

## LAW REVIEW 17014<sup>1</sup>

February 2017

### If a Reserve Component Service Member Is Called to or Retained on Active Duty for Medical Treatment, that Period of Active Duty Should Be Exempted from the Computation of the Member's Five-Year Limit.

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Update on Sam Wright

1.3.1.2—Character and duration of service

1.3.2.9—Accommodations for disabled veterans

1.8—Relationship between USERRA and other laws/policies

In the 15-plus years since the terrorist attacks of 9/11/2001, almost one million Reserve Component<sup>3</sup> (RC) personnel have been called to the colors. Several thousand have been wounded in action, and thousands more have suffered injuries in the line of duty.<sup>4</sup> When an RC service member incurs serious wounds or injuries while on active duty, it is quite common for the member to be retained on or called back to active duty for medical treatment, rehabilitation, and perhaps consideration of granting the member a military disability

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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 1600 "Law Review" articles about military voting rights, reemployment rights, and other military-legal topics, 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 1400 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. I have 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 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. 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.

<sup>3</sup> Our nation has seven Reserve Components. In order of size, they are the Army National Guard, the Army Reserve, the Air National Guard, the Air Force Reserve, the Navy Reserve, the Marine Corps Reserve, and the Coast Guard Reserve.

<sup>4</sup> In the military context, the word "wounded" means that the service member suffered injuries as a direct result of combat with an enemy of the United States. Other injuries (including injuries sustained during military training) are considered to be in the line of duty but are not combat wounds.

retirement. Section 12301(h) of title 10 of the United States Code authorizes such a call to active duty. That subsection reads as follows:

- (h)(1) When authorized by the Secretary of Defense, the Secretary of a military department may, *with the consent of the member*, order a member of a reserve component to active duty--
  - (A) to receive authorized medical care;
  - (B) to be medically evaluated for disability or other purposes; or
  - (C) to complete a required Department of Defense health care study, which may include an associated medical evaluation of the member.
  - (2) A member ordered to active duty under this subsection may, with the member's consent, be retained on active duty, if the Secretary concerned considers it appropriate, for medical treatment for a condition associated with the study or evaluation, if that treatment of the member is otherwise authorized by law.
  - (3) A member of the Army National Guard of the United States or the Air National Guard of the United States may be ordered to active duty under this subsection only with the consent of the Governor or other appropriate authority of the State concerned.<sup>5</sup>

To illustrate my concern, let us consider a hypothetical but realistic example. Josephine Smith was a Major in the Army Reserve when she was involuntarily called to active duty (along with her unit) for one year. Josephine left her job at Daddy Warbucks Industries (DWI) to report to active duty as ordered. Josephine and the unit deployed to Southwest Asia (SWA), and Josephine was wounded in action.

Josephine had been working for DWI for ten years prior to this deployment, and during that decade she had been away from her DWI job twice for voluntary periods of active duty, and those two periods totaled 25 months. Those two prior active duty periods were not exempt from the computation of Josephine's five-year limit with respect to her employer relationship with DWI. Thus, Josephine had utilized just over two years of her five-year limit, with respect to her DWI job, prior to the deployment in question.

As I have explained in Law Review 15116 (December 2015) and other articles, a person has the right to reemployment under USERRA if he or she meets five simple conditions:

- a. Left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary uniformed service. Josephine clearly met this condition.
- b. Must have given the employer prior oral or written notice. Let us assume that Josephine gave such notice.

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<sup>5</sup> 10 U.S.C. 12301(h) (emphasis supplied).

- 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 the person seeks reemployment. More on this condition below.
- d. Must have been released from the period of service without having received a disqualifying bad discharge from the military. Josephine served honorably and did not receive a disqualifying bad discharge.
- e. After release from the period of service, must have made a timely application for reemployment.<sup>6</sup> Josephine applied for reemployment immediately after she was released from active duty, and she was well within the 90-day deadline.

Because of her combat wounds, Josephine was retained on active duty for three years, after the expiration of the one-year involuntary call to active duty, and during that three-year period she received extensive medical treatment (including several surgeries) and rehabilitation. After she had recovered to the maximum extent feasible, she was medically retired from the Army with a substantial disability rating.

If Josephine meets the five USERRA conditions, DWI is required to reemploy her promptly<sup>7</sup> in the position of employment that she would have attained if she had been continuously employed or in another position, for which she is qualified, that is of like seniority, status, and pay.<sup>8</sup> DWI is required to make reasonable efforts to accommodate the disability that Josephine received while on active duty, and if the disability cannot be reasonably accommodated in the position of employment that she would have attained if she had been continuously employed (probably the position she left), DWI is required to reemploy her in some other position for which she is qualified (despite her disability) or for which she can become qualified with reasonable employer efforts.<sup>9</sup>

DWI is required to reemploy Josephine and to make accommodations for her disability only if she meets all five of the USERRA conditions. She clearly meets the first two (left for service and gave prior notice) and the last two (released from the period of service without a disqualifying bad discharge and made a timely application for reemployment). The remaining issue is whether she has exceeded the five-year limit with respect to her employer relationship with DWI.

