LAW REVIEW 17031[1]
April 2017

How Does USERRA's Escalator Principle Apply to Government Contractors

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Update on Sam Wright

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Q: I am a Lieutenant Colonel in the Army Reserve and a 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). I am trying to figure out how USERRA applies to my own job situation. I recently returned to my civilian job after two years of active duty, from March 1, 2015 until February 28, 2017.

In February 2013, I took a job for a major government contractor—let's call it Liquor Sicker Ticker or LST. Two years later, I was called to active duty, involuntarily, by the Army Reserve, for one year. At the end of that year, I voluntarily extended for a second year of active duty. Between February 2013, when I was hired by LST, and February 2015, when I left my job to

[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1700 "Law Review" articles about military voting rights, reemployment rights, and other military-legal topics, along with a detailed Subject Index, 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 1500 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 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. 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 through ROA at (800) 809-9448, extension 730, or SWright@roa.org. Please understand that I am a volunteer, and I may not be able to respond the same day.

report to active duty, my only military service periods were drill weekends and two-week annual training tours.

Using your Law Review 15116 (December 2015) as a guide, I have carefully documented that I meet the five USERRA conditions for reemployment. In February 2015, I left my civilian job to report to active duty as ordered. I gave the employer both oral and written notice, two months in advance, and I provided the company a copy of my activation orders. At the end of the initial year of involuntary active duty, I gave the company notice by e-mail and then by certified mail that I had extended for a second year. I served honorably and was released from active duty without a disqualifying bad discharge from the Army. I made a timely application for reemployment at LST.[3] I made a formal application for reemployment on the day after I left active duty, and I was back at work a few days later.

Like the great majority of LST employees, I worked on a specific government contract with the company (LST). I was one of five LST employees working on a major project for the Navy, a project that will likely continue for many years. When I left my LST job for active duty in February 2015, LST hired Mary Jones, with the approval of the Navy, to replace me.

While I was gone from work for two years for military service, the Navy renewed its contract with LST for an additional three years and expanded the project. There are now ten LST employees working on that specific project. That includes my four LST colleagues who were working with me on the project in February 2015 (just before I left), plus Mary Jones (who was hired to replace me), plus five new employees who were hired in 2016. This Navy project, and the LST participation in the project, will likely continue for another ten years or more.

At LST, an employee who is working on a specific government contract is transferred to "company overhead" when the contract comes to an end. The employee continues to draw his or her full LST salary for up to 60 days, while he or she searches for a suitable vacancy on another government contract in the LST "family." If the employee does not land in a suitable opening within 60 days, his or her LST employment is terminated.

When I returned to work at LST last month, I was put on company overhead. I report to work every day at the company headquarters and spend the entire eight-hour day contacting LST supervisors on various contracts and submitting my resume to them. So far, I have found nothing, and I am worried because the 60-day clock is running.

I am worried about finding another position within LST for two reasons. First, this is a hard time for the company, as several major government contracts have ended recently and there

[3] 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.

are dozens of well qualified LST employees currently on company overhead. I must compete with them for a very limited number of opportunities on new or existing LST contracts. Second, I have a niche area of expertise. The LST contract that I worked on from 2013 to 2015 was right up my alley, but I have yet to find another LST contract that is similarly within my area of expertise.

Have my USERRA rights been violated?

A: Yes. Because you met the five USERRA conditions in March 2017, the company has an affirmative legal obligation to reemploy you promptly in the position that you would have attained if you had been continuously employed or another position, for which you are qualified, that is of like seniority, status, and pay. Putting you on company overhead and forcing you to find your own position violates your USERRA rights.

The company seems to be treating you like an employee who was adversely affected by the loss of a government contract or an employee returning to work after absence for a reason other than military service. The company needs to understand that you are returning from military service, and the company has special obligations to you in this circumstance.

An employee returning to work after a period of service of more than 90 days, and who meets the five USERRA conditions, must be reemployed "in the position of employment in which the person *would have been employed* if the continuous employment of such person with the employer had not been interrupted by such [uniformed] service, or a position of like seniority, status, and pay, the duties of which the person is qualified to perform."[4] In your case, it is clear beyond dispute that the position that you would have held if you had remained continuously employed, instead of leaving for military service, is the position that you left in February 2015 when you were called to the colors. The fact that the woman who was hired to replace you when you left is still employed on that contract and your four LST colleagues who were working with you on that contract in February 2015 are still working on that contract clearly shows that you would still be working on that contract.

Q: Does the company have the flexibility to reemploy me in a different position on another contract?

A: Yes, but only if the other position is of like seniority, *status,* and pay, and only if you are qualified for that other position.

Q: What is "status?"

[4] 38 U.S.C. 4313(a)(2)(A) (emphasis supplied).

A: As I explained in Law Review 15067 (August 2015), USERRA was enacted in 1994 as a complete rewrite of and replacement for the Veterans' Reemployment Rights (VRR) law, which can be traced back to 1940. USERRA made some major changes, but the concept of "status" has not changed from the VRR law to USERRA.

