

## **The Department where you Worked Has Been Abolished—That Does Not Necessarily Mean that you Don't Have the Right to Reemployment**

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

### 1.3.2.2—Continuous accumulation of seniority-escalator principle

**Q: I am a First Lieutenant in the Army Reserve and a member of the Reserve Organization of America (ROA).<sup>3</sup> I was involuntarily called to active duty for one year, from January 2019 until**

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<sup>1</sup> I invite the reader's attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 1800 "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 1600 of the articles.

<sup>2</sup> 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 (VRRRA—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 VRRRA 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 VRRRA 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](mailto:SWright@roa.org).

<sup>3</sup> 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 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

January 2020. I am currently deployed to a classified location in the Middle East, and I expect to return to my home and civilian job in about five months, in January 2020.

Since January 2017, I have worked as an Information Technology (IT) professional for a major international corporation headquartered in the United States—let's call it Daddy Warbucks International or DWI. My husband sent me an e-mail, informing me that the Human Relations (HR) Department of DWI sent me a complex e-mail, the gist of which is that DWI has decided to outsource the IT function and the DWI employees working in IT will be laid off, but they can apply for other DWI positions for which they may be qualified. Where does this leave me when I return home in January 2020?

I have read with great interest several of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), including Law Review 15116 (December 2015). I think that I already meet the first two USERRA requirements for reemployment, in that I left my DWI job to report to active duty and I gave the company oral and written notice. I was called to active duty involuntarily, so this year of active duty does not count toward my five-year limit with DWI, but even if it is not exempt, I am nowhere near the limit. I am serving honorably, and I fully expect to leave active duty in January 2020 without a disqualifying bad discharge from the Army. I realize that I have 90 days to apply for reemployment after I am released from active duty, but I expect to apply for reemployment and return to work right away.

**How does USERRA apply to a situation like this?**

**A:** First, let us assume that you meet the five USERRA conditions in January 2020. In that case, DWI is required to reemploy you "in the position of employment in which the person [you] *would have been employed* if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status, and pay, the duties of which the person is qualified to perform."<sup>4</sup>

Usually, the position that the service member would have attained if continuously employed is the position that he or she left when called to service. Your case is different. If you had remained on the job, you would not still be in the IT department because that department is being abolished.

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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.

<sup>4</sup> 38 U.S.C. 4313(a)(2)(A) (emphasis supplied).

In its first case construing the 1940 reemployment statute, 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.”<sup>5</sup> The escalator principle is codified in section 4313(a) and section 4316(a) of USERRA.<sup>6</sup>

It has always been the case that the “escalator” can descend as well as ascend. USERRA does not protect you from a bad thing, like a reduction in force or a layoff, that *clearly would have happened anyway*, even if you had not been away from work for service at the time. The pertinent section of the Department of Labor (DOL) USERRA regulation reads as follows:

**Can the application of the escalator principle result in adverse consequences when the employee is reemployed?**

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**Yes.** The Act does not prohibit lawful adverse job consequences that result from the employee's restoration on the seniority ladder. Depending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated. For example, if an employee's seniority or job classification would have resulted in the employee being laid off during the period of service, and the layoff continued after the date of reemployment, reemployment would reinstate the employee to layoff status. Similarly, the status of the reemployment position requires the employer to assess what would have happened to such factors as the employee's opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he or she had remained continuously employed. The reemployment position may involve transfer to another shift or location, more or less strenuous working conditions, or changed opportunities for advancement, depending upon the application of the escalator principle.<sup>7</sup>

When you return to work in January 2020, you are entitled to the position of employment that you would have attained if you had been continuously employed. That will not be in the IT department, but it is likely that you will be entitled to reemployment in an active position in another department of this large company, depending on what happens to the other displaced IT department employees while you are gone.

**Q: I am informed that my colleagues in the IT department are being kept on the payroll until 10/15/2019, and they have free run of the company's headquarters to visit various departments and shop their resumes, seeking new positions at the company. I am missing out on that opportunity because I am serving our country in uniform thousands of miles away. I am fully engaged with my military duties, and I have no telephone access and only limited**

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<sup>5</sup> *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946).

<sup>6</sup> 38 U.S.C. 4313(a), 4316(a).

<sup>7</sup> 20 C.F.R. 1002.194 (bold question and bold “Yes” in original).

**Internet and e-mail access. How am I supposed to learn about other DWI opportunities, apply within deadlines, and interview for those positions?**

**A:** I suggest that you inform the company's HR department that the company has an *affirmative obligation* to ensure that you do not miss out on the opportunity to apply for and be considered for these opportunities. Some arrangement needs to be made promptly. Perhaps the company could give your husband access to the headquarters, although he is not a DWI employee, so that he can visit departments and shop your resume. Another possible solution is for you to give a *limited power of attorney* to a trusted colleague at work (preferably not somebody in the IT department) so that the trusted colleague can apply for positions on your behalf and shop your resume at departments that are looking to hire.

**Q: I am informed that it is likely that displaced IT department employees who are unable to find other DWI positions will be offered severance pay or supplemental unemployment benefits. If I find myself unemployed in January 2020 when I return from service, will I be entitled to severance pay or supplemental unemployment benefits?**

**A:** Yes, if other displaced IT department employees get severance pay or supplemental unemployment benefits, you will be entitled to those same benefits.<sup>8</sup>

**Q: DWI's General Counsel has insisted that USERRA and its "escalator principle" only apply to formal systems of seniority under collective bargaining agreements between employers and unions. There are no unions at DWI. Does USERRA apply?**

**A:** The argument that the General Counsel is making was made by Pfizer Pharmaceuticals and accepted by the United States District Court for the District of Puerto Rico. The service member appealed to the United States Court of Appeals for the First Circuit.<sup>9</sup> The appellate court reversed and firmly rebuked the district court.<sup>10</sup>

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<sup>8</sup> See *Accardi v. Pennsylvania Railroad Co.*, 383 U.S. 225 (1966) (severance pay) and *Coffy v. Republic Steel Corp.*, 447 U.S. 191 (1980). I discuss *Accardi* in detail in Law Review 0861 (December 2008). I discuss *Coffy* in detail in Law Review 0919 (May 2009).

<sup>9</sup> The 1<sup>st</sup> Circuit is the federal appellate court that sits in Boston and hears appeals from district courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.

<sup>10</sup> See *Rivera-Melendez v. Pfizer Pharmaceuticals LLC*, 730 F.3d 49 (1<sup>st</sup> Cir. 2013). I discuss this case in detail in Law Review 13127 (September 2013).