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The 3d Circuit, like the 7th Circuit, Has Agreed with ROA's Position on USERRA's "Furlough or Leave of Absence" Clause

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

1.3.2.10—Furlough or leave of absence clause

***Travers v. FedEx Corp.,* 473 F. Supp. 3d 421 (E.D. Pa. 2020); reversed and remanded, 2021 U.S. App. LEXIS 23671 (3d Cir. Aug. 10, 2021).**

Bottom line up front

Gerard Travers, an employee of FedEx, is an enlisted Navy Reservist, now retired. He sued FedEx in the United States District Court for the Eastern District of Pennsylvania, claiming that the company had violated the Uniformed Services Employment and Reemployment Rights Act

[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2000 "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 specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 1800 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 44 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 38 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.

(USERRA).[3] Specifically, he claimed that FedEx violated the law's "furlough or leave of absence" clause.[4] He claimed that FedEx was required to give him *paid* military leave because the company granted paid leave for comparable periods of absence for jury duty, bereavement, and other non-military reasons.[5]

Travers' case was assigned to Judge March A. Kearney. Judge Kearney granted the defendant's motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure (FRCP), agreeing with the defendant's assertion that Travers was not entitled to the relief he sought even if all the facts are exactly as Travers has asserted them to be.

In ruling for the defendant, Judge Kearney cited and relied upon the decision of the United States District Court for the Northern District of Illinois rejecting a similar "furlough or leave of absence" claim against United Airlines.[6] Months later, the United States Court of Appeals for the 7th Circuit[7] reversed that Northern District of Illinois decision.[8]

Travers appealed to the United States Court of Appeals for the 3rd Circuit.[9] The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), filed an amicus curiae (friend of the court) brief in the 3rd Circuit in support of Travers' appeal. On 8/10/2021, a three-judge panel of the 3d Circuit unanimously reversed the District Court's dismissal of Travers' case and remanded the case back to the District Court for trial. As I predicted in Law Review 21016 (March 2021), the 3rd Circuit followed the 7th Circuit precedent.

Now that two circuits have agreed with ROA's position, and the other circuits have not yet addressed this specific legal question, it is likely that the other circuits will fall in line. This is great news for those who serve our country part-time in the National Guard or Reserve. Two separate Federal appellate court have accepted ROA's argument that short military training tours are comparable to leave for jury duty. If an employer grants to employees *paid* leave for jury duty, it must similarly grant paid leave for comparable periods of military training.

USERRA's pertinent provision

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[3] 38 U.S.C. 4301-35.

[4] 38 U.S.C. 4316(b).

[5] Travers' claim is almost identical to the claim that Eric White made against United