

LAW REVIEW 188

Vacation Benefits Under USERRA

By CAPT Samuel F. Wright, JAGC, USNR*

Q: I am an Army Reservist on active duty. I was recalled to active duty on October 1, 2004, and I expect to leave active duty in about March of 2006. I am concerned about my accrual of vacation days at my civilian job. Please review for me the rules under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

At the company where I work, employees with 0-5 years of seniority earn one week of vacation per year, and employees with 5-20 years of seniority earn two weeks of vacation per year. I was hired in September 2000.

After I was mobilized, I continued accruing vacation at the company for 26 weeks, through the end of March 2005, and then my vacation accrual was discontinued. Have my USERRA rights been violated?

A: No. USERRA does not require the employer to permit you to continue accruing vacation while you are away from work performing uniformed service, so the employer was within its rights in discontinuing this privilege after 26 weeks.

Congress enacted USERRA in 1994, as a complete rewrite of and replacement for the Veterans' Reemployment Rights (VRR) law, which can be traced back to 1940. In its first case construing the VRR law, 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." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946). Section 4316(a) of USERRA, 38 U.S.C. 4316(a), codifies the escalator principle.

In the half century plus since the Supreme Court enunciated the escalator principle, there have been hundreds of published court decisions about what it means, including at least six Supreme Court decisions. The escalator principle applies to "perquisites of seniority." A two-part test determines what is, and what is not, a perquisite of seniority that the returning veteran can claim under this principle. First, a perquisite of seniority must be something that was intended to be a reward for length of service, rather than a form of short-term compensation for services. Second, a perquisite of seniority is something that *with reasonable certainty* the servicemember would have received if he or she had remained continuously employed. It need not be an absolute certainty, but it must be more than a mere possibility.

The Supreme Court has held that vacation days fail under part one of this test. *See Foster v. Dravo Corp.*, 420 U.S. 92 (1975). The employer is simply not required to give you the vacation days that you would have earned if you had been continuously employed. Those vacation days are not a perquisite of seniority.

Q: What about the *rate at which I earn vacation*? The company hired me in September 2000. If my career at the company had not been interrupted by service, I would have gone over the five-year point in September 2005. I figure that when I return to work in March or April of 2006 I should start earning vacation at the rate of two weeks per year, immediately after I return to work. Do you agree?

A: Yes. The rate at which you earn vacation is clearly a reward for length of service and a perquisite of seniority. When you return to work in 2006, you should start immediately earning vacation at the new, higher rate.

Q: What about vacation for partial years? I can understand that I will accrue no civilian vacation for calendar year 2005—I will be away from work the whole year. But I worked 75 percent (the first nine of 12 months) of calendar year 2004, before I was mobilized. I expect to work the last 75 percent of calendar year 2006, after I return from mobilization. I think that I should earn about 30 hours of vacation (75 percent of one week, or 40 hours) for that part of 2004 that I worked. And if I return to work about April 1, 2006, I think that I should receive about 60 hours (75 percent of two weeks of vacation) for that part of 2006 that I expect to work. Do you agree with my analysis?

A: Yes, but this is frankly a gray area in the law. I think that you should be credited with the vacation that you earn by working at your civilian job, before and after your mobilization. I am aware of a recent case in which the Department of Labor (DOL) agreed with the employer's position that the employee was required to *work the whole year to earn any vacation*. (DOL has enforcement authority under USERRA.) If this is DOL policy, I urge DOL to reconsider.

Q: What about *use of vacation*? When I was called to active duty, I had five days of vacation “in the bank” at my civilian job. What happens to those vacation days?

A: Under Section 4316(d) of USERRA, 38 U.S.C. 4316(d), you have the *right* to use and be paid for those five days of vacation, but it would be unlawful for the employer to *make you use* your vacation in that way. This is *your choice, not the employer's choice*.

**Military title shown for purposes of identification only. The views expressed herein are the personal views of the author, and not necessarily the views of the Department of the Navy, the Department of Defense, or the U.S. government. The best way to reach Captain Wright is by e-mail, at samwright50@yahoo.com.*