

Does USERRA Have a Statute of Limitations?

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Q: I recently retired from the Army Reserve as a Lieutenant Colonel, and I am a life 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).

What is a statute of limitations? Does USERRA have a statute of limitations?

A: A statute of limitations is a rule providing a deadline for a person claiming rights to file a lawsuit or file a claim in writing with a government agency. Today, there are statutes of limitations for almost all claims. Some statutes of limitations are very short—like 30 days. Do not sleep on your rights. “You snooze you lose” is the general rule.

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 (VRRRA—the 1940 version of the federal reemployment statute) for 36 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 VRRRA 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 VRRRA 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.

Let us say that I am crossing the street, in the crosswalk, with a walk light. You are speeding and texting while driving, and you have been drinking and have a blood alcohol level twice the legal limit. You hit me in the crosswalk, causing me serious bodily injury.

Let us say that in the state where this happens the statute of limitations for claims of this kind is two years. For whatever reason, I wait two years and one day to file suit against you. My suit will be dismissed because it was filed after the running of the statute of limitations, despite the overwhelming evidence that you were at fault in this accident.

When Congress enacts a statute creating a cause of action,³ it generally includes a statute of limitations. In 1990, Congress enacted a default statute of limitations to cover situations wherein Congress omits a statute of limitations in a new enactment: “Except as otherwise provided by law, a civil action arising under an act of Congress enacted after the date of enactment of this section [December 1, 1990] may not be commenced later than four years after the cause of action accrues.”⁴

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA and President Bill Clinton signed it into law on 10/13/1994. USERRA was a long-overdue update and rewrite of the Veterans’ Reemployment Rights Act (VRRRA), which was originally enacted in 1940. Neither the VRRRA nor USERRA has ever had its own statute of limitations.

On December 3, 1974 President Gerald Ford signed into law the Vietnam Era Veterans Readjustment Assistance Act (VEVRRA).⁵ VEVRRA made some important substantive changes to the VRRRA and moved it from title 50 of the United States Code (war and national defense) to title 38 (veterans’ benefits). One of the substantive changes was to add a provision that state statutes of limitations should not be applied to VRRRA claims. When Congress enacted USERRA in 1994, that provision was carried over unchanged.

After the enactment of USERRA in 1994, it was held that the four-year default statute of limitations under section 1658(a) of title 28 of the United States Code applied to USERRA claims. That was the case until October 10, 2008, when Congress enacted section 4327(b) of USERRA. That subsection provides: “If any person seeks to file a complaint or claim with the Secretary [of Labor], the Merit Systems Protection Board,⁶ or a Federal or State court under this

³ A cause of action creates a substantive right and authorizes persons whose rights have been violated to sue to enforce the right.

⁴ 28 U.S.C. 1658(a). The citation is to subsection (a) of section 1658 of title 28 of the United States Code.

⁵ Public Law 93-508, 88 Stat. 1593.

⁶ Under section 4324 of USERRA, 38 U.S.C. 4324, USERRA complaints against federal executive agencies, as employers, are adjudicated by the Merit Systems Protection Board rather than a court.

chapter [USERRA] alleging a violation of this chapter, *there shall be no limit on the period [of time] for filing the complaint or claim.*”⁷

The “no statute of limitations” rule established by section 4327(b) of USERRA applies to causes of action that accrued on or after October 10, 2008, when Congress enacted section 4327 of USERRA. The rule is not retroactive.⁸

Q: I was called to active duty for one year, from January 2008 to January 2009. I left my job at Coors Heineken & Schlitz Incorporated (CHSI), where I had worked since January 2004, when I was called to the colors. I have read and reread your Law Review 15116 (December 2015), and I met the five USERRA conditions for reemployment in January 2009. I left my civilian job to perform uniformed service and gave prior oral and written notice to the employer. I did not exceed the cumulative five-year limit on the duration of my periods of uniformed service, with respect to my employer relationship with CHSI, and since I was called to active duty involuntarily my 2008-09 active duty period does not count toward my five-year limit.⁹ I served honorably and did not receive a disqualifying bad discharge from the Army. After I was released from active duty in January 2009, I applied for reemployment almost immediately, and well within the 90-day deadline.¹⁰

CHSI reemployed me in January 2009, but the company did not give me the pay raise that I would have received, with reasonable certainty, if I had remained continuously employed during all of calendar year 2008. At CHSI, each employee receives a pay raise each year, based on having achieved another year of CHSI employment. Each pay raise is computed on a percentage basis. Not receiving the 2008 pay raise in January 2009 did not seem like a big deal at the time, and I was just glad to get my job back. But each annual pay raise after 2009 is less than it should have been because I never received the 2008 pay raise. My sister the mathematics teacher pointed out to me that because of the “magic of compound interest” the pay that I have lost in the last decade is quite substantial, and the amount keeps adding up each year.

