LAW REVIEW 16106[1]
October 2016

How Does Section 4318 of USERRA Apply to the Regular Military Retiree who Leaves a Federal Civilian Job To Return to Active Duty, Completes a Period of Voluntary Active Duty, Returns to Federal Civilian Employment, and then Retires?

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Update on Sam Wright

1.1.1.8—USERRA applies to the Federal Government
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Q: I am a retired Air Force Lieutenant Colonel. I found some of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA[3]) by

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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), 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 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. For six years (2009-15), I was 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. Although I am no longer employed by ROA, I have continued writing new "Law Review" articles as a volunteer and ROA member. I am available by e-mail at SWright@roa.org or by telephone at (800) 809-9448, extension 730.

[3] As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA (Public Law 103-353, 108 Stat. 3160) and President Bill Clinton signed it into law on October 13, 1994. USERRA was a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA), Public Law 76-783, 54 Stat. 885. The STSA is the law that led to the drafting of more than ten million young men (including my late father) for World War II. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have been dealing with the VRRA and USERRA for more than 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. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. I have also dealt with the VRRA and USERRA as a judge

doing an Internet search, and I read those articles with great interest. I recently joined ROA because I want to support the Law Review Library as a resource for service members and their attorneys in understanding their legal rights and obligations.[4]

I was born in 1958, and I graduated college in 1980. While in college, I participated in the Air Force Reserve Officers Training Corps (ROTC), and I was commissioned a Second Lieutenant on graduation. I then spent the next 28 years on full-time regular active duty and retired as a Lieutenant Colonel in 2008.

Shortly after I retired from the Air Force, I became a federal civilian employee of the Department of the Air Force (DAF). After just four months as a DAF civilian, I learned that the Air Force had a serious shortage of experienced, senior instructor pilots, to train new Air Force pilots for operations in Iraq, Afghanistan, and elsewhere. I learned that the Air Force was soliciting retired regular officers like me to return to active duty for the emergency, and I volunteered.

I returned to active duty in November 2008 and remained on active duty for 42 months, until May 2012. I have read many of your Law Review articles, and I believe that I met the five conditions for reemployment under USERRA. In November 2008, I left my civilian DAF job for the purpose of performing uniformed service, and I gave my civilian employer (DAF) both oral and written notice. As I understand your Law Review 16043 (May 2016), my five-year limit only counts active duty that I performed after I started my relevant civilian job, so my 1980-2008 active duty does not count toward the month limit. I served honorably and was released from active duty (returning to my retired status) in May 2012, and I did not receive a disqualifying bad discharge from the Air Force. After I left active duty, I applied for reemployment in the DAF civilian job almost immediately, and I was well within the 90-day deadline to apply for reemployment.[5] When I left active duty and returned to my retired status in May 2012, my additional 42 months of active duty (November 2008 through May 2012) added to the amount of my monthly retirement check as a regular Air Force retiree.

When I began my federal civilian career in June 2008, I started participating in the Federal Employee Retirement System (FERS), which consists of the Thrift Savings Plan (TSP) and "FERS Basic." After I returned to work for DAF as a civilian in May 2012, I arranged to make up (by

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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 SMLC Director.

[4] Yes, military regulars and retired regulars are eligible to join ROA. Anyone who is or has been a commissioned or warrant officer of any one of the seven uniformed services is eligible to join ROA. In 2013, ROA members amended the ROA Constitution to make noncommissioned officers and petty officers eligible for full membership. To join ROA, go to www.roa.org or call ROA at (800) 809-9448.

[5] After a period of service of 181 days or more, the returning service member or veteran has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

payroll deduction) the missed employee TSP contributions for the period of my active duty (November 2008 through May 2012).

There is also a small employee contribution to FERS Basic. I have sought to make up those missed employee contributions and to get credit for the 42 months when I returned to active duty in determining when I am eligible to retire from the federal civil service and in determining the amount of my federal employee FERS retirement benefit.