The VRR law did not give rulemaking authority to the Department of Labor (DOL), but DOL did publish a *VRR Handbook*. While employed as a DOL attorney, I co-edited the 1988 edition of that handbook, which replaced the 1970 edition. Several courts, including the Supreme Court, have accorded a "measure of weight" to the interpretations expressed in the *VRR Handbook*.[5]

The 1988 *VRR Handbook* has this to say about the concept of status:

> The statutory concept of 'status' is broad enough to include both pay and seniority, as well as other attributes of the position, such as working conditions, opportunities for advancement, job location, shift assignment, rank or responsibility, etc. Where such matters are not controlled by seniority or where no established seniority system exists, they can be viewed as matters of 'status.' In a determination of whether an alternative position offered is of 'like seniority, status, and pay,' all of the features that make up its 'status' must be considered in addition to the seniority and rate of pay that are involved."

USERRA's legislative history also addresses the issue of "status," as follows:

> Although not the subject of frequent court decisions, courts have construed status to include 'opportunities for advancement, general working conditions, job location, shift assignment, [and] rank and responsibility.' (*Monday v. Adams Packing Association*, *Inc.,* 85 LRRM 2341, 2343 (M.D. Fla. 1973).) *See Hackett v. State of Minnesota*, 120 Labor Cases (CCH) Par. 11,050 (D. Minn. 1991). A reinstatement offer in another city is particularly violative of status. (*See Armstrong v. Cleaner Services, Inc.,* 79 LRRM 2921, 2923 (M.D. Tenn. 1972)), as would reinstatement in a position which does not allow for the use of specialized skills in a unique situation."[6]

Q: I live in the Washington, DC area with my wife and three school age children. We own a house in the Virginia suburbs, and my children are in an excellent school that they love. My

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[5] *See Monroe v. Standard Oil Co*., 452 U.S. 549, 563 n. 14 (1981); *Leonard v. United Air Lines, Inc.,* 972 F.2d 155, 159 (7th Cir. 1992); *Dyer v. Hinky-Dinky, Inc.,* 710 F.2d 1348, 1352 (8th Cir. 1983); *Smith v. Industrial Employers and Distributors Association*, 546 F.2d 314, 319 (9th Cir. 1976), *cert. denied*, 431 U.S. 965 (1977); *Helton v*. *Mercury Freight Lines, Inc*., 444 F.2d 365, 368 n. 4 (5th Cir. 1971).

[6] 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 676 of the 2016 edition of the *Manual.*

wife has a good job in DC. I was working for LST on a government project at a government building close to my home, and that project has not moved. LST has found a position for me on an LST contract at a Navy base in California. I am most reluctant to take that position because that would require relocating or splitting up my family, and relocation would mean that my wife would lose the excellent job that she holds. Am I required to accept the California job?

A: No. Location (as in metropolitan commuting area) is a fundamental aspect of the "status" to which you are entitled under USERRA.

Concerning the insufficiency of the California position that you were offered, I invite your attention to *Armstrong v. Cleaner Services.*[7] The plaintiff (Ronald D. Armstrong) was hired in November 1967 as the manager of one of the defendant's three One Hour Martinizing (dry cleaning) plants in Murfreesboro, Tennessee (Armstrong's home town). Armstrong worked in that manager position until March 1968, when he was drafted. He was honorably discharged in March 1970 and promptly applied for reemployment. The defendant was unwilling to reinstate Armstrong as manager of the facility where he had been employed because the manager position at that facility was filled. The defendant offered Armstrong a similar position at Fort Oglethorpe, Georgia. Armstrong declined that offer and sued.

The case was assigned to Judge Leland Clure Morton of the United States District Court for the Middle District of Tennessee.[8] In his scholarly opinion, Judge Morton wrote:

> Under the facts of this particular case, plaintiff was entitled to be reinstated in his pre-induction position at one of defendant's three plants in Murfreesboro. To hold that plaintiff had no such rights under the Act would have the effect of penalizing plaintiff for serving his country in the Armed Services. In addition to the circumstance that plaintiff's wife was five to six months pregnant, the court must consider the financial burden which would necessarily be required of a removal to Georgia. No evidence was introduced to indicate that defendant would have paid any expenses resulting from such a move.
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> The fact that it had been the custom and policy of the defendant to shift managers from plant to plant does not justify the defendant's refusal to re-employ the plaintiff at the same place of employment. *See Salter v. Becker Roofing Co*., 65 F. Supp. 633 (M.D. Ala. 1946); *Mihelich v. F. W. Woolworth Co*., 69 F. Supp. 497 (D. Idaho 1946)). Nor does the mere fact that defendant has hired another to fill the vacated position make it

[7] 1972 U.S. Dist. LEXIS 15054 (M.D. Tenn. February 17, 1972). This case is cited in USERRA's legislative history, quoted above.

