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The Employer Is Required To Treat you as if you Had Been Continuously Employed in the Civilian Job for Civilian Pension Purposes, but only *upon Reemployment under USERRA*

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Update on Sam Wright

1.3.1.2—Character and duration of service
1.3.1.3—Timely application for reemployment
1.3.2.3—Pension credit for service time

Q: I am a life member of the Reserve Officers Association (ROA), and I recently retired from the Air Force as a Lieutenant Colonel. I have read with great interest many of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

While in college, from 1986 to 1990, I participated in the Air Force Reserve Officers Training Corps (ROTC), and when I graduated in May 1990 I was simultaneously commissioned a

[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1700 "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 1500 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.

Second Lieutenant. I spent the next nine years on full-time active duty and was released from active duty in May 1999. For the next eight years I was a traditional Air Force Reservist. I returned to full-time active duty in May 2007, when I was involuntarily called to active duty with my USAFR unit. At the end of the involuntary mobilization, I remained on active duty voluntarily until May 2018, when I retired from the Air Force as a Lieutenant Colonel with 28 years of commissioned service, including 20 years of full-time active duty (1990-99 and 2007-18).

After I left active duty in 1999, I found a job as a pilot for a commuter airline—let's call it Tree Top Airlines or TTA. I remained employed at TTA until I returned to active duty in May 2007. When I learned, in early 2007, that I was being mobilized with my USAFR unit, I gave prior oral and written notice to the Chief Pilot and the Personnel Director at TTA, and the airline put me on a "military leave" status. When I completed my year of involuntary active duty and remained on active duty voluntarily, I gave notice to the airline by certified mail, and I notified the airline of each extension of my active duty.

The airline kept me on its "military leave" list, but in May 2013, after I had been on active duty for six years, the airline sent me a letter giving me an ultimatum. The letter said that I must return to work at the airline by 7/1/2013 or I would be fired. I contacted you, during the time that you were the full-time Director of the Service Members Law Center (SMLC) at ROA. You sent a letter to the General Counsel of the airline, informing her that firing me for being away from my job for military service was a violation of section 4311 of USERRA.[3] The airline relented and kept me on the "military leave" list.

When I left active duty in May 2018, I got a great job offer from another commuter airline—let's call it Puddle Jump Airlines or PJA. In September 2018, I sent a resignation letter to TTA, informing them that I had left active duty and that I had taken a new job with another airline. Although I was away from my TTA job for 11 years, and although I did not apply for reemployment at TTA after I left active duty by retirement, I think that TTA was required to fund my TTA pension account during the entire time that I was in a "military leave" status. What do you think?

A: TTA was not required to fund your pension account while you were in a "military leave" status. The company was only required to fund your account *if and when you met the five USERRA conditions for reemployment and returned to work at the company.* Because you never met the five conditions and did not return to the company after you left active duty, the company had no obligation to you under USERRA. Here is the entire text of section 4318 of USERRA:

> **Employee pension benefit plans**

[3] 38 U.S.C. 4311.

(a)

(1)

(A) Except as provided in subparagraph (B), in the case of a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974) or a right provided under any Federal or State law governing pension benefits for governmental employees, the right to pension benefits of a *person reemployed under this chapter* shall be determined under this section.

(B) In the case of benefits under the Thrift Savings Plan, the rights *of a person reemployed under this chapter* shall be those rights provided in section 8432b of title 5. The first sentence of this subparagraph shall not be construed to affect any other right or benefit under this chapter.

(2) (A) *A person reemployed under this chapter* shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services.

(B) Each period served by a person in the uniformed services shall, *upon reemployment under this chapter*, be deemed to constitute service with the employer or employers maintaining the plan for the purpose of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan.

(b)

(1) An employer *reemploying a person under this chapter* shall, with respect to a period of service described in subsection (a)(2)(B), be liable to an employee pension benefit plan for funding any obligation of the plan to provide the benefits described in subsection (a)(2) and shall allocate the amount of any employer contribution for the person in the same manner and to the same extent the allocation occurs for other employees during the period of service. For purposes of determining the amount of such liability and any obligation of the plan, earnings and forfeitures shall not be included. For purposes of determining the amount of such liability and for purposes of section 515 of the Employee Retirement Income Security Act of 1974 or any similar Federal or State law governing pension benefits for governmental employees, service in the uniformed services that is deemed under subsection (a) to be service with the employer shall be deemed to be service with the employer under the terms of the plan or any applicable collective bargaining agreement. In the case of a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability of the plan described in this paragraph shall be allocated--

(A) by the plan in such manner as the sponsor maintaining the plan shall provide; or

(B) if the sponsor does not provide--

(i) to the last employer employing the person before the period served by the person in the uniformed services, or

(ii) if such last employer is no longer functional, to the plan.