The DAF civilian personnel office has told me, more than once, that I cannot make up the missed employee contributions to FERS Basic and that I am not entitled to use my 42 months of voluntary active duty (2008-12) for purposes of qualifying for federal civilian retirement or for determining the amount of my federal civilian employee monthly retirement check. The civilian personnel office says that a regular military retiree like me is not entitled to use military service time for federal civilian employee retirement purposes, even when the employee returns to active duty from a military retirement status, serves on active duty for a period, meets the USERRA conditions, and is reemployed as a federal civilian employee. For this proposition, the civilian personnel office has cited title 5 of the United States Code section 8411(c)[6] and title 5 of the Code of Federal Regulations section 842.306(b).[7]

I believe that I am entitled to be treated as if I had been continuously employed in the DAF civilian job for purposes of my federal civilian retirement, under section 4318 of USERRA.[8] Does section 4318 of USERRA trump this title 5 section? Or does the title 5 section trump section 4318 of USERRA? Am I entitled to use my 2008-12 active duty period in determining my eligibility for federal civilian retirement and in determining the amount of my federal civilian retirement benefit at age 62?

A: I did a LEXIS search[9] and did not find a case directly on point—a case involving facts similar to yours. I think that you are entitled to use your 42 months of post-retirement active duty in computing the date when you are eligible for federal civilian retirement and in computing the amount of your monthly federal civilian retirement check at age 62, but this is an open legal question that may have to be answered through litigation. It appears that there is a direct conflict between section 4318 of USERRA and section 8411(c) of title 5, as applied to your unusual but not unique facts. The question is: Does USERRA trump the title 5 provision? Or does the title 5 provision trump USERRA?

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[6] 5 U.S.C. 8411(c).
[7] 5 C.F.R. 842.306(b).
[8] 38 U.S.C. 4318.
[9] LEXIS is a computerized legal research service.

First, let me say that USERRA definitely does apply to a military retiree who returns to active duty voluntarily or involuntarily and leaves a post-retirement civilian job to do so.[10] In the 15 years since the September 11 terrorist attacks, several thousand military retirees (Active Component and Reserve Component) have returned to active duty for the emergency, either voluntarily or involuntarily.

As I explained in Law Review 15116 (December 2015), USERRA accords the right to reemployment to anyone who meets five simple conditions:

a. Must have left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary uniformed service. You clearly did that in November 2008.
b. Must have given the employer prior oral or written notice. For purposes of this article, I shall assume that you gave such notice.
c. Must not have 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.* Your 28 years of active duty (1980-2008) do not count toward your five-year limit because that period of service was before you began your civilian employment relationship with the Federal Government.
d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.[11] It is clear that you did not receive a disqualifying bad discharge.
e. Must have made a timely application for reemployment after release from the period of service.[12] Because you returned to your civilian DAF job almost immediately after you left active duty in May 2012, it is clear that you made a timely application for reemployment.

Because you met the five conditions in May 2012, you were and are entitled to be treated *as if you had been continuously employed in the civilian job during the 42 months that you were away from work for service,* under section 4318 of USERRA. Section 4318 provides:

- **(a)** (1) (A) Except as provided in subparagraph (B), in the case of a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974 *or a right provided under any Federal or State law governing pension benefits for governmental*

[10] Please see Law Review 0760 (November 2007).
[11] Under section 4304 of USERRA, 38 U.S.C. 4304, bad discharges include punitive discharges by court martial and other-than-honorable administrative discharges.
[12] 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.

employees, the right to pension benefits of a person reemployed under this chapter shall be determined under this section.

- ***(B)*** *In the case of benefits under the Thrift Savings Plan, the rights of a person reemployed under this chapter shall be those rights provided in section 8432b of title 5. The first sentence of this subparagraph shall not be construed to affect any other right or benefit under this chapter.*
  - **(2)** (A) A person reemployed under this chapter shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services.
- **(B)** Each period served by a person in the uniformed services shall, upon reemployment under this chapter, be deemed to constitute service with the employer or employers maintaining the plan for the purpose of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan.

