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Important New USERRA Case from the 6th Circuit

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Update on Sam Wright

1.3.2.3—Pension credit for military service time
1.4—USERRA enforcement
1.8—Relationship between USERRA and other laws/policies

***Savage v. Federal Express Corp.,* 2017 U.S. App. LEXIS 8267 (6th Cir. May 10, 2017).**

This is a very recent decision of the United States Court of Appeals for the 6th Circuit, the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee. As is the practice in the federal appellate courts, this case was heard and decided by a panel of three judges. In this case, the three judges were Alice M. Batchelder, Jane B. Stranch, and Bernice B. Donald. All three are active judges of the 6th Circuit. Judge Batchelder was appointed by President George H.W. Bush and confirmed by the Senate in 1991. Judge Stranch and Judge Donald were appointed by President Barack Obama and confirmed in 2010 and 2011.

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[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 by e-mail at SWright@roa.org or by telephone at 800-809-9448, ext. 730. I will provide up to one hour of information without charge. If you need more than that, I will charge a very reasonable hourly rate. If you need a lawyer, I can suggest several well-qualified USERRA lawyers.

Judge Stranch wrote the majority panel decision and was joined by Judge Donald. Judge Batchelder wrote a separate opinion, concurring in part and dissenting in part.

Kenneth E. Savage is a Lieutenant (O-3) in the Navy Reserve and serves as an Aviation Maintenance Officer. On the civilian side, he worked for FedEx as a Senior Aircraft Mechanic at FedEx's Memphis hub from August 2001 (when he was hired) until September 2012 (when he was fired). The September 11 terrorist attacks occurred one month after Savage began his FedEx job, and his civilian job was interrupted by multiple periods of military training and service in the Navy Reserve.[3]

In this case, Savage asserted that FedEx did not fully comply with section 4318[4] of the Uniformed Services Employment and Reemployment Rights Act (USERRA), regarding the civilian pension credit to which Savage was entitled for the periods when he was away from his FedEx job for service in the uniformed services. Savage also claimed that the September 2012 firing violated section 4311[5] of USERRA because the firing was motivated (Savage claimed) by his absences from work because of uniformed service and by his actions to enforce his USERRA rights. For ease of understanding, I will discuss Savage's section 4318 claim in this article and his section 4311 claim in the next article in this "Law Review" series.

Section 4318 of USERRA provides as follows:

- **(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 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.*

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[3] In this case, it was clear and not contested that Savage met the USERRA conditions for reemployment after each period when he was absent from his FedEx job for uniformed service. Please see Law Review 15116 (December 2015) for a detailed discussion of the five conditions.

[4] 38 U.S.C. 4318.

[5] 38 U.S.C. 4311.

- **(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.*

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- **(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.[6]

Under USERRA, a Reserve Component (RC) member like Savage is entitled to an unpaid but job-protected leave of absence from his or her civilian job (federal, state, local, or private sector) for periods of service in the uniformed service, as defined by USERRA.[7] This USERRA right applies to short military training periods, like drill weekends and traditional two-week annual training tours, and it also applies to longer periods of voluntary or involuntary military service.

The employer is not required to pay the RC member for an hour, day, week, month, or year that he or she is away from work for uniformed service, but under section 4318 the employer is required to make payments to the individual's civilian pension account based on the person's *imputed earnings—what he or she would have earned from the civilian employer if he or she had remained continuously employed in the civilian job.*

The employer is not required to make these payments to the individual's pension account during the time that the individual is away from work for uniformed service. This obligation only

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[6] 38 U.S.C. 4318 (emphasis supplied).

[7] USERRA also applies to a person who leaves a civilian job for regular military service in an Active Component of the armed forces, if the person meets the five USERRA conditions.

applies *upon reemployment.* If the individual meets the five USERRA conditions[8] and returns to work, at that point the employer must make payments to the individual's pension plan account.

I have discussed section 4318 of USERRA in many previous "Law Review" articles. Three important recent articles are Law Review 16053 (June 2016), Law Review 16054 (June 2016), and Law Review 16094 (September 2016). Category 1.3.2.3 in our Law Review Subject Index pertains to pension credit for military service time.

In some cases, it is easy to determine how much the individual would have earned in the civilian job if his or her civilian employment had not been interrupted by military service. In other cases, it is not possible to determine the imputed earnings down to the last dollar, but it is possible to come up with a reasonable estimate. In some cases, it is not possible to come up with even a reasonable estimate—the imputed earnings cannot be determined with reasonable certainty.[9]

If the RC service member's imputed earnings (what he or she would have earned from the civilian job but for the military interruption) can be determined with reasonable certainty, the employer's payment obligation will be based on the reasonable estimate of what the individual would have earned.[10] If the imputed earnings cannot be determined with reasonable certainty, the employer's payment obligation will be determined based on the individual's average rate of compensation in the civilian job during the year prior to the military interruption.[11] If the

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[8] The individual must have left a civilian job to perform uniformed service and must have given the employer prior oral or written notice. The individual's cumulative periods of uniformed service, relating to the employer relationship for which the person seeks reemployment, must not have exceeded five years, and certain kinds of service do not count toward the five-year limit. The individual must have been released from the period of service without having received a disqualifying bad discharge from the military. After release from the period of service, the individual must have been timely in reporting back to work or applying for reemployment. Please see Law Review 15116 (December 2015) for a detailed discussion of these conditions. In this case, Savage clearly met the conditions for each uniformed service period.

[9] For example, Joe Smith was hired as a salesman for Cadillacs R Us (CRU) in September 2011. He was paid solely by commission, and his monthly earnings varied greatly from month to month. Smith left his CRU job for military service in January 2012 and was released from active duty a year later. Smith was away from his CRU job for all of calendar year 2012. He met the USERRA conditions and was reemployed by CRU in January 2013. How many Cadillacs would Smith have sold in 2012, and how much would he have earned in commissions, in 2012, if he had remained continuously employed? That figure cannot be estimated with reasonable certainty. Accordingly, the CRU payments to Smith's pension account will be based on Smith's average rate of compensation during his last year of CRU employment before the military interruption. Because Smith was employed by CRU for only four months before the interruption, the employer obligation will be computed based on his average rate of compensation during his entire period of CRU employment before the military interruption. 38 U.S.C. 4318(b)(3)(B).

[10] 38 U.S.C. 4318(b)(3)(A).

[11] 38 U.S.C. 4318(b)(3)(B).

individual was employed by that employer for less than one year before the interruption, the employer's payment obligation will be based on the individual's average rate of compensation during his or her entire employment period with that employer.[12]

In some cases, it is very much to the individual service member's advantage to use the "what I would have earned" estimate rather than the "what I did earn" figure. For example, Mary Jones was on active duty in the Air Force as a pilot for nine years, before she left active duty at the end of 2000. She was hired by Very Large Air Line (VLAL) in January 2001 as a rookie pilot (First Officer). Nine months later, 19 terrorists commandeered four airliners and crashed them into three buildings and a field, killing almost 3000 Americans. The September 11 terrorist attacks led to a pronounced reduction in the demand for commercial air travel.

VLAL and other major airlines (except Southwest Airlines) responded by reducing the number of scheduled flights and furloughing[13] many pilots. In unionized airlines like VLAL, furloughs and recalls from furlough are based on seniority, so the most junior pilots are among the first to be furloughed and the last to be recalled from furlough.

Because she had only nine months of VLAL seniority at the time of the September 11 terrorist attacks, Jones was among the first VLAL pilots furloughed, in October 2001. She did not know when, or even if, she would be recalled by the airline. In January 2003, 15 months after the furlough, Jones volunteered to return to active duty in the Air Force for three years, until January 2006.[14] She gave notice to VLAL by means of a certified letter to the VLAL Chief Pilot. In January 2005, VLAL sent her a letter, advising her that she was being recalled by the airline. She responded to the recall notice by informing the airline's Chief Pilot that she was still on active duty and would be until January 2006.

In January 2006, Jones was released from active duty and promptly applied for reemployment. She returned to work at the airline a few days later. How much is VLAL required to contribute to Jones' pension account based on what she would have earned from the airline but for her Air Force service? If the airline's obligation is computed based on Jones' average rate of compensation during calendar year 2002 (the last year before she returned to active duty in January 2003), there is no payment obligation because Jones had no VLAL compensation during 2002—she was furloughed for the entire year.

In this situation, the airline's payment obligation is based on what Jones would have earned from the airline during the period of her military service—January 2003 to January 2006. The

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[12] Id.

[13] In the airline industry, an airline "furloughs" a pilot when business conditions mandate that the airline employ fewer pilots. In other industries, this situation is called a "layoff."

[14] An individual who has been furloughed or laid off is still an "employee" for USERRA purposes, so long as he or she has a possibility of being recalled by the civilian employer.

amount that she would have earned can be computed by multiplying the number of hours that she would have worked by the hourly rate that she would have received. At a unionized airline like VLAL, it is possible to determine with reasonable certainty both the hourly rate of compensation and the number of hours that Jones would have worked.

At VLAL, Jones' seniority number (based on her VLAL hire date) is X. Bob Williams, who was hired one day after Jones, has a seniority number of X plus 1. Amanda Adams, who was hired one day before Jones, has a seniority number of X minus 1. How many hours did Williams and Adams work during the three-year period of January 2003 to January 2006? And how much were they paid per hour? Those numbers are available in the VLAL personnel records. Using those numbers, it is possible to determine with reasonable certainty what Jones would have earned but for the military interruption.

Savage's situation is different. During his FedEx employment, Savage's earnings varied considerably from month to month. In addition to his regular hourly wage for straight-time scheduled work, he also received overtime pay and shift differential pay. Savage was absent from his FedEx job for uniformed service for 55 discrete periods, mostly short periods of Navy Reserve training. For each of these periods, FedEx and its pension plan administrator need to determine how much Savage would have earned from FedEx but did not earn because of his absence from work for uniformed service. Savage's theory, accepted by the 6th Circuit majority, was that the amount of FedEx earnings could not be determined with reasonable certainty, so for each military period the employer's payment obligation needed to be computed based on Savage's FedEx earnings during the year prior to the military period.

The District Court judge granted FedEx's motion for summary judgment, holding that after discovery there was no material issue of fact and FedEx was entitled to judgment as a matter of law. The 6th Circuit majority disagreed with the District Judge's legal analysis of Savage's section 4318 claim and reversed. This case is not necessarily over. FedEx can ask the 6th Circuit for rehearing en banc. If FedEx makes such a request and the court grants it, there will be new briefs and a new oral argument and a decision by all the active judges (those who have not taken senior status) of the 6th Circuit. If FedEx chooses not to request rehearing en banc, or if the court denies that motion, or if the 6th Circuit grants rehearing en banc and then affirms the decision of the panel majority, FedEx's final step would be to apply to the Supreme Court for a writ of certiorari. If at least four of the nine Justices vote for certiorari, it is granted. In that case, there will be new briefs and a new oral argument in the Supreme Court. If three or fewer Justices vote for certiorari, it is denied, and the decision of the Court of Appeals becomes final. I will keep the readers informed of further developments in this interesting and important case, if there are any further developments.

Savage also challenged the September 2012 FedEx decision to fire him, asserting that the firing violated section 4311 of USERRA. I will address that aspect of the case in the next "Law Review" article in this series.