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USERRA, the SCRA, and the Statute of Limitations

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

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Q: What is a statute of limitations?

A: A statute of limitations is a rule providing a deadline for a person claiming rights to file a lawsuit or file a claim in writing with a government agency. Today, there is a statute of limitations for almost any claim. Some statutes of limitation are very short—like 30 days. Do not sleep on your rights. “You snooze you lose” is the rule.

¹I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 2000 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

²BA 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 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans’ Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 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, 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 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

Let us say that I am crossing the street, in the crosswalk, with a walk light. You are speeding and texting while driving, and you also have been drinking and have a blood alcohol rating well above the legal limit. You hit me in the crosswalk, causing me serious bodily injury.

Let us say that in the state where this occurs the statute of limitations for vehicular accident claims is two years. For whatever reason, I wait two years and one day to file suit against you. My suit will be dismissed because it was filed beyond the statute of limitations, despite the overwhelming evidence that you were at fault in this accident.

When Congress enacts a statute creating a cause of action it generally includes a statute of limitations.³ In 1990, Congress enacted a default statute of limitations to cover situations wherein Congress omits a statute of limitations in a new enactment:

Except as otherwise provided by law, a civil action arising under an act of Congress enacted after the date of enactment of this section [December 1, 1990] may not be commenced later than four years after the cause of action accrues.⁴

Q: What does it take to stop the running of a statute of limitations?

A: Some federal statutes provide for initiating the action by filing a written claim with a specific federal agency. Otherwise, you stop the statute of limitations by *filing suit in court*.

You do not stop the statute of limitations by contacting a lawyer to discuss your rights nor by writing a letter to your United States Senator or Representative to complain that your rights have been violated.⁵

Q: What does the Servicemembers Civil Relief Act (SCRA) provide about statutes of limitations as applied to service members on active duty?

A: The SCRA provides:

Tolling of statutes of limitations during military service. The period of a servicemember's military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department of a State (or political subdivision of a State) or the United States *by or against* the servicemember or the servicemember's heirs, executors, administrators, or assigns.⁵

This subsection means that while you are on active duty the statute of limitations for any cause of action, *for you or against you*, stops running. When you leave active duty, even many years later, you can file suit based on the cause of action, because the statute of limitations was

³A cause of action creates a substantive right and authorizes persons affected to sue to enforce that right.

⁴ 28 U.S.C. § 1658(a). The citation is to title 28 of the United States Code, section 1658(a).

⁵*Id.* § 3936(a) (emphasis supplied).

tolled during your active duty service. But remember that this provision cuts both ways. If someone has a cause of action against you, based on something that happened before you entered active duty or during your active duty, the statute of limitations on that cause of action is also tolled.

The fact that you *can* wait until you leave active duty to file your lawsuit does not mean that you *should* wait. When you are the plaintiff (the party bringing the suit), you almost always have the burden of proof. If you wait to file your lawsuit, it will likely become more difficult for you to prove your case, as records can be lost or destroyed, memories can dim, and potential witnesses can die or otherwise become unavailable. Sleeping on your rights is always a bad idea.

Q: What does the Uniformed Services Employment and Reemployment Rights Act (USERRA) provide about statutes of limitations?⁶

A: USERRA provides:

If any person seeks to file a complaint or claim with the Secretary [of Labor], the Merit Systems Protection Board,⁷ or a Federal or State court under this chapter alleging a violation of this chapter, *there shall be no limit on the period for filing the complaint or claim.*⁸

This “no statute of limitations” rule was added to USERRA on October 10, 2008, and it applies to causes of action that accrue on or after that date. USERRA causes of action that accrued prior to October 10, 2008 are still subject to the four-year default statute of limitations set forth in section 1658(a) of Title 28, as discussed above.⁹

Although there is no drop-dead deadline for filling a USERRA case, there is the equitable doctrine of laches. If you wait many years to sue, the defendant employer will likely argue that it has been prejudiced by the delay, in that it likely had a good defense but cannot prove the defense now because memories have dimmed, witnesses have died or otherwise become

⁶As I 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 enacted in 1940. USERRA is codified at 38 U.S.C. §§ 4301—35.

⁷Under section 4324 of USERRA, 38 U.S.C. §4324, USERRA complaints against federal executive agencies as employers are adjudicated by the Merit System Protection Board, not by a court.

⁸38 U.S.C. § 4327(b) (emphasis supplied). Section 4327 was added to USERRA by public Law 110-389, Title III, section 311(f)(1), October 10, 2008, 122 Stat. 4163. It should be noted that section 4327(b) exempts you from a deadline in filing your USERRA claim, but it does not exempt you from deadlines imposed by the judge or by Federal Rules of Civil Procedure on when you must take certain steps after you have filed.

⁹See *Middleton v. City of Chicago*, 578 F.3d 655, 622—65 (7th Cir. 2009). I discuss this case in detail in Law Review 0948, If your cause of action was not already dead on October 10, 2008, based on the four-year statute of limitations having expired, you can argue that section 4327(b) applies and preserves your right to sue. For example, Joe Smith has a USERRA cause of action that accrued in October 2005, so he could argue that his claim does not expire in October 2009 because of section 4327(b). When Congress enacted section 4327(b) in 2008, Mary’s claim was already dead. Section 4327(b) could not resurrect her claim.

unavailable, and records have been lost or destroyed.¹⁰ If the court agrees that you have inexcusably delayed in bringing your suit and that the defendant employer has been prejudiced by the delay, the court will likely dismiss your case based on laches.

Moreover, as I have stated the longer you wait the more difficult it is to prove your case. If you believe that your USERRA rights have been violated, you should consult an attorney and consider filing suit, sooner rather than later. If you snooze, you lose.

¹⁰A company will generally have a record retention policy. After a specified number of years (perhaps ten), records are destroyed because the company cannot lease the whole state of Iowa to store records. If the company is on notice that there is a claim or that a claim is likely, the company has a duty to preserve records that are relevant to that claim. The company has a duty to avoid *spoliation of evidence*. See Law Review 16059 (July 2016). But if you have not put the company on notice of your claim, the records that are relevant to your case will probably be destroyed in the ordinary course of business at the appointed time.