- **(b)** (1) An employer reemploying a person under this chapter shall, with respect to a period of service described in subsection (a)(2)(B), be liable to an employee pension benefit plan for funding any obligation of the plan to provide the benefits described in subsection (a)(2) and shall allocate the amount of any employer contribution for the person in the same manner and to the same extent the allocation occurs for other employees during the period of service. For purposes of determining the amount of such liability and any obligation of the plan, earnings and forfeitures shall not be included. For purposes of determining the amount of such liability and for purposes of section 515 of the Employee Retirement Income Security Act of 1974 *or any similar Federal or State law governing pension benefits for governmental employees,* service in the uniformed services that is deemed under subsection (a) to be service with the employer shall be deemed to be service with the employer under the terms of the plan or any applicable collective bargaining agreement. In the case of a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability of the plan described in this paragraph shall be allocated--
  - **(A)** by the plan in such manner as the sponsor maintaining the plan shall provide; or
  - **(B)** if the sponsor does not provide--
    - **(i)** to the last employer employing the person before the period served by the person in the uniformed services, or
    - **(ii)** if such last employer is no longer functional, to the plan.
      - **2)** A person reemployed under this chapter shall be entitled to accrued benefits pursuant to subsection (a) that are contingent on the making of, or derived from, employee contributions or elective deferrals (as defined in section 402(g)(3) of the Internal Revenue Code of 1986) only to the extent the person makes

payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of service described in subsection (a)(2)(B). Any payment to the plan described in this paragraph shall be made during the period beginning with the date of reemployment and whose duration is three times the period of the person's service in the uniformed services, such payment period not to exceed five years.

- **(3)** 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).

(c) Any employer who reemploys a person under this chapter and who is an employer contributing to a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter, shall, within 30 days after the date of such reemployment, provide information, in writing, of such reemployment to the administrator of such plan.[13]

Here is the pertinent language of section 8411(c):

(c)(1) Except as provided in paragraphs (2), (3), and (5)[14], and employee [of the Federal Government] or a Member [of Congress] shall be allowed credit for—
(A) each period of military service performed before January 1, 1957; and
(B) each period of military service performed after December 31, 1956, and before the separation on which title to annuity is based, if a deposit (including interest, if any) is made with respect to such period in accordance with section 8422(e).

[13] 38 U.S.C. 4318 (emphasis supplied).
[14] Section 8411(c)(5) deals with claims by former spouses to a share of retirement benefits. That subsection is not relevant to you since you have no former spouse-you are still married to your first wife.

(2) If an employee or Member is awarded retired pay based on any period of military service, the service of the employee or Member may not include credit for such period of military service unless the retired pay is awarded—
(A) based on a service-connected disability—
(i) incurred in combat with an enemy of the United States; or
(ii) caused by an instrumentality of war and incurred in the line of duty during a period of war as defined by section 301 of title 38; or
(B) under section 1223 of title 10 (or under chapter 67 of that title as in effect before the effective date of the Reserve Officer Personnel Management Act).[15]

There is a direct and irreconcilable conflict between section 4318 of USERRA and section 8411(c) of title 5, as applied to your facts. Section 4318 *requires* the Federal Government to give you civilian retirement credit for your 42 months of post-retirement active duty, and section 8411(c) *prohibits* giving you such credit. How do we resolve this issue?

I have determined that section 8411 was added to title 5 in 1986.[16] Here is the language of section 8411(c)(1) and (2) as added to the United States Code in 1986:

Except as provided in paragraph (2) or (3), an employee or Member shall be allowed credit for—
(A) each period of military service performed before January 1, 1957; and
(B) each period of military service performed after December 31, 1956, and before the separation on which title to the annuity is based, if a deposit (including interest, if any) is made in accordance with section 8422(e).
(2)If an employee or Member is awarded retired pay based on any period of military service, the service of the employee or Member may not include credit for such period of military service unless the retired pay is awarded—
(A) based on a service-connected disability—
(i)incurred in combat with an enemy of the United States; or
(ii)caused by an instrumentality of war and incurred in the line of duty during a period of war as defined in section 301 of title 38; or
(B)under chapter 67 of title 10.

