

**LAW REVIEW 18034<sup>1</sup>**

**April 2018**

**Right to Civilian Pension Credit for Military Service  
Prior to the Enactment of USERRA in 1994**

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

- 1.1.3.1—USERRA applies to voluntary service
- 1.3.2.3—Pension credit for military service time
- 1.8—Relationship between USERRA and other laws/policies

**Q: I am a veteran of the United States Army, and I have read with great interest some of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and civilian pension systems. I was particularly interested in Law Review 13137 (October 2013). I am wondering how USERRA applies to my situation.**

**In January 1970, when I was a junior in high school, I began working part-time for our local telephone company. I became a full-time employee in June 1971, after I graduated from high school. I was drafted, and I served on active duty for exactly two years, from January 1972 until January 1974. After I was honorably discharged from the Army, I immediately sought reemployment at the phone company. The company initially denied my request for**

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<sup>1</sup> I invite the reader’s attention to [www.roa.org/lawcenter](http://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.

<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 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](mailto:SWright@roa.org).

reemployment, but after I contacted the United States Department of Labor (DOL) the company put me back to work. I remained at the company until January 2018, when I retired.

If my two years of Army service count toward my telephone company pension, I have 48 years of company service, from January 1970 until January 2018. If my two Army years do not count, I have only 46 years of company service. The additional two years of company service entitle me to an additional \$180 per month in my telephone company pension payment. The company has a traditional pension plan in which the amount of the retiree's monthly retirement check is determined by a formula that includes the individual's total number of years of company service.

I think that USERRA entitles me to telephone company pension credit for the two years that I was away from my telephone company job for Army service. The company's lawyer and pension administrator insist that I am not entitled to this benefit. What do you think?

#### **Answer bottom line up front**

You are entitled to pension credit for your two Army years, but not under USERRA, which was enacted in 1994. You are entitled to the pension credit under the Veterans' Reemployment Rights Act (VRRA), which was enacted in 1940.

#### **Explanation**

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA<sup>3</sup> and President Bill Clinton signed it into law on 10/13/1994. USERRA was a long-overdue rewrite of the VRRA, which was originally enacted in 1940, as part of the Selective Training and Service Act.<sup>4</sup> The VRRA, not USERRA, applies to a person who completed his or her military service and returned to the pre-service civilian job prior to the enactment of USERRA, regardless of when the lawsuit is brought.<sup>5</sup>

It seems clear that you met the VRRA eligibility criteria and were entitled to reemployment in 1974, when you were honorably discharged from the Army and made a timely application for reemployment at the local telephone company. You left your job to perform military service and served honorably.

Unlike USERRA, the VRRA did not specifically mention pension plans and the entitlement of the returning veteran to be treated as if continuously employed in the civilian job in determining eligibility for and the amount of civilian pension payments. In its first case construing the VRRA,

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<sup>3</sup> Public Law 103-353, 108 Stat. 3149.

<sup>4</sup> Public Law 76-783, 54 Stat. 885.

<sup>5</sup> *Bowlds v. General Motors Manufacturing Division of the General Motors Corp.*, 411 F.3d 808, 811 (7<sup>th</sup> Cir. 2005).

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.”<sup>6</sup>

Three decades later, the Supreme Court applied the escalator principle to benefits under a defined benefit pension plan.<sup>7</sup> Mr. Davis was employed by the Alabama Power Company from 1936 to 1971, but his career with the company was interrupted by 30 months of military service, from March 1943 until September 1945, when he was honorably discharged at the end of World War II. While he was away at war, the company established a traditional pension plan in 1943, and the plan rewarded work for the company both before and after the plan was established.

When Mr. Davis retired from the company in 1971, he received a pension based on continuous service from 1945 to 1971. The Supreme Court held that under the VRRA’s escalator principle Mr. Davis was entitled to computation of his pension based on continuous service from 1936 to 1971—that his 30 months of military service did not interrupt his continuous accumulation of seniority for pension purposes. For Mr. Davis, crediting his military service time meant an additional \$18 per month in his pension check.<sup>8</sup>

It does not matter that the Supreme Court decided *Alabama Power Co.* three years after you returned from military service and returned to the telephone company in 1974. The Supreme Court did not establish a new rule in 1977. *Alabama Power Co.* clarified what the law had always been.

