

## LAW REVIEW 190

### Active Duty to Mitigate Damages Does Not Count Toward 5-Year Limit

By CAPT Samuel F. Wright, JAGC, USNR\*

**Q:** I recently returned from more than six years of active duty, some of which did not count toward the five-year limit under the Uniformed Services Employment and Reemployment Rights Act (USERRA). I have read and reread your Law Reviews 6 and 42, and I am convinced that I did not exceed the five-year limit, although I was within about a week of it. I made a proper and timely application for re-employment with my pre-service employer, a major corporation. I used the sample application for re-employment letter that you have attached to Law Review 77. I think that I meet all the USERRA eligibility criteria. I gave the employer prior notice. I am within the five-year limit (albeit just barely). I was released from the period of service under honorable conditions, and I made a timely application for reemployment, about a month ago.

The employer's personnel office strung me along for about a month and then, yesterday, told me that I do not have USERRA rights and will not be re-employed, because I am beyond the five-year limit (the way the employer figures it). I have feelers out, looking for other employment, but I think that it will take me some time to find another job, and it probably will pay only a little more than half of what my job at the major corporation would pay. The military command I recently left has offered me the opportunity to come back on active duty for special work (ADSW) orders, for 179 days. My active duty O-5 pay is equal to, or maybe a little more than, what I would be making at the major corporation. My concern is that this 179-day voluntary ADSW period will put me over the five-year limit under USERRA. What do you advise?

**A:** As I described in Law Review 169 (May 2005), the Department of Labor (DOL) published *proposed* USERRA regulations in the *Federal Register* on September 20, 2004. The 60-day notice and comment period expired on November 19, 2004. I hope that DOL will soon publish the *final* USERRA regulations, perhaps by the time this article is published in *The Officer*. You can find the proposed USERRA regulations on the DOL Web site. Go to <http://www.dol.gov/vets/>.

I invite your attention specifically to proposed Section 1002.103, concerning USERRA's exemptions from the 5-year limit. Section 1002.103(b) provides that "Service that you performed to mitigate economic harm where your employer is in violation of its employment or reemployment obligations to you" does not count toward the five-year limit.

In the *Federal Register* of September 20, 2004, and on the DOL Web site, you can find a lengthy preamble amplifying upon and explaining the rationale for the proposed regulations, including the following: "The regulation [pertaining to the five-year limit

and its exceptions] also recognizes a ninth exception based on equitable considerations. A servicemember is expected to mitigate economic damages suffered as a result of an employer's violation of the Act. *See Graham v. Hall-McMillen Co., Inc.*, 925 F. Supp. 437, 446 (N.D. Miss. 1996). If an individual remains in (or returns to) the service in order to mitigate economic losses caused by an employer's unlawful refusal to re-employ that person, the additional service is not counted against the five-year limit."

I think that this proposed regulation and the explanation fit your situation exactly. Because the employer has unlawfully denied you re-employment, you have a duty to mitigate your damages, by finding other gainful employment. The best way for you to mitigate your damages, at least for 179 days, is for you to go on ADSW. Your military pay as an O-5 is much more than any civilian job you could find in the short term. In good conscience, the employer should be *estopped* to assert that the 179-day ADSW period puts you over the five-year limit. The equitable doctrine of *estoppel* has its origin in Great Britain hundreds of years before the Declaration of Independence, but it remains an important part of the law of Great Britain and the United States today.

I suggest that you do the following to strengthen your case. Send the employer a certified letter, setting forth your position that you meet the USERRA eligibility criteria and that you are entitled to re-employment. Explain in some detail the basis for your statement that you have not exceeded the five-year limit. Tell the employer about the ADSW opportunity. Tell the employer that you expect to be re-employed by a date certain—give them a few days to receive, consider, and act upon your letter. Tell the employer that if you are not back on the employer's payroll by that date you will take advantage of the ADSW opportunity, and that you are doing so as the most practical means available to mitigate your damages, and that this 179-day ADSW period will not count toward your five-year limit. Attach a copy of this article. Be polite but firm. Send the letter by certified mail, and retain the postcard showing receipt. Keep me informed as to how this turns out. Good luck.

*\*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.*