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Don't Sleep on your Rights, because if you Snooze you Lose

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]
Update on Sam Wright

1.3.2.9—Accommodations for disabled veterans
1.3.1.3—Timely application for reemployment
1.6—USERRA and statutes of limitation

***Corbin v. Southwest Airlines, Inc.,* 2019 U.S. Dist. LEXIS 134285 (S.D. Tex. August 9, 2019).**

Tracy Corbin has been a pilot for Southwest Airlines (SWA) since July 2002. She was a traditional reservist in the Air Force Reserve at the time she was hired by the airline and until 2010, when she was honorably discharged.[3] In April 2007, while she was away from her SWA job for a period of Air Force active duty, she injured her back.

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[1] I invite the reader's attention to 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.

[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] The facts in this article come directly from the published court decision. I have no personal knowledge of the facts.

In May or June of 2007 (precise date not mentioned in the court decision), she left active duty and communicated with SWA about her status. It is unclear exactly what she communicated to the employer and when, because her communications were oral and the SWA Chief Pilot with whom she communicated in 2007 suffered a serious brain injury in a 2011 automobile accident, and when Corbin finally got around to suing SWA in 2017 the retired Chief Pilot could not remember what Corbin had told him more than a decade earlier.

Did Corbin meet the five conditions for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA) in May or June of 2017.[4] She left her SWA job to perform uniformed service, and she probably gave the airline prior oral or written notice. She served honorably and was released from active duty in 2007 without a disqualifying bad discharge from the Air Force. She did not exceed the cumulative five-year limit on the duration of her period or periods of uniformed service relating to her employment with SWA.

What is not clear is when she applied to SWA for reemployment, after she was released from active duty in 2007. After a period of service that lasted 181 days or more, the returning service member or veteran must apply for reemployment within 90 days after the date of release from duty.[5] If the returning service member or veteran is hospitalized or convalescing from an injury or illness incurred or aggravated during the period of service, the deadline to apply for reemployment can be extended during the period of hospitalization or convalescence, and that period can last up to two years.[6]

If Corbin applied for reemployment in May or June of 2007, the airline was required to reemploy her promptly in the position that she would have attained if she had been continuously employed.[7] The position that she would have attained if she had been continuously employed was almost certainly the position that she left when she was called to the colors—the position of First Officer on SWA airliners.

But Corbin could not return to the cockpit of airliners in 2007 because her physical condition (the back injury) precluded her from getting a medical certificate from the Federal Aviation Administration (FAA) until January 2008. Certainly, USERRA did not override FAA safety rules or require the airline to violate those rules to comply with USERRA.

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[4] Please see Law Review 15116 (December 2015) for a detailed discussion of the five conditions.
[5] 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.
[6] 38 U.S.C. 4312(e)(2)(A). If the returning service member waits to apply for reemployment, while convalescing, she does not have the right to reemployment until she applies for reemployment. The convalescence delays the deadline for applying for reemployment. If Corbin did not apply for reemployment until January 2008, when she had recovered and could return to the cockpit, SWA had no obligation to find a nonflying position for her.
[7] 20 C.F.R. 1002.180, 181.

When the returning service member returns to work with a temporary or permanent disability incurred during the recent active duty period, the employer has a duty to make reasonable efforts to help the service member qualify for the position that she would have attained if continuously employed (the First Officer position). If the returning service member cannot qualify for that position, despite the employer's reasonable efforts to assist, the employer is required to reemploy the returning disabled service member in some other position for which she is qualified or can become qualified with reasonable employer efforts.[8]

It is possible that Corbin applied for reemployment in April or May of 2007 and requested placement in a nonflying position at that time. If so, SWA should have reemployed her promptly in a non-flying position while waiting for her to recover sufficiently to return to the cockpit.[9]

It is also possible that Corbin did not apply for reemployment until she completed her convalescence period and returned to work on 1/4/2008. Another possibility is that both Corbin and the then Chief Pilot were confused and vague about how USERRA applied to this unusual but by no means unprecedented situation.

We do not know, and we can never know, exactly what Corbin said to the Chief Pilot in the summer of 2007, because she communicated only orally and the conversations were not recorded, and because the 2007 Chief Pilot suffered a serious brain injury in 2011, and because Corbin waited until September 2017 to file suit. Corbin was not required to educate the airline about its legal obligations, but the airline was not required to read her mind or to guess about what she was asking for.

USERRA has no statute of limitations.

Section 4327(b) of USERRA provides: "If any person seeks to file a complaint or claim with the Secretary [of Labor], the Merit Systems Protection Board, or a Federal or State court under this chapter alleging a violation of this chapter, there shall be no limit on the period for filing the complaint or claim."[10] But SWA and Judge Lee H. Rosenthal did not rely on any statute of limitations. Rather, they relied on the ancient and venerable equitable doctrine of laches. Judge Rosenthal held:

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[8] 38 U.S.C. 4313(a)(3)(A). I discuss that provision in detail in Law Review 121 (April 2004), Law Review 17035 (April 2017), and Law Review 18036 (April 2018).