Josephine's one-year involuntary call to active duty is clearly exempt from the computation of her five-year limit.<sup>10</sup> The issue is whether the 36-month extension of her active duty (for

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<sup>6</sup> After a period of service of 181 days or more, the individual has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

<sup>7</sup> Prompt reemployment means putting the returning service member or veteran back on the payroll within two weeks after his or her application for reemployment, except in the most unusual circumstances that might justify giving the employer a little longer to act on the application for reemployment. 20 C.F.R. 1002.181

<sup>8</sup> 38 U.S.C. 4313(a)(2)(A).

<sup>9</sup> 38 U.S.C. 4313(a)(3). Please see Law Review 17003 (January 2017) concerning the obligations of the employer to a service member or veteran who meets the USERRA conditions and who returns to work with a disability incurred or aggravated during the period of service.

<sup>10</sup> 38 U.S.C. 4312(c)(4)(A).

medical treatment, rehabilitation, and processing for a disability retirement) is exempt from the five-year limit.

When Josephine applied to DWI for reemployment, the company denied her application. The company claims that the 36-month extension for medical treatment is not exempt from the computation of Josephine's five-year limit. That period, when added to the 25-months of non-exempt service that Josephine performed prior to the subject call to active duty, puts Josephine over the five-year limit by one month, the company claims. Thus, the company argues that it has no obligation to reemploy Josephine and no obligation to accommodate her disability.

I have explained USERRA's five-year limit in detail in Law Review 16043 (May 2016), Law Review 16075 (August 2016), and Law Review 17002 (January 2017). There are nine exemptions from the limit—kinds of service that do not count toward exhausting the individual's limit.

For example, service under section 12301(g) of title 10 is exempt from the five-year limit, under section 4312(c)(4)(A) of USERRA.<sup>11</sup> Section 12301(g) provides:

- (g)
  - (1) A member of a reserve component may be ordered to active duty without his consent if the Secretary concerned determines that the member is in a captive status. A member ordered to active duty under this section may not be retained on active duty, without his consent, for more than 30 days after his captive status is terminated.
  - (2) The Secretary of Defense shall prescribe regulations to carry out this section. Such regulations shall apply uniformly among the armed forces under the jurisdiction of the Secretary. A determination for the purposes of this subsection that a member is in a captive status shall be made pursuant to such regulations.
  - (3) In this section, the term "captive status" means the status of a member of the armed forces who is in a missing status (as defined in section 551(2) of title 37) which occurs as the result of a hostile action and is related to the member's military status.<sup>12</sup>

Here is the scenario for section 12301(g). Bob Jones is an Army Reservist who has been called to active duty and deployed to a combat zone. Jones is serving at a forward operating base that is overrun by the enemy. The Army does not know Jones' status. He may be dead, or perhaps he is alive and is being held captive by the enemy. Based on this uncertainty, the Secretary of the Army categorizes Jones as "captive" and involuntarily extends Jones' active duty period.<sup>13</sup>

More than five years later, a Navy SEAL team miraculously rescues Jones and brings him home to the United States. After medical treatment and extensive debriefing, Jones is released from

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<sup>11</sup> *Id.*

<sup>12</sup> 10 U.S.C. 12301(g).

<sup>13</sup> Under these circumstances, it is impossible for the Secretary of the Army to contact Jones and to ask whether he wants to be extended on active duty.

active duty, returns home, and applies for reemployment at Archie Bunker's Bar & Grill in Queens, New York, where he had worked before he was called to the colors almost six years before. Jones' five years of active duty in a "captive" status is exempt from his five-limit with respect to his employer relationship at Archie's. If Jones meets the other four USERRA conditions, he is entitled to reemployment at the bar.

The 12301(g) scenario could happen, but there is no evidence that it ever has happened.<sup>14</sup> By contrast, the section 12301(h) scenario has happened thousands of times since 9/11/2001. Congress should amend section 4312(c)(4)(A) by adding section 12301(h) to the list of title 10 subsections that are exempt from the five-year limit. A person like Jones should not lose her civilian job because her combat wounds necessitate retaining her on active duty for medical treatment.

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<sup>14</sup> Bowe Bergdahl's situation was not governed by section 12301(g). Bergdahl was a member of the Regular Army, not the Army Reserve or the Army National Guard, at the time of his mysterious disappearance in Afghanistan. Moreover, Bergdahl did not leave a civilian job to report to active duty.