[8] Judge Morton was appointed to the court by President Richard M. Nixon and confirmed by the Senate in 1970. He took senior status in 1984 and died in 1998.

unreasonable to require an employer to reinstate a veteran in that position. *Trusteed Funds v. Dacey*, 160 F.2d 413, 420 (1st Cir. 1947); *Salter v. Becker Roofing Co., supra*, at 636.[9]

Q: The LST personnel director told me that there are currently ten positions on the Navy contract that I was working on when I left for military service in 2015. All ten positions are filled, and all ten employees are doing well. The Navy will not permit the creation of an eleventh position for the Navy to fund. The personnel director said that the company is not prepared to displace one of the ten incumbent employees and is not required to do so. What do you say about that?

A: The fact that there is no present vacancy for which you are qualified, that is of like seniority, status, and pay, is not a defense to the employer's unqualified obligation to reemploy you promptly in an appropriate position. The company is required to displace one of the ten incumbents, if that is what is required to reemploy you in an appropriate position.

The United States Court of Appeals for the Federal Circuit[10] has held:

> The department [Department of Veterans Affairs, the employer in the case] first argues that, in this case, Nichols' [Nichols was the returning veteran and the plaintiff] former position was 'unavailable' because it was occupied by another, and thus it was within the department's discretion to place Nichols in an equivalent position. This is incorrect. Nichols' former position is not unavailable because it still exists, even if occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. 'Employers must tailor their workforces to accommodate returning veterans' statutory rights to reemployment. Although such arrangements may produce temporary work dislocations for nonveteran employees, these hardships fall within the contemplation of the Act, which is to be construed liberally to benefit those who 'left private life to serve their country.' *Fishgold v. Sullivan Drydock & Repair Corp*., 328 U.S. 275, 285 (1946).' *Goggin v. Lincoln St. Louis*, 702 F.2d 698, 704 (8th Cir. 1983). Although occupied by Walsh, Nichols' former position is not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him.[11]

USERRA's legislative history includes the following instructive paragraph:

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[9] *Armstrong, supra,* at pages 5-6.

[10] The Federal Circuit is the federal appellate court that sits in Washington, DC and has nationwide jurisdiction over certain kinds of cases, including appeals from the Merit Systems Protection Board (MSPB).

[11] *Nichols v. Department of Veterans Affairs,* 11 F.3d 160, 163 (Fed. Cir. 1993). Nichols was the supervisory chaplain (GS-13) at a VA medical facility when he left the job for military service. When he returned from service, he was reinstated as a GS-13 chaplain at the same facility, but the VA refused to make him the supervisor of the other chaplains at the facility. The MSPB agreed with the VA, but the Federal Circuit reversed, holding that being the supervisor of other chaplains was part of the status to which Nichols was entitled.

> It is also not a sufficient excuse [for the employer not to reemploy the returning veteran in an appropriate position] that another person has been hired to fill the position vacated by the veteran nor that no opening exists at the time of application [for reemployment]. *Davis v. Halifax County School System,* 508 F. Supp. 966, 969 (E.D.N.C. 1981). *See also Fitz v. Board of Education of Port Huron,* 662 F. Supp. 1011, 1015 (E.D. Mich. 1985), *affirmed,* 802 F.2d 457 (6th Cir. 1986); *Anthony v. Basic American Foods,* 600 F. Supp. 352, 357 (N.D. Cal. 1984); *Goggin v. Lincoln St. Louis,* 702 F.2d 698, 709 (8th Cir. 1983).[12]

Q: LST's personnel director told me that the Department of the Navy's contracting officer is very satisfied with the ten LST employees who are currently working on this specific contract, and she said that if LST displaces one of the ten to reemploy me the Navy will terminate the contract with LST. What do you say about that?

A: The Department of the Navy is LST's customer, and customer preference can never be an excuse for an employer to violate an employee protection law.

In 1964, Congress enacted the Civil Rights Act of 1964. Title VII of that Act forbids employment discrimination on the basis of race, color, sex, religion, or national origin. In the years after 1964, automobile dealers (especially in the South) often said, "I would love to hire a Negro [the polite term at the time] car salesman, but my customers would never buy a car from a Negro." The Equal Employment Opportunity Commission and the federal courts firmly rejected that purported defense.

Moreover, if the Department of the Navy, through its contracting officer, interferes with LST compliance with USERRA the Department of the Navy has thereby violated USERRA, and a remedy is available through the Merit Systems Protection Board (MSPB).[13]

Conclusion:

You have a strong case, and you should not accept a position that is inferior to the position you are entitled to, with respect to seniority, status, or pay. If LST carries through on its threat to terminate you at the end of the 60-day "company overhead" period, you should retain a lawyer and sue.

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[12] 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 667 of the 2016 edition of the *Manual.*

[13] *See Silva v. Department of Homeland Security,* 2009 MSPB 189 (Merit Systems Protection Board September 23, 2009). I discuss the *Silva* case in detail in Law Review 0953 (October 2009) and Law Review 0953 Update. The "Silva' is Brigadier General Michael J. Silva, the ROA life member who later served as our National President.