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Another Important New USERRA Case

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Update on Sam Wright

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[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.

***Wingard v. Allegheny County,* 2017 U.S. Dist. LEXIS 67191 (W.D. Pa. May 3, 2017) (*Wingard I*).[3]**

***Wingard v. Allegheny County,* 2017 U.S. Dist. LEXIS 67193 (W.D. Pa. May 3, 2017) (*Wingard II*).[4]**

Barry Wingard was an attorney working for the Allegheny County Office of the Public Defender when he enlisted in the U.S. military in July 2008.[5] He gave notice to his civilian employer and left his job to serve on active duty. He served honorably and was released from active duty without having received a disqualifying bad discharge. He was released from active duty in 2013 and applied for reemployment at the Public Defender's Office in September of that year.[6]

Although Wingard met the five conditions for reemployment in September 2013, Allegheny County did not reemploy him until December 2014, 15 months later. Under USERRA, Wingard was entitled to *prompt* reemployment, within 14 days after he applied for reemployment.[7] Moreover, upon reemployment Wingard was entitled to be treated, for seniority purposes, as if he had been continuously employed in the civilian job during the entire time that he was away from the job for uniformed service.[8]

When Allegheny County reemployed Wingard in December 2014, it correctly gave him seniority credit for the time that he was away from work for service, but a year later (December 2015) the county incorrectly decided that Wingard was not entitled to that seniority credit and it

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[3] This is a decision by Judge Mark A. Kearney.

[4] This is the follow-up decision by Judge Kearney.

[5] Contrary to popular misconception, the reemployment statute is not limited to persons who serve in the National Guard or Reserve. It also applies to persons who leave civilian jobs to enlist in the Active Component of the armed forces. Please see Law Review 0719 (May 2007).

[6] As I have explained in detail in Law Review 16043 (May 2016), the Uniformed Services Employment and Reemployment Rights Act (USERRA) has a five-year limit on the duration of the period or periods of uniformed service that an individual can perform with respect to the employer relationship for which he or she seeks reemployment. Judge Kearney did not say so in his opinion, but it is likely that Wingard was released from active duty in July 2013 and applied for reemployment in September. In that case, he would have been within the five-year limit because the limit only includes the period of uniformed service, not the entire period of absence from the civilian job. Please see Law Review 18073 (August 2018). Moreover, in that case Wingard's application for reemployment would have been timely, because after a period of service of 181 days or more the returning veteran has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). It is also possible that Wingard left his civilian job in July 2008 but did not report to active duty until September 2008. A person who is about to enter an extended period of active duty is entitled to leave his or her job some weeks or even months before entering active duty to get his or her affairs in order. 20 C.F.R. 1002.74(b). In any case, I am assuming, for purposes of this article, that Wingard did not exceed the five-year limit and that his application for reemployment was timely.

[7] 20 C.F.R. 1002.181.

[8] 38 U.S.C. 4316(a). Wingard is entitled to be treated as if he had been continuously employed during the five-year period of service and during the time between his departure from the job and his entry on active duty and the time between his release from active duty and his return to the civilian job. Please see Law Review 60 (December 2002).

demoted him and canceled the seniority credit. Wingard sued Allegheny County seeking back pay for the 15-month delay on reemploying him and compensation for the vacation days, sick days and personal days that he lost because of the delay in reemployment and the incorrection demotion in December 2015.

By means of a motion in limine, Allegheny County asked Judge Kearney to rule that the vacation, sick, and personal days that Wingard claimed were a form of compensation for services and not a perquisite of seniority and that Wingard was not entitled to compensation for those lost days. Judge Kearney considered and rejected the county's arguments, as follows:

