

LAW REVIEW 18030¹

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Great New Federal Circuit Case about Paid Military Leave for Federal Employees

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[\(Update on Sam Wright\)](#)

1.1.1.8—USERRA applies to the Federal Government

1.2—USERRA forbids discrimination

1.8—Relationship between USERRA and other laws/policies

2.0—Paid military leave for government employees

O'Farrell v. Department of Defense, 882 F.3d 1080 (Fed. Cir. 2018).

This is a very recent (2/9/2018) decision of the United States Court of Appeals for the Federal Circuit. 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 final decisions of the Merit Systems Protection Board (MSPB). The citation means that you can find this court decision in Volume 882 of *Federal Reporter Third Series*, starting on page 1080. In Law Review 18017 (February 2018), I describe in detail the statutory basis for the MSPB, the kinds of

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1600 "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, 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.

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 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.

cases it adjudicates, and the way that the three MSPB members are nominated by the President with Senate confirmation.

Statutes that are relevant to this case

Under section 6323 of title 5 of the United States Code, federal civilian employees who are Reserve Component (RC)³ members are entitled to *paid* military leave. Here is the entire text of that section:

Military leave; Reserves and National Guardsmen

(a)

(1) Subject to paragraph (2) of this subsection, an employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, is entitled to leave without loss in pay, time, or performance or efficiency rating for active duty, inactive-duty training (as defined in section 101 of title 37), funeral honors duty (as described in section 12503 of title 10 and section 115 of title 32), or engaging in field or coast defense training under sections 502-505 of title 32 as a Reserve of the armed forces or member of the National Guard. Leave under this subsection accrues for an employee or individual at the rate of 15 days per fiscal year and, to the extent that it is not used in a fiscal year, accumulates for use in the succeeding fiscal year until it totals 15 days at the beginning of a fiscal year.

(2) In the case of an employee or individual employed on a part-time career employment basis (as defined in section 3401(2) of this title), the rate at which leave accrues under this subsection shall be a percentage of the rate prescribed under paragraph (1) which is determined by dividing 40 into the number of hours in the regularly scheduled workweek of that employee or individual during that fiscal year.

(3) The minimum charge for leave under this subsection is one hour, and additional charges are in multiples thereof.

(b) Except as provided by section 5519 of this title, an employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, who--

(1) is a member of a Reserve component of the Armed Forces, as described in section 10101 of title 10, or the National Guard, as described in section 101 of title 32; and
(2)(A) performs, for the purpose of providing military aid to enforce the law or for the purpose of providing assistance to civil authorities in the protection or saving of life or property or the prevention of injury--

- **(i)** Federal service under section 331, 332, 333, or 12406 of title 10, or other provision of law, as applicable, or

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

- (ii) full-time military service for his State, the District of Columbia, the Commonwealth of Puerto Rico, or a territory of the United States; or
- (B) *performs full-time military service as a result of a call or order to active duty in support of a contingency operation as defined in section 101(a)(13) of title 10; is entitled, during and because of such service, to leave without loss of, or reduction in, pay, leave to which he otherwise is entitled, credit for time or service, or performance or efficiency rating. Leave granted by this subsection shall not exceed 22 workdays in a calendar year.* Upon the request of an employee, the period for which an employee is absent to perform service described in paragraph (2) may be charged to the employee's accrued annual leave or to compensatory time available to the employee instead of being charged as leave to which the employee is entitled under this subsection. The period of absence may not be charged to sick leave.
- (c) An employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, who is a member of the National Guard of the District of Columbia, is entitled to leave without loss in pay or time for each day of a parade or encampment ordered or authorized under title 39, District of Columbia Code. This subsection covers each day of service the National Guard, or a portion thereof, is ordered to perform by the commanding general.
- (d)
 - (1) A military reserve technician described in section 8401(30) is entitled at such person's request to leave without loss of, or reduction in, pay, leave to which such person is otherwise entitled, credit for time or service, or performance or efficiency rating for each day, not to exceed 44 workdays in a calendar year, in which such person is on active duty without pay, as authorized pursuant to section 12315 of title 10, under section 12301(b) or 12301(d) of title 10 for participation in operations outside the United States, its territories and possessions.
 - (2) An employee who requests annual leave or compensatory time to which the employee is otherwise entitled, for a period during which the employee would have been entitled upon request to leave under this subsection, may be granted such annual leave or compensatory time without regard to this section or section 5519.⁴

The basic entitlement to 15 days per federal fiscal year of *paid* military leave dates from 8/10/1956.⁵ The provision in section 6323(b)(2)(B), providing for an additional 22 days of paid military leave for a federal employee who "performs full-time service as a result of an order or call to active duty in support of a contingency operation as defined in section 101(a)(13) of title 10" dates from 11/24/2003.⁶

Section 101(a)(13) of title 10 reads as follows:

⁴ 5 U.S.C. 6323 (emphasis supplied).

⁵ Section 13, Public Law 85-861, 70A Stat. 632.

