 2010, I contacted you at the Service Members Law Center (SMLC), and you provided me detailed information about my rights and obligations under USERRA, and that is why I chose to join ROA. You wrote Law Review 1102 (January 2011) about my situation and my issue, without using my name.

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[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1500 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), 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 1300 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. I have dealt with USERRA and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal 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 VRRA rewrite 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 USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) 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 (TR), and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (May 2015), concerning the accomplishments of the SMLC. After ROA disestablished the SMLC last year, I returned to TR, this time in an "of counsel" role. To arrange for a consultation with me or another TR attorney, please call Ms. JoAnne Perniciaro (the firm's Client Relations Director) at (518) 640-3538. Please mention Captain Wright when you call.

I went to work for a local school district in Utah, as a teacher, in 1999, and my career as a teacher has been interrupted by several periods of voluntary and involuntary military service. I am very familiar with section 4312(c) of USERRA, the five-year limit.[3] In 2010, I was released from a long period of voluntary active duty, and at the time I was clearly beyond the five-year limit. I saw a vacancy announcement on the school district's website, and I applied. I made clear that I was not applying for reemployment, because I was beyond the five-year limit. I was interviewed for the vacancy, and I was selected for the job. I was rehired, not reemployed. I started over as a new-hire teacher in August 2010.

You wrote in Law Review 1102 that, under these circumstances, I had a new *employer relationship* with the school district in 2010 and that my five-year clock was rewound back to zero. Based on that theory, I decided to take a new opportunity to return to active duty, voluntarily, in July 2012. I gave notice that I was leaving my school district employment for the purpose of service, and I gave the school district notice of the extensions of my initial 12-month orders. In July 2016 (this month), I completed four years of uninterrupted active duty (within the five-year limit) and immediately applied for reemployment.

The school district offered me a new teaching position, and I will start next month, at the beginning of the 2016-17 school year. The school district has refused to give me seniority and pension credit for the two years that I worked for the district (2010-12) or for the four years of active duty that I recently completed. Again, I am starting over as a new hire, and this makes a big difference, especially with regard to the pension credit.

I have had detailed discussions with the school district's personnel and legal departments, and I provided them with a copy of your Law Review 1102. The school district does not accept your argument that the five-year limit applies to the *employer relationship* and that I started a new employer relationship with the district in 2010 and received a fresh five-year limit at that time. Do you adhere to the position that you took in January 2011 in Law Review 1102?

A: Yes, I adhere to what I wrote in Law Review 1102, and since the issue has arisen again I will elaborate on what I wrote 5.5 year ago.

As I have explained in Law Review 15116 (December 2015) and other articles, you must meet five conditions to have the right to reemployment under USERRA:

a. You left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services.
b. You gave the employer prior oral or written notice.

[3] Please see Law Review 16043 (May 2016) for a recent summary of USERRA's five-year limit—what counts and what does not count in exhausting your five-year limit with a specific employer relationship. There are nine exemptions—kinds of service that do not count toward exhausting your five-year limit.

c. You have not exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the *employer relationship* for which you seek reemployment.
d. You were released from the period of service without having received a disqualifying bad discharge from the military.
e. After release from service, you made a timely application for reemployment.

In your case, it seems clear beyond any question that you meet the first two conditions and the last two. The remaining issue is whether you are within or beyond the five-year limit with respect to the school district. This is a "pure question of law" case—the facts probably are not in dispute. What is in dispute is the meaning of section 4312(c) of USERRA as applied to your unusual but certainly not unique circumstances. If my "new employer relationship with a former employer" theory is correct, you are within the five-year limit, meaning that you are entitled to reemployment and to seniority and pension credit for the two years that you worked for the school district (2010-12) and the four years that you were on active duty most recently (2012-16). If my theory is not correct, you are beyond your five-year limit with the school district, meaning that you are not entitled to reemployment or to seniority and pension credit.