> The Uniformed Services Employment and Reemployment Right Act of 1994 requires an employer re-hire returning service members and provide the returning service member "the additional seniority and rights and benefits that such person would have attained if the person had *remained continuously employed*."[1] The Supreme Court, reviewing an earlier iteration of the Act, describes its purpose "to preserve for the retuning veterans the rights and benefits which would have automatically accrued to them had they remained in private employment rather than responding to the call of their country."[2]
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> Mr. Wingard requests personal days, sick time and vacation benefits for the time before **[*3]** the County re-hired him and at the higher seniority level after December 2015. The County argues Mr. Wingard is not entitled to recover benefits which are not based on seniority, including its belief vacation and sick leave are not seniority-based under its Collective Bargaining Agreement. The County argues these benefits are compensation for work performed not based on seniority.
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> Under the Agreement: (1) for personal days, an employee may select three work days; (2) for vacation, all permanent eligible employees "shall be entitled to paid vacation" based on their years employed; and, (3) for sick leave, all permanent eligible employees "shall receive" ten days of paid sick leave.[3] The Agreement requires an eligible employee "must have received earnings or earnings and compensable disability credited to thirteen pay periods in the previous year."[4] The Agreement also defines seniority "as the length of continuous service an employee has with the county, and *shall apply for pension and vacation purposes only*....Seniority shall accumulate during absences due to illness, layoff or leave of absence..."[5]
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> The Act requires Mr. Wingard be afforded "the additional seniority and rights and benefits **[*4]** that such person would have attained if the person had *remained continuously employed*."[6] The County's argument runs contrary to the unambiguous language of § 4316(a) of the Act. Had Mr. Wingard *remained continuously employed* from July 2008-2009, he would have received earnings for the thirteen previous pay periods for

seniority for 2009-2010, and then had he *remained continuously employed* from July 2009-2010 he would have received earnings for the thirteen previous pay periods for seniority for 2010-2011 and so on up to his re-hire date in November 2014.

In *Foster v. Dravo Corp*, the Supreme Court distinguished when vacation time is considered a seniority benefit and when it is considered compensation for actual work performed under an earlier iteration of the Act.[7] In *Foster*, the employee worked 22 weeks of 1965, 52 weeks of 1966, and 7 weeks of 1967 before leaving to serve.[8] The employee served for the remainder of 1967 and the first 8 months of 1968.[9] The employee returned to work in September 1968 and worked the final 13 weeks of 1968.[10] The employer denied him vacation benefits for 1967 and 1968 because he did not work a minimum of 25 weeks as required by the employer.[11] The employee alleged he **[*5]** should receive credit for the full vacation benefits in 1967 and 1968 while he served in the military because he would have earned vacation had he remained employed.[12]

The Supreme Court analyzed if the employer has a "work requirement" to earn the benefit in question it tends to show the benefit is a form of short-term compensation and not based on seniority.[13] The Court also held the employer's "work requirement may be so insubstantial that it appears plainly designed to measure time on the payroll rather than hours on the job; in that event, the Act requires that the benefit be granted to returning veterans."[14] In *Foster*, the Supreme Court held the employer's vacation benefit is a form of short-term compensation not covered by the Act because employees must work 25 weeks to receive it but can earn more vacation through overtime and an employee who works less than 25 weeks will receive pro-rata vacation based on actual service.[15]

Mr. Wingard's Collective Bargaining Agreement ties seniority to"vacation purposes" and not to hours worked by the employee.[16] Unlike *Foster*, Mr. Wingard cannot earn more vacation by working more and does not have to work a requisite amount of weeks in **[*6]** a calendar year to receive vacation that year.[17] Instead, his vacation increases the following year simply by his presence in the payroll for the previous year. The Agreement also allows seniority to "accumulate during...leave of absence" further showing vacation is based on time served, not actual hours worked.[18] The County asks us to hold an employee on a leave of absence can accrue seniority and vacation even if they are not present in the office working, but a person on a leave of absence while serving in the military cannot accrue seniority because they are not present in the office working.

> We disagree and find the County's requirement of earning for 13 previous pay periods is "so insubstantial that it appears plainly designed to measure time on the payroll rather than hours on the job; in that event, the Act requires that the benefit be granted to returning veterans."[9]

In *Wingard II,* Judge Kearney rejected the county's statute of limitations defense at the motion in limine stage but held that the county could raise the issue again at trial.[10]

Q: In Law Review 18077 (August 2018) and other articles, you have explained that there are often great difficulties in enforcing USERRA against state government agencies as employers, because of the 11th Amendment of the United States Constitution and the doctrine of sovereign immunity. Was that a problem in this case?

A: No. Counties and other political subdivisions of a state do not have 11th Amendment immunity. You can sue a political subdivision in federal court, in your own name and with your own lawyer.[11]

[9] *Wingard I.*

[10] The county's statute of limitations defense is probably without merit because USERRA explicitly provides that there is *no statute of limitations* with respect to USERRA claims that accrued after 10/10/2008. 38 U.S.C. 4327(b). See also Law Review 18068 (August 2018).

[11] *See* 38 U.S.C. 4323(i). *See also* Law Review 10029 (April 2010).