

LAW REVIEW¹ 18068

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Is it too Late To Sue Blockbuster?

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Q: I am a Lieutenant Commander in the Navy Reserve Judge Advocate General's Corps and 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).

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. For 42 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also 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 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 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.

Recently, at the Naval Operational Support Center (NOSC) where I drill, I met a Navy Reserve petty officer—let's call him Joe Smith. He told me that he graduated from high school in 2005 and immediately started working full-time at a Blockbuster Video Store in the city where Smith and I still live. Smith joined the Navy Reserve in late 2007, and he was away from his home and civilian job for a year of full-time Navy Reserve training from January 2008 to January 2009. When he left full-time duty in January 2009, he immediately applied for reemployment at the local Blockbuster store, but he was not reemployed. Is it too late to do something about that now?

I have read and reread your Law Review 15116 (December 2015). I think that it is clear beyond any question that Smith met the five USERRA conditions for reemployment. He left his job for uniformed service in January 2008 and gave the employer prior oral and written notice. His year of active duty is probably exempt from USERRA's five-year cumulative limit under section 4312(c) of USERRA,³ but even if that year counts he is clearly well within the five-year cumulative limit. Smith served honorably. He is still serving in the Navy Reserve today, so he did not receive a disqualifying bad discharge from the Navy. He applied for reemployment immediately after he left duty in January 2009, well within the 90-day deadline after a period of service of 181 days or more.⁴

A: First, it should be noted that Smith's claim is *not barred by a statute of limitations*. The pertinent USERRA section reads as follows:

If any person seeks to file a complaint or claim with the Secretary [of Labor], the Merit Systems Protection Board, or a Federal or State court under this chapter [USERRA] alleging a violation of this chapter, *there shall be no limit on the period [of time] for filing the complaint or claim.*⁵

President George W. Bush signed into law section 4327(b), as an amendment to USERRA, on 10/10/2008. The "no statute of limitations" rule applies to claims that accrued on or after 10/10/2008. Smith's claim accrued in January 2009, when he completed his year of service and applied for reemployment. Thus, Smith's claim is not barred by any statute of limitations, but that is not to say that he has a valid, enforceable claim in 2018.

You are too young to remember Blockbuster, but I remember the company very well. It was founded 10/19/1985 and enjoyed years of explosive growth, reaching a peak of 9,000 stores in 2004. Like McDonald's today, some of the stores were company-owned but most were franchises.

³ 38 U.S.C. 4312(c). Please see Law Review 16043 (May 2016) for a detailed discussion of USERRA's five-year limit.

⁴ 38 U.S.C. 4312(e)(1)(D).

⁵ 38 U.S.C. 4327(b) (emphasis supplied).

After its peak in 2004, the company began a slow decline that soon turned into a rout. By that time, there were so many cheaper and more convenient ways to rent movies and driving to a video store seemed “so 20th Century.” Blockbuster, Inc. ceased operation and closed the remaining company stores in November 2013. As of July 2018, there is one remaining privately-owned store in the United States plus a handful of Blockbuster stores outside our country.

Whether Smith worked for Blockbuster, Inc. or for a local franchisee, he cannot file suit today because there is no extant corporate entity to sue. Trying to sue Blockbuster is like trying to sue Studebaker.⁶

Moreover, it is not clear that Smith was entitled to reemployment in January 2009. He met the five USERRA conditions and that meant that he was entitled to be reemployed *in the position of employment that he would have attained if he had been continuously employed*, but that “escalated reinstatement position” was likely no position at all. Smith’s year of full-time military service corresponded with a period of massive, irreversible decline at Blockbuster.

The pertinent section of the Department of Labor USERRA Regulation is 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 conditions, or changed opportunities for advancement, depending upon the application of the escalator principle.⁷

⁶ Studebaker produced its last automobile on 3/17/1966.

⁷ 20 C.F.R. 1002.194 (bold question and bold “Yes” in original).