⁷ 38 U.S.C. 4327(b) (emphasis supplied). Section 4327 was added to USERRA by Public Law 110-389, Title III, section 311(f)(1), signed into law by President George W. Bush on October 10, 2008, 122 Stat. 4163. It should be noted that the “no statute of limitations” rule established by section 4327(b) exempts you from a deadline for filing your lawsuit, but it does not exempt you from a deadline established by the judge or the Federal Rules of Civil Procedure, after you have filed your lawsuit.

⁸ See *Middleton v. City of Chicago*, 578 F.3d 655, 662-65 (7th Cir. 2009). This is a decision of the United States Court of Appeals for the 7th Circuit, the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin. The citation means that you can find the *Middleton* case in Volume 578 of *Federal Reporter Third Series*, starting on page 655. The discussion of the statute of limitations issue is at pages 662-65. I discuss the *Middleton* case in detail in Law Review 09048.

⁹ Please see Law Review 16043 (May 2016).

¹⁰ 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).

When I was reemployed in January 2009, was I entitled to the 2008 pay raise that I would have received if I had not been called to active duty in January 2008? If so, when did my cause of action accrue? Is my USERRA claim barred by the four-year statute of limitations in 28 U.S.C. 1658(a)?

A: Because you met the five USERRA conditions in January 2009, you were entitled to prompt reemployment with the seniority, status, and rate of pay that you *would have received if you had been continuously employed*.¹¹ Thus, you were entitled to the 2008 pay raise, provided you can show that it is reasonably certain (not necessarily absolutely certain) that you would have received it if you had not been called to active duty.

A cause of action accrues when the potential plaintiff realizes or in the exercise of due diligence should realize that his or her rights have been violated. Your cause of action accrued in January 2009, when you were released from active duty and reemployed with an insufficient rate of pay, not in January 2008, when you were called to active duty. Because your claim accrued after October 10, 2008, the “no statute of limitations” rule of section 4327(b) applies to your case. Your claim is not time-barred.¹²

Q: My good friend Joe Smith was also hired by CHSI in January 2004. Like me, Joe is an Army reservist. Joe was called to active duty for a year, from January 2007 to January 2008. Joe was reemployed by CHSI in January 2008, but he was denied the pay raise that he should have received for calendar year 2007. How does the statute of limitations work in Joe’s case?

A: Joe’s claim accrued in January 2008, when he was reemployed at an insufficient rate of pay. Accordingly, it can be argued that the four-year default statute of limitations under section 1658(a) applies to Joe’s case. But it can also be argued that the four-year statute of limitations had not expired in Joe’s case at the time section 4327(b) was enacted in October 2008. Thus, Joe’s case was still “alive” in October 2008 when Congress enacted section 4327(b), and Joe’s case can still be brought.

In the *Middleton* case, the plaintiff’s case was already “dead” based on the passage of four years after the claim accrued and before October 10, 2008. The 7th Circuit held (probably correctly) that the enactment of section 4327(b) in 2008 did not “resurrect” a claim that was already “dead.” The law remains uncertain as it applies to a person in Joe’s situation.

¹¹ 38 U.S.C. 4313(a), 4316(a).

¹² If you had contacted me in 2009, I would have advised you to assert your claim at that time and not to wait. You have the burden of proof to show that you met the five USERRA conditions in 2009 and that the rate of pay at which you were reemployed was less than what it would have been if you had remained continuously employed instead of going on active duty. Proving your case now, almost a decade later, may be more difficult, because memories have dimmed, witnesses have died or otherwise become unavailable, and records have been lost or destroyed. My advice is always to retain counsel and file suit sooner rather than later.