The school district is likely to point to the Department of Labor (DOL) USERRA Regulation, which provides in pertinent part:

> **Does the five-year service limit include periods of service that the employee performed when he or she worked for a previous employer?**
> No. An employee is entitled to a leave of absence for uniformed service for up to five years *with each employer* for whom he or she works. When the employee takes a position with a new employer, the five-year period begins again regardless of how much service he or she has performed while working in any previous employer relationship.[4]

It should be noted that DOL published the final USERRA Regulations in the *Federal Register* in December 2005, more than five years before my Law Review 1102 was published in January 2011. Section 1002.101 is clearly correct when it states that an employee who starts a *new job with a new employer* gets a fresh five-year limit with the new employer. This section does not address the more subtle question of whether a person who starts a *new employer relationship* with an employer that employed the individual earlier in his or her lifetime also gets a fresh five-year limit. Your scenario simply was not anticipated by the DOL employees who drafted the USERRA Regulations.

[4] 20 C.F.R. 1002.101 (bold question in original, emphasis by italics supplied).

When construing the meaning of a statute, it is always necessary to start with the precise words that Congress or the state legislature enacted. Here are the exact words of section 4312(c):

> 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 cumulative period of service in the uniformed services, with respect to the *employer relationship* for which a person seeks reemployment, does not exceed five years, except that any such period of service shall not include any service …[nine exemptions from the five-year limit].[5]

The school district's interpretation is that your five-year limit counts all military service that you performed while employed by the district, despite the fact that you started a new employer relationship with the school district in 2010, when you were brought back as new hire, not a reemployed veteran. The problem with this theory is that it renders meaningless the word "relationship" in section 4312(c), and an interpretation that ignores a word or phrase in the statute is disfavored, under the *surplusage canon.*

In 2012, Thomson/West Publishing Company published *Reading Law: The Interpretation of Legal Texts,* by Supreme Court Justice Antonin Scalia and law professor Bryan A. Garner. This highly regarded book details the *rules of statutory construction* developed by courts in Great Britain, the United States, Canada, Australia, and other common law countries over many centuries. The everyday work of courts includes determining the meaning of words used in contracts, wills, statutes, constitutions, executive orders, regulations, and other legal documents.

At pages 174-79 of their book, Justice Scalia and Professor Garner state and expound upon the *surplusage canon,* which they summarize as follows:

> If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienta).* None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.

The canons of statutory construction go back centuries. In my research,[6] I found a 2001 Supreme Court decision that addresses the *surplusage canon* in considerable detail, as follows:

> Further, were we to adopt respondent's construction of the statute, we would render the word "State" insignificant, if not wholly superfluous. "It is our duty to give effect, if possible, to every clause and word of a statute." *United States v. Menasche,* 348 U.S. 528, 538-39 (1955) (quoting *Montclair v. Ramsdell,* 107 U.S. 147, 152 (1883); see also *Williams v. Taylor,* 529 U.S. 362, 404 (describing this rule as a "cardinal principle of

[5] 38 U.S.C. 4312(c) (emphasis supplied).

[6] My employment at ROA, as SMLC Director, ended 5/31/2015, but ROA still provides me a subscription to LEXIS, a computerized legal research service. I use that service to do research for the "Law Review" articles.

> statutory construction"); *Market Co. v. Hoffman,* 101 U.S. 112, 115 (1879) ("As early as Bacon's Abridgment, section 2, it was said that a statute ought, upon the whole, to be so construed that, if it can't be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."). We are thus "reluctant to treat statutory terms as surplusage" in any setting. *Babbitt v. Sweet Home Chapter, Communities for Great Oregon,* 515 U.S. 687, 698 (1995); see also *Ratzlaf v. United States,* 510 U.S. 135, 140 (1994).[7]

Like any statute, USERRA is to be construed in accordance with the canons of statutory construction, including the *surplusage canon.* Construing section 4312(c) this way, the term "employer relationship" has a different meaning than the word "employer." You started a *new employer relationship* with the school district when you were rehired, as a new employee, in 2010. Your 2012-16 active duty period is within the five-year limit. You are entitled to reemployment, and you are entitled to be treated, for seniority and pension purposes, *as if you had been continuously employed* during your 2010-12 employment by the school district and during your 2012-16 active duty.

[7] *Duncan v. Walker,* 533 U.S. 167, 174 (2001).