

LAW REVIEW¹ 19052

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Is she Entitled to Seniority and Pension Credit for the Entire Period of Absence from the Job Necessitated by her Service?

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Q: I am a retired reservist and a member of the Reserve Organization of America.³ I am also a volunteer ombudsman for the Department of Defense (DOD) organization called “Employer

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 43 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.

³ At its September 2018 annual convention, the Reserve Officers Association amended its Constitution to make all service members (E-1 through O-10) eligible for membership and adopted a new “doing business as” (DBA) name: Reserve Organization of America. The full name of the organization is now the Reserve Officers Association DBA the Reserve Organization of America. The point of the name change is to emphasize that our organization represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most senior officers. Our nation has seven Reserve Components. In ascending order of size, they are the Coast Guard

Support of the Guard and Reserve" (ESGR). For more than 15 years, I have been using your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) in my ESGR work, explaining to Reserve and National Guard personnel their legal rights and how to exercise those rights and persuading employers to comply with the law.

I am currently working a case involving an Army reservist who was called to active duty with her unit for exactly one year, from 10/1/2017 until 9/30/2018. Let's call her Mary Jones. Because she needed to get her affairs in order before reporting to active duty for an overseas deployment, Jones left her civilian job on 9/15/2017, after giving the employer oral and written notice that she was leaving to go on active duty. After she was released from active duty on 9/30/2018, she waited 60 days to apply for reemployment on 11/29/2018.

When she applied for reemployment, she provided the employer's personnel office a copy of her DD-214, showing that she was on active duty for exactly one year. The personnel director said: "I see that you were on active duty for exactly one year. We will give you exactly one year of seniority and pension credit for your service. We will not give you credit for the 15 days that you were away from work before the start of your active duty period or the 60 days after you left active duty and before you asked to return to your job."

In about 2004, I attended the ESGR ombudsman training on USERRA, and you taught the course. I believe that I recall that you said that the returning service member is entitled to seniority and pension credit for the entire period of absence from the job necessitated by the period of service, and that the period of absence will almost always be at least a few days longer than the period of service.

Is Jones entitled to one year of seniority and pension credit for her recent active duty period? Or is she entitled to one year and 75 days of credit?

Answer, bottom line up front:

Jones is entitled to one year and 75 days of seniority and pension credit. The call to the colors made it necessary for her to be away from her job for one year and 75 days, and she is entitled to seniority and pension credit for the entire period of absence.

Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The number of service members in these seven components is almost equal to the number of personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more dependent than ever before on the Reserve Components for national defense readiness. Almost a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

Explanation:

- 1. Jones was entitled to leave her job 15 days before the date she reported to active duty.**

The pertinent section of the Department of Labor (DOL) USERRA regulation is as follows:

If the employee is ordered to perform an extended period of service in the uniformed services, he or she may require a reasonable period of time off from the civilian job to put his or her personal affairs in order, before beginning the service. Taking such time off is also necessitated by the uniformed service.⁴

- 2. After release from a period of service that lasted more than 180 days, Jones was permitted to wait up to 90 days to apply for reemployment.**

After a period of service that lasted longer than 180 days, Jones had 90 days to apply for reemployment.⁵ Jones' application for reemployment on day 60 after her release was well within the deadline.

- 3. Jones is entitled to seniority and pension credit for the entire time that she was away from work (one year and 75 days), not just the one-year period of service.**

The pertinent paragraph in USERRA's legislative history is as follows:

Section 4315(a) [later renumbered as 4316(a)] would recodify the “escalator” principle as it applies to seniority and all rights and benefits which flow from seniority, calculated as if the person had never left employment. For example, in determining how much vacation (length of vacation) a servicemember is entitled to in the years following reinstatement, *all time away from work (period between leaving the job and entering military service, period of military service, and period between discharge or release from military service and reemployment) would be required to be considered under this section*, together with the pre-military service period of employment.⁶

The pertinent section of the DOL USERRA regulation is as follows:

Depending on the length of the employee's period of service, he or she is entitled to take from one to ninety days following service before reporting back to work or applying for

⁴ 20 C.F.R. 1002.74(b).

⁵ 38 U.S.C. 4312(e)(1)(D).

⁶ House Committee Report, April 28, 1993, H.R. Rep. 103-65 (Part 1). The entire report is reprinted in Appendix D-1 of *The USERRA Manual*, by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found on page 721 of the 2018 edition of the *Manual*.

reemployment. (See section 1002.115.) This period of time must be treated as continuous service with the employer for purposes of determining participation, vesting and accrual of pension benefits under the plan.⁷

Q: In Law Review 19032 (March 2019) and Law Review 18104 (October 2018), among other articles, you have argued that the period of time between leaving the job and entering active duty and the period between leaving active duty and returning to the job do not count toward exhausting the individual's five-year limit. But now you say that the returning veteran is entitled to seniority and pension credit for these pre-service and post-service periods of absence from the civilian job. Are you being inconsistent?

A: For the last 37 years, I have consistently argued for the most favorable interpretation of provisions of the federal reemployment statute that a harmonious interplay of the various provisions will permit. As I have explained in footnote 2 and in Law Review 15067 (August 2015), among other articles, Congress enacted USERRA in 1994 as a long-overdue update and rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. In its first case construing the VRRA, the Supreme Court held:

This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. *See Boone v. Lightner*, 319 U.S. 561, 575 (1943). And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits that Congress has secured the veteran under the Act. Our [the Supreme Court's] problem is to construe the separate provisions of the Act as parts of a harmonious whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits.⁸

As to the five-year limit, it is "such person's cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment" that is subject to the five-year limit.⁹ As to the continuous accumulation of seniority while away from work for service, the returning veteran or service member is entitled "to the seniority and other rights and benefits determined by seniority that the person had on the date of commencement of service in the uniformed services *plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.*"¹⁰ The most reasonable interpretation of this statutory language is that it applies to

⁷ 20 C.F.R. 1002.259(a).

⁸ *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

⁹ 38 U.S.C. 4312(c). As I have explained in detail in Law Review 16043 (May 2016) and other articles, there are nine exemptions from the five-year limit. That is, there are nine kinds of service that do not count toward exhausting the individual's five-year limit.

¹⁰ 38 U.S.C. 4316(a) (emphasis supplied). *See also* 38 U.S.C. 4318(a)(2)(A) for a similar entitlement regarding pension credit.

the entire period of absence from the civilian job necessitated by the service, not just the period of service itself. My position is not inconsistent.

Please join or support the Reserve Organization of America

This article is one of 1800-plus “Law Review” articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s national defense needs.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation’s seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve.

If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

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