**Q: The telephone company’s General Counsel has stated that I am too late. He says that if I wanted military service credit for my 24 months of active duty I should have raised the issue in 1974, when I was honorably discharged from the Army and seeking reemployment with the company. In 1974, I was only 22 years old and not thinking about retirement—at that time I had no idea that I would remain with the company for another 44 years. I just wanted my job back, because I was unemployed after I left active duty. And the company did not exactly welcome me back with open arms. I had to bring in the Department of Labor just to get my job back.**

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<sup>6</sup> *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946).

<sup>7</sup> *Alabama Power Co. v. Davis*, 431 U.S. 581 (1977). A defined benefit plan is a traditional pension plan, like your plan at the telephone company. In a defined benefit plan, the employer is defining (guaranteeing) a specific retirement benefit, typically including the number of years of company service and the highest company position or earnings attained. A defined contribution plan is different. In a defined contribution plan, the employer is defining only the contributions that the employer will make, and those employer contributions may or may not be matched by employee contributions. In a defined contribution plan, but not a defined benefit plan, there is an account for each employee and retiree. In a defined contribution plan, the amount that the retiree will receive is determined by the amount of money deposited in his or her account during the working years and the performance of the investments during the working and retirement years. I discuss these matters in detail in Law Review 09015 (April 2009).

<sup>8</sup> You have told me that in your case crediting your 24 months of military service will result in an additional \$180 per month for you, or exactly ten times the amount at issue for Mr. Davis. That is about right, because Mr. Davis retired from his career during your two-year military service, almost half a century ago.

## **What do you think about the General Counsel's assertion that I am too late?**

**A:** The General Counsel is wrong. The VRRA never had a statute of limitations, and in 1974 it was amended to make clear that state statutes of limitations should not be applied to VRRA cases.<sup>9</sup> Moreover, your claim about pension credit did not accrue until February 2018, when you received your first pension check and it was short \$180 because your 1972-74 military service was not credited. Even if there were a statute of limitations applicable here, it has not expired.

Moreover, it was not your responsibility, in 1974, to explain to the company its obligations under the VRRA. You were only required to make a timely application for reemployment, and you did that. It was the company's responsibility to research and understand its legal obligations under federal law.

Having said that, let me add that it would be prudent for returning service members, their lawyers, and DOL to assert specific statutory entitlements as part of the reemployment process. Proving a case in 1974, when witnesses are still alive, memories are still fresh, and documents can still be found, is a lot easier than proving the case in 2018, when witnesses have died, memories have dimmed, and documents cannot be found. Fortunately, in your case you have retained all the documents that you need to prove your case.

**Q: My good friend Mary Jones is almost exactly my age, and she went to work, with me, for the telephone company in 1970. In 1971, she graduated from high school and voluntarily enlisted in the Army. She served on active duty for exactly four years, from 10/1/1971 until 9/30/1975, when she was honorably discharged. She made a timely application for reemployment and returned to work in November 1975. She will be retiring from the telephone company very soon.**

### **How does the VRRA apply to Mary's situation?**

**A:** Like USERRA, the VRRA applies to *voluntary as well as involuntary service*. It appears that Mary's service was within the VRRA's four-year limit and that she met the VRRA eligibility criteria in 1975. Mary is entitled to telephone company pension credit for her four years of active duty service.

### **UPDATE—APRIL 2018**

After reading this article, the employer and the pension plan administrator agreed to credit this individual with his two years of Army active duty, from 1972 to 1974, in computing the amount of his monthly pension check. This matter has been resolved.

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<sup>9</sup> On 12/3/1974, President Gerald Ford signed into law the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA), Public Law 93-508, 88 Stat. 1593. VEVRAA moved the VRRA from title 50 of the United States Code to title 38, and it made substantive amendments to the law, including adding the provision that state statutes of limitations should not be applied in reemployment rights cases.