[9] It is unclear whether Corbin reasonably could have returned to work even in a non-flying position in the summer of 2007. She had major back surgery on 7/18/2007. It is unclear how long she was hospitalized or how long she needed to recuperate at home before returning to work in a nonflying capacity.

[10] 38 U.S.C. 4327(b). This provision was added to USERRA by Public Law 110-389, Title III, section 311(f)(1), signed into law on October 10, 2008. This new provision applies to causes of action that accrued on or after 10/10/2008. Corbin's claim at least arguably arose prior to that date. Prior to 10/10/2008, the four-year default statute of limitations under 28 U.S.C. 1658(a) applied to USERRA cases. Please see Law Review 18050 (June 2018).

> Laches is an equitable affirmative defense that requires the defendant to show that: the plaintiff unreasonably delayed bringing a claim; the delay was inexcusable; and the delay materially prejudiced the defendant. *See Retractable Techs., Inc. v. Becton Dickinson & Co.,* 842 F.3d 883, 900 (5th Cir. 2016). … The court also found that Ms. Corbin unreasonably delayed bringing this lawsuit for over 10 years after her claims accrued, and that the delay was inexcusable. … On August 6, 2019, with the parties' agreement, the court held a bench trial on whether Ms. Corbin's delay materially prejudiced Southwest's ability to present a defense.
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> Based on a careful review of the pleadings, record, applicable law, and the arguments of counsel, the court finds and concludes that Ms. Corbin's delay in bringing this lawsuit materially prejudiced Southwest's ability to defend against her claims. The court also finds and concludes the delay also materially prejudiced Southwest by inflating Ms. Corbin's damages. Laches bars Ms. Corbin's remaining claims and, as a result, her complaint is dismissed, with prejudice. Final judgment is separately entered.

Let this be a lesson for us all. If you believe that your USERRA rights have been violated, you need to seek out legal counsel *or read our published Law Review articles. Do not sleep on your rights.*

Q: But wasn't SWA required to reemploy Corbin promptly after she applied for reemployment and then, after putting her back on the payroll, to find her a position that she could perform despite the temporary disability?

A: Yes, but only if she had met all five USERRA conditions at the time, including having made a timely application for reemployment. It is quite possible that Corbin did not apply for reemployment until January 2008, when she completed her convalescence and was capable to meeting the FAA medical standard to return to the cockpit.

Under section 4312(e)(2)(A),[11] Corbin had the right to wait until she completed the convalescence[12] before applying for reemployment, and it is likely that that is what she did. We do not know, and we cannot know, because of three reasons:

a. Her communications to SWA, via the Chief Pilot, were oral.
b. The Chief Pilot suffered a serious brain injury in a 2011 accident.
c. Most importantly, Corbin waited more than ten years to file this lawsuit.

[11] 38 U.S.C. 4312(e)(2)(A).

[12] The period of convalescence can last up to two years, but Corbin's convalescence did not take that long. She was fit for duty as a pilot by January 2008, about seven months later, and she returned to work at that time.

Service members like Corbin need detailed information about their legal rights when the issue arises, not years later, when it is often too late to do anything about it. That explains why ROA created the Law Review Library in 1997.[13] Today, we have more than 1800 articles, including a detailed Subject Index to facilitate finding articles about very specific topics. In 2007, when Corbin needed this information, we had about 500 articles, including Law Review 121 (April 2004). That article explains in detail the rights of the returning disabled veteran, including the right to insist on returning to work in alternative position (like a nonflying position) if a temporary or permanent disability incurred on active duty precluded the veteran from returning to the position that he or she had held before the period of service and would have continued to hold but for the service.

For 25 years, from 1982 (when I went to work for DOL as an attorney and became aware of the federal reemployment statute) until 2007 (when I retired from the Navy Reserve), I gave hundreds of speeches to units in all seven of the Reserve Components, even the Coast Guard Reserve. Unfortunately, there is no Reserve Component judge advocate, in the Navy or any other service, who is making this effort today. I call upon Reserve and National Guard judge advocates, especially junior judge advocates, to educate themselves about USERRA, and then to share that knowledge with their non-lawyer colleagues at Reserve Centers, National Guard Armories, and other drill sites across our country.

But the central message is that we need to educate serving Reserve Component members about the Law Review Library, this great asset that ROA has created over a period of 22 years and continuing. And Reserve Component members need to join ROA.

Please join or support ROA

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 defense needs.

Indeed, ROA is the *only* national military organization that exclusively supports America's Reserve and National Guard.

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[13] See footnote 1.

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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