In all relevant respects, the 1986 version of section 8411(c)(1) and (2) is identical to the 2016 version.[17] In other words, section 8411(c)(1) and (2) in essentially its present form predates the

[15] 5 U.S.C. 6411(c)(1) and (2). The Reserve Officer Personnel Management Act moved the provisions of chapter 67 of title 10 to chapter 1223 of that title.
[16] Section 8411 was added by the Federal Employees Retirement System Act of 1986, 100 Stat. 514.
[17] In the 30 intervening years, chapter 67 of title 10 became chapter 1223, and section 8411(c) was amended to reflect that change. Also, paragraph (5) was added, pertaining to the rights of former spouses to a claim of a federal retiree's pension. As I explained in footnote 14, paragraph (5) is not relevant to your situation.

enactment of USERRA (in 1994) by eight years. USERRA controls, because it was enacted later. To the extent that there is an irreconcilable conflict between section 4318 of USERRA and section 8411(c), it must be concluded that the enactment of USERRA in 1994 impliedly repealed the conflicting 1986 language of section 8411(c).

I acknowledge that the law does not favor repeals by implication, so I will offer other reasons why I believe that section 4318 of USERRA prevails.

First, in two places[18] section 4318 specifically overrides other federal statutes that govern pension benefits for federal employees. Second, in one place[19] section 4318 expressly provides that a specific section of title 5 (section 8432b) controls over section 4318 of USERRA. Making one explicit exception necessarily means that other implied exceptions are precluded.

This is a good case for the invocation of the legal doctrine of *expressio unius est exclusio alterius* (expression of one thing is the exclusion of another). By expressly providing that one title 5 section (section 8432b) prevails over section 4318, section 4318 clearly means that this section of USERRA prevails over other conflicting sections of title 5.

The classic example of *expressio unius est exclusio alterius* comes in the early Supreme Court case, *Marbury v. Madison,* 5 U.S. 137 (1803). Article III, Section 2, Clause 2 of the United States Constitution establishes the *original* (as opposed to appellate) jurisdiction of the Supreme Court-cases affecting ambassadors and other public ministers and disputes between states. The statute at issue in *Marbury* expanded the original jurisdiction of the Supreme Court to include cases in which a *writ of mandamus* is sought against a federal official. The Supreme Court held that since the Constitution expressly states the classes of cases for which the Supreme Court has original jurisdiction, a federal statute that adds additional classes of cases to the original jurisdiction of the Supreme Court is unconstitutional.
The United States Court of Appeals for the Sixth Circuit[20] applied this doctrine to the construction of section 4304 of USERRA, which provides that a person who has received a punitive discharge (by court martial) from the armed forces or an other-than-honorable administrative discharge or who has been dismissed or dropped from the rolls of a service shall not have the right to reemployment in his or her civilian job, even if he or she otherwise meets the USERRA eligibility criteria. This means that a person who resigned his commission "for the good of the service" in lieu of trial by court martial and who received a "general discharge under honorable conditions" is entitled to reemployment, even though the person was certainly not "Soldier of the Year" material. By setting forth the specific kinds of unfavorable

[18] 38 U.S.C. 4318(a)(1)(A) and 4318(b)(1), section 4318 explicitly states that it controls over "a right provided under any Federal or State law governing pension benefits for governmental employees."
[19] 38 U.S.C. 4318(a)(1)(B).
[20] The 6th Circuit is the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee.

discharges that disqualify a person from reemployment, Congress established that other less than fully satisfactory discharges do not disqualify a person from the right to return to his or her pre-service civilian job. *See Petty v. Metropolitan Government of Nashville-Davidson County,* 538 F.3d 431 (6th Cir. 2008), *cert. denied,* 556 U.S. 1165 (2009) (*Petty I). See also Petty v. Metropolitan Government of Nashville,* 687 F.3d 710 (6th Cir. 2012) (*Petty II).*
Applying this same rule of statutory construction to section 4318, it is clear that section 4318 of USERRA prevails over conflicting title 5 sections, except for section 8432b.