(2) *A person reemployed under this chapter* shall be entitled to accrued benefits pursuant to subsection (a) that are contingent on the making of, or derived from, employee contributions or elective deferrals (as defined in section 402(g) of the Internal Revenue Code of 1986) only to the extent the person makes payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of service described in subsection (a)(2)(B). Any payment to the plan described in this paragraph shall be made during the period beginning with the date of reemployment and whose duration is three times the period of the person's service in the uniformed services, such payment period not to exceed five years.

(3) For purposes of computing an employer's liability under paragraph (1) or the employee's contributions under paragraph (2), the employee's compensation during the period of service described in subsection (a)(2)(B) shall be computed--

(A) at the rate the employee would have received but for the period of service described in subsection (a)(2)(B), or

(B) in the case that the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).

(c) Any employer *who reemploys a person under this chapter* and who is an employer contributing to a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter, shall, within 30 days after the date of such reemployment, provide information, in writing, of such reemployment to the administrator of such plan.[4]

In seven places in section 4318, the text of USERRA makes clear that the employer obligations to fund a pension account or to treat the returning service member as if he or she had been continuously employed for pension purposes only apply *upon the reemployment of the person under USERRA.* I have italicized each of those places in my quotation of section 4318, above.

[4] 38 U.S.C. 4318 (emphasis supplied).

As I have explained in Law Review 15116 (December 2015) and many other articles, an individual must meet five simple conditions to have the right to reemployment under USERRA:

a. Must have left a civilian job (federal, state, local, or private sector) to perform uniformed service.
b. Must have given the employer prior oral or written notice.
c. Must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service relating to the employer relationship for which the person seeks reemployment.
d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.[5]
e. Must have made a timely application for reemployment after release from the period of service.[6]

It is necessary to meet all five of these conditions to have the right to reemployment. If there is one condition that you clearly do not meet, the question of whether you meet the other four conditions is moot. Because you failed to apply for reemployment within 90 days after you were released from active duty in May 2018, the question of whether you were within or outside the cumulative five-year limit is moot.

As I have explained in detail in Law Review 16043 (May 2016), there are nine exemptions to the five-year limit. That is, there are nine kinds of service that do not count toward exhausting the individual's five-year limit. Your 1990-99 active duty period does not count toward your five-year limit because that period came before your hiring at TTA. It may be that enough of your 2007-18 active duty period was exempt under section 4312(c) of USERRA[7] so that you had not exceeded the five-year limit. That question is now moot because you did not make a timely application for reemployment. I wish that you had contacted me months ago, before you allowed the 90-day deadline to pass without an application for reemployment. I do not have the power to turn back the hands of time.

Let me clarify what I told you and TTA in 2013. I did not say that you would have the right to reemployment when you finally left active duty, and I did not say that TTA had an obligation to fund your TTA pension account while you were on active duty. I said that it was premature, while you were on active duty, to address the five-year limit and the other USERRA conditions for reemployment. I said that the determination about the five-year limit need not be made

[5] Under section 4304 of USERRA, 38 U.S.C. 4304, disqualifying bad discharges include punitive discharges (awarded by court martial for serious criminal offenses) and other-than-honorable administrative discharges.
[6] After a period of service of 181 days or more, as in your case, the returning service member or veteran must apply for reemployment within 90 days after the date of release. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.
[7] 38 U.S.C. 4312(c). I would need to review all your orders to determine which periods are exempt from the limit.

until you left active duty and applied for reemployment. As it turned out, that time never came because you chose not to apply for reemployment at TTA after you left active duty.

In Law Review 11026 (July 2011), I wrote:

> Unless and until Joe [the employee who is away from his civilian job for long-term active duty] is released from active duty and then applies for reemployment in his civilian job, there is no occasion to consider the five-year limit and the other eligibility criteria. … Further, it should be emphasized that the five-year limit is *solely an eligibility criterion for reemployment* [not misconduct meriting firing]. Performing uniformed service, whether for a day or for a decade, is protected activity under section 4311(a) [of USERRA].[8]

Section 4311(a) provides:

> A person who is a member of, applies to be a member of, *performs, has performed*, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, *retention in employment,* promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.[9]

Q: What is the difference between being fired in 2013 and being denied reemployment in 2018?

A: There is a big difference. Because TTA came to its senses and decided not to fire you in 2013, while you were on active duty, you do not need to answer "yes" to "have you ever been fired?" questions on job application forms and during job interviews.

I strongly adhere to the position I have taken in several articles that it is unlawful for an employer to fire a person while he or she is on active duty, even if the employer believes that the person has already exceeded the five-year limit. The deployed service member should not have to worry about what is going on at the civilian job back home. The whole point of USERRA, as well as the Servicemembers Civil Relief Act (SCRA), is to remove those considerations from the service member's mind, to the maximum extent possible, so that he or she can devote his or her full attention to military duties.[10]

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[8] Emphasis in original.

[9] 38 U.S.C. 4311(a) (emphasis supplied).

[10] Please see Law Review 134.