⁶ Section 1113(a) of Public Law 108-136, 117 Stat. 1392.

The term "contingency operation" means a military operation that--

- (A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or
- (B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of this title, chapter 15 of this title, section 712 of title 14, or any other provision of law during a war or during a national emergency declared by the President or Congress.⁷

Section 4311 of the Uniformed Services Employment and Reemployment Rights Act (USERRA)⁸ makes it unlawful for an employer (federal, state, local, or private sector) to deny a person a "benefit of employment" (or initial employment, reemployment, retention in employment, or a promotion) on the basis of the person's membership in a uniformed service, application to join a uniformed service, performance of uniformed service, or application or obligation to perform service. The term "benefit of employment" is broadly defined by section 4303(2) of USERRA.⁹

The Federal Circuit has held that paid military leave under section 6323 of title 5 is a "benefit of employment" for USERRA purposes.¹⁰ This means that if the federal employee's claim is that he or she has been wrongfully denied paid military leave, the USERRA enforcement mechanism is the proper way to adjudicate such a claim. USERRA's provision for enforcement with respect to federal executive agencies, as employers, is set forth in section 4324, as follows:

Enforcement of rights with respect to Federal executive agencies

- (a)
 - (1) A person who receives from the Secretary a notification pursuant to section 4322(e) may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board. Not later than 60 days after the date the Secretary receives such a request, the Secretary shall refer the complaint to the Office of Special Counsel established by section 1211 of title 5.
 - (2) ▪ (A) If the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred under paragraph (1) is entitled to the rights or benefits sought, the Special Counsel (upon the request of the person submitting the complaint) may appear on behalf of, and act as attorney for, the person and initiate an action regarding such complaint before the Merit Systems Protection Board.
 - (B) Not later than 60 days after the date the Special Counsel receives a referral under paragraph (1), the Special Counsel shall-

⁷ 10 U.S.C. 101(a)(13) (emphasis supplied).

⁸ 38 U.S.C. 4311.

⁹ 38 U.S.C. 4303(2). Please see Law Review 18012 (January 2018) for a detailed discussion of this definition.

¹⁰ *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003).

- (i) make a decision whether to represent a person before the Merit Systems Protection Board under subparagraph (A); and
- (ii) notify such person in writing of such decision.

(b) A person may submit a complaint against a Federal executive agency or the Office of Personnel Management under this subchapter directly to the Merit Systems Protection Board if that person--

- (1) has chosen not to apply to the Secretary for assistance under section 4322(a);
- (2) has received a notification from the Secretary under section 4322(e);
- (3) has chosen not to be represented before the Board by the Special Counsel pursuant to subsection (a)(2)(A); or
- (4) has received a notification of a decision from the Special Counsel under subsection (a)(2)(B) declining to initiate an action and represent the person before the Merit Systems Protection Board.

(c)

- (1) The Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to subsection (a)(2)(A) or (b), without regard as to whether the complaint accrued before, on, or after October 13, 1994. A person who seeks a hearing or adjudication by submitting such a complaint under this paragraph may be represented at such hearing or adjudication in accordance with the rules of the Board.
- (2) If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.
- (3) Any compensation received by a person pursuant to an order under paragraph (2) shall be in addition to any other right or benefit provided for by this chapter and shall not diminish any such right or benefit.
- (4) If the Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that such person is entitled to an order referred to in paragraph (2), the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.

(d)

- (1) A person adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board under subsection (c) may petition the United States Court of Appeals for the Federal Circuit to review the final order or decision. Such petition and review shall be in accordance with the procedures set forth in section 7703 of title 5.
- (2) Such person may be represented in the Federal Circuit proceeding by the Special Counsel unless the person was not represented by the Special Counsel before the Merit Systems Protection Board regarding such order or decision.¹¹

¹¹ 38 U.S.C. 4324.

Facts pertaining to O'Farrell

Michael J. O'Farrell, Jr. was (until his recent retirement) a judge advocate in the Army Reserve. On the civilian side, he was a civil service attorney for the Defense Logistics Agency (DLA), a Department of Defense organization. In early 2013, another Army Reservist (not named in the court decision) was mobilized and deployed to Afghanistan. The other reservist was an attorney, like O'Farrell, and was employed as an attorney for the Naval Surface Warfare Center (NSWC). The other reservist left his NSWC job to report to active duty, and the decision was made to fill that other reservist's civilian job on an interim basis with a mobilized reservist attorney. This was an opportunity to volunteer, and O'Farrell volunteered and was selected for this assignment.

On 4/17/2013, O'Farrell received orders directing him to report to the NSWC on 4/22/2013, and he reported as ordered. His orders directed him to serve as the legal counsel for NSWC as "operational support" of the Afghanistan mission. O'Farrell served at NSWC, on active duty, until the end of the fiscal year (9/30/2013), when he left active duty, returned home, and reported back promptly to his DLA civilian job.