It should also be noted that USERRA applies with special force to the Federal Government as a civilian employer. USERRA's very first section expresses the "sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter."[21] Finally, it should be noted that from the very beginning the Supreme Court has held that the reemployment statute should be "liberally construed for the benefit of he who laid aside his civilian concerns to serve his country in its hour of great need."[22] USERRA's legislative history makes clear that the VRRA case law (and especially the "liberal construction" mandate) continues to apply under USERRA. Here is the pertinent paragraph of the legislative history:

> The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protection against employment-related discrimination, and the protection of certain other rights and benefits have been eminently successful for over fifty years. Therefore, the Committee [House Committee on Veterans' Affairs] wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act, remains in full force and effect in interpreting these provisions. *This is particularly true of the basic principle established by the Supreme Court that the Act is to be "liberally construed." See Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946); *Alabama Power Co. v. Davis,* 431 U.S. 581, 584 (1977).[23]

Section 8411(c) applies to a particular situation. That situation involves a person who has served on active duty in the uniformed services who leaves active duty and then begins a federal civilian career. Section 8411(c) does not apply to your situation—where you already held a federal civilian job, you left that job for active military duty, and you completed the period of active duty and returned to the federal civilian job. Your situation is governed by USERRA, not by section 8411(c).

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[21] 38 U.S.C. 4301(b). Please see Law Review 16064 (July 2016). The title of that article is "The Air Force Must Comply with USERRA."

[22] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946). Please see Law Review 0803 (January 2008) for a detailed discussion of *Fishgold* and its implications.

[23] House Committee Report, April 28, 1993 (H.R. Rep. No. 103-65, Part 1), reprinted in Appendix B-1 of *The USERRA Manual* by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found on page 659 of the 2016 edition of the *Manual.*

While the matter is not entirely free from doubt, I believe that the better argument is that USERRA controls here, not section 8411(c), and that you are entitled to use your 42 months of active duty (2008-12) in computing when you qualify for federal civilian retirement and in computing the amount of your monthly federal civilian retirement check starting at age 62.

Q: Who will decide if I get to use my 42 months of active duty for federal civilian retirement purposes? If that decision goes against me, what appeal right do I have?

A: The federal Office of Personnel Management (OPM)[24] administers the federal civilian retirement system, among many other personnel functions. OPM will decide if and to what extent you can use your 42 months of active duty for federal civilian retirement purposes.

If OPM rules against you on this issue, and if you wish to argue that so ruling violates USERRA, you can appeal to the MSPB, under section 4324 of USERRA.[25] If you lose at the MSPB, you can appeal to the United States Court of Appeals for the Federal Circuit.[26]

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[24] The Civil Service Reform Act of 1978 (CSRA) split the former Civil Service Commission (CSC) into three separate agencies. OPM inherited the CSC's large headquarters building and most of the staff and resources. Like the CSC, OPM serves as the personnel office for the Executive Branch of the Federal Government. The Merit Systems Protection Board (MSPB) inherited the adjudicatory functions of the CSC. The Office of Special Counsel (OSC) inherited the CSC's investigative and prosecutorial functions.

[25] 38 U.S.C. 4324. Please see Law Review 16012 (March 2016) for a detailed discussion of USERRA's enforcement mechanism with respect to federal executive agencies (including OPM) as civilian employers.

[26] 38 U.S.C. 4324(d)(1). 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 MSPB decisions. If the federal agency loses at the MSPB, it cannot appeal to the Federal Circuit.