**LAW REVIEW 17097**[1]
**October 2017**

# The Escalator Does Not Always Ascend

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]
Update on Sam Wright

1.1.1.8—USERRA applies to the Federal Government
1.1.3.3—USERRA applies to National Guard service
1.3.2.2—Continuous accumulation of seniority-escalator principle
1.7—USERRA regulations
1.8—Relationship between USERRA and other laws/policies

**Q:** I am a volunteer ombudsman for the Department of Defense (DOD) organization called "Employer Support of the Guard and Reserve" (ESGR). For many years, I have read and utilized your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

I am working a case involving a young soldier in the Army National Guard—let's call him Private First Class (PFC) Bud Wiser. In January of last year (2016), he started a new job with an intermediate sized company—let's call it Coors Heineken & Schlitz Incorporated or CHSI. In July of 2016, he enlisted in the Army National Guard.

---

[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1500 "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 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. 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 35 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.

Wiser left in December of last year for seven months of Army training, including boot camp. I think that it is clear beyond any doubt that he meets the five USERRA conditions for reemployment. I have read and reread your Law Review 15116 (December 2015), concerning the USERRA eligibility criteria.

Wiser gave CHSI three months of notice, before he left his job in December to report to boot camp. As I suggested, he sent a certified letter to the company's personnel department. He retained a copy of the letter, and he has paperwork from the United States Postal Service to show that he sent the letter and that it was received by the company. It is my understanding that military training like this does not count toward PFC Wiser's five-year limit with CHSI, but even if this period counts he is not close to exceeding the limit. He served honorably and successfully completed the training, and he is now a traditional National Guard member. He applied for reemployment at CHSI the day after he returned home from the Army, well within the 90-day deadline to apply for reemployment.

Before he left his civilian job to report to boot camp, Wiser was being paid $18 per hour and was working 40-hour weeks at CHSI. He occasionally worked more than 40 hours per week, and when he did that he was paid $27 per hour for the overtime. When Wiser returned to work in August 2017, he was paid $20 per hour, but he has only been working 24-32 hours per week, and there has been no overtime.

Although he is now being paid more per hour, his earnings are substantially less, because he is now working on a part-time schedule. He has made clear to the company that he wants to work full-time, that is 40 hours per week or more. Have Wiser's USERRA rights been violated?

**Answer, bottom line up front:**

Because Wiser met the five USERRA conditions, the company was required to reinstate him in *the position that he would have attained if he had been continuously employed*, or at the employer's option in another position, for which he is qualified, that is of like seniority, status, and pay.[3] The position that Wiser would have attained if continuously employed is not necessarily equal to or better than the position that he left. USERRA does not protect the returning veteran from a bad thing (like a layoff or a reduction in hours) that *clearly would have happened anyway* even if the veteran's civilian job had not been interrupted by military service.

---

[3] 38 U.S.C. 4313(a)(2)(A). The citation refers to section 4313(a)(2)(A) of title 38 of the United States Code.

**Explanation:**
As I have explained in Law Review 15067 (August 2015) and many other articles, Congress enacted USERRA[4] in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA).[5] There have been 17 Supreme Court cases about the reemployment statute, including 16 about the VRRA and one (so far) about USERRA. I invite the reader's attention to Category 10.1 in our Law Review Subject Index. You will find a case note about each of these 17 decisions.

In its first case construing the VRRA, the Supreme Court enunciated the "escalator principle" when it held: "[The returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war."[6] The escalator principle is codified in sections 4313(a)(2)(A) and 4316(a) of USERRA.[7]

This escalator can descend as well as ascend. The pertinent section of the Department of Labor (DOL) USERRA Regulation reads as follows:

> **Can the application of the escalator principle result in adverse consequences when the employee is reemployed?**
>
> - Yes. The Act does not prohibit lawful adverse job consequences that result from the employee's restoration on the seniority ladder. Depending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated. For example, if an employee's seniority or job classification would have resulted in the employee being laid off during the period of service, and the layoff continued after the date of reemployment, reemployment would reinstate the employee to layoff status. Similarly, the status of the reemployment position requires the employer to assess what would have happened to such factors as the employee's opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he or she had remained continuously employed. The reemployment position may involve transfer to another shift or location, more or less strenuous working

---

4 Public Law 103-353, 108 Stat. 3149. The citation means that USERRA was the 353rd new Public Law enacted during the 103rd Congress (1993-94). You can find USERRA, in the form that it was enacted in 1994, in Volume 108 of *Statutes at Large*, starting on page 3149. USERRA is codified at 38 U.S.C. 4301-35.

5 The VRRA was originally enacted in 1940, as part of the Selective Training and Service Act (STSA), Public Law 76-783, 54 Stat. 885.

6 *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946). The citation means that you can find this case in Volume 328 of *United States Reports*, starting at page 275. The two sentences quoted can be found at the bottom of page 284 and the top of page 285. I discuss *Fishgold* in detail in Law Review 0803 (January 2008).

7 38 U.S.C. 4313(a)(2)(A), 4316(a).

> conditions, or changed opportunities for advancement, depending upon the application of the escalator principle.[8]

If the evidence shows that other CHSI employees who were hired before Wiser was hired have been reduced from full-time to part-time status during the time that Wiser was away from work for military service, it is reasonable to infer that Wiser also would have gone to part-time status, even if he had not been away from work for service. In that circumstance, reducing Wiser to part-time status is not a violation of USERRA.

**Q:** In Law Review 17028 (April 2017), you wrote that federal employees who leave their jobs for military service are exempted from the "descending escalator"—that the federal employee who is reemployed under USERRA is entitled upon reemployment to a job that is at least as good as the job that he or she left. Why is PFC Bud Wiser not entitled to that same consideration?

**A:** USERRA's first section expresses the "sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter [USERRA]."[9] Section 4302(a) of USERRA[10] makes it clear that an employer can always do more for service members and veterans than USERRA requires.

Section 4331(a) of USERRA[11] gives DOL the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. Section 4331(b)(1)[12] gives the United States Office of Personnel Management (OPM) the authority to promulgate regulations about the application of USERRA to federal executive agencies as employers. The pertinent subsection of the OPM regulation is as follows:

> *An employee may not be demoted or separated (other than military separation) while performing duty with the uniformed services except for cause*. (Reduction in force is not considered "for cause" under this subpart.) He or she is not a "competing employee" under § 351.404 of this chapter. If the employee's position is abolished during such absence, the agency must reassign the employee to another position of like status, and pay.[13]

Bud Wiser is not a federal employee. The DOL USERRA regulation applies to him, not the OPM regulation for federal employees. Wiser is not exempted from the application of a descending escalator. If Wiser would have been downgraded from full-time to part-time, even if he had not been away from work for service, reemploying him as a part-timer is not a violation of USERRA.

---

8 20 C.F.R. 1002.194 (bold question in original).

9 38 U.S.C 4301(b).

10 38 U.S.C. 4302(a).

11 38 U.S.C. 4331(a).

12 38 U.S.C. 4331(b)(1).

13 5 C.F.R. 353.209(a) (emphasis supplied).