By 8/26/2013, O'Farrell had exhausted his 15 days of paid military leave under section 6323(a) and most of his accrued annual leave and advanced annual leave. Because he wanted to avoid going on military leave-without-pay (LWOP), he requested the additional 22 days of paid military leave under section 6323(b), asserting that his service at NSWC was in support of the contingency mission (Afghanistan) and that he was eligible for the 22 additional days of military leave.

O'Farrell's 2013 duty at NSWC was under orders that cited section 12301(d) of title 10. That subsection provides as follows:

At any time, an authority designated by the Secretary concerned [the Service Secretary] may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, *with the consent of that member*. However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriate authority of the State concerned.¹²

DLA declined O'Farrell's request for the additional 22 days of paid military leave under section 6323(b) and this case resulted.

Proceedings at the MSPB

¹² 10 U.S.C. 12301(d) (emphasis supplied).

As is always the case in MSPB cases, the case began before an Administrative Judge (AJ) of the MSPB. The AJ conducted a hearing and made findings of fact and conclusions of law. The AJ found as a fact that O'Farrell's active duty service was in indirect support of the Afghanistan operation, in that O'Farrell was called to active duty as a backfill for another NSWC employee who was also a reservist and who was called to active duty and deployed to Afghanistan. The AJ also found, as a question of law, that indirect support is not sufficient and that an RC member federal employee must serve on active duty in *direct* support of the contingency operation, for the employee to be eligible for the 22 additional days of paid military leave under section 6323(b).¹³

O'Farrell appealed to the MSPB itself. At the time, one of the three MSPB positions was vacant. One member voted to affirm the AJ's decision, and one voted to reverse the AJ's decision.¹⁴ The MSPB's rules provide that when the board's members are equally divided, the decision of the AJ becomes the decision of the board.

O'Farrell appeals to the Federal Circuit

O'Farrell filed a timely appeal with the United States Court of Appeals for the Federal Circuit. As with all cases in the federal circuit courts, the case was assigned to a panel of three judges. In this case, the three judges were Judge Timothy B. Dyk, Judge Kimberly Ann Moore, and Judge Evan J. Wallach. Judge Wallach wrote the decision and the other two judges joined in a unanimous panel decision reversing the MSPB.

The decision held: "Contrary to the Government's assertions, ... section 6323(b) imposes no requirement that the service member provide direct, as opposed to indirect, support of the contingency operation." Since section 6323 does not define the term "support," the court looked to dictionary definitions and found that the word support connotes indirect as well as direct support.

The court also pointed out that other sections of title 5 of the United States Code require "direct support" as a condition precedent to some benefit or advantage, but section 6323(b) only requires "support." It is reasonable to infer that if Congress had intended that only direct support of a contingency operation would qualify an employee for the additional 22 days of paid military leave, it would have included the term "direct support" in section 6323(b), quoting a recent Supreme Court decision:

¹³ *O'Farrell v. Department of Defense*, No. DE-4324-14-0013-I-1, 2016 MSPB LEXIS 1401, 2016 WL 1014371 (MSPB March 8, 2016).

¹⁴ *O'Farrell v. Department of Defense*, 123 MSPR 590, 591 (2016).

We [the Supreme Court] have long held that where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion.¹⁵

The Federal Circuit decision also quotes a Supreme Court reemployment rights case holding that: "Provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor."¹⁶

This case is not necessarily over.

As a next step, the Federal Government can ask the Federal Circuit for a rehearing en banc. All the active judges¹⁷ of the Federal Circuit get to vote on granting or denying rehearing en banc. If a majority vote to grant that motion, there will be new briefs and a new oral argument before all the active judges of the Federal Circuit. I think that it is unlikely that the Federal Circuit would grant rehearing en banc because there was no dissent among the three-judge panel.

As a final step, the Federal Government can ask the Supreme Court for certiorari (discretionary review). If four or more of the nine Justices vote for certiorari in a conference to consider certiorari petitions, there will be new briefs and oral argument at the Supreme Court. Certiorari is granted in only about one percent of the cases where it is sought, but the Federal Government has much better odds when it seeks certiorari to review a circuit court decision.

We will keep the readers informed of further developments in this important case, if there are any further developments.

I want to hear from affected persons.

There are probably hundreds of federal employees who have requested the additional 22 days of paid military leave and whose requests were denied on the basis that they provided only indirect, rather than direct, support for contingency operations since 2003, when Congress amended section 6323 to provide for the additional 22 days of paid leave in this situation. If you are affected by this issue, I want to hear from you. You can reach me, through the Reserve Officers Association (ROA), at 800-809-9448, extension 730, or by e-mail at SWright@roa.org.

I am also available to answer more general questions about USERRA and other laws that are particularly pertinent to those who serve our country in uniform, but please understand that I

¹⁵ *Sebelius v. Cloer*, 569 U.S. 369, 378 (2013).

¹⁶ *King v. St. Vincent Hospital*, 502 U.S. 215, 220 n. 9 (1991).

¹⁷ The active judges are those who have not taken senior status.

am no longer employed by ROA and I no longer live in the DC metropolitan area. I may not be able to respond to your call or e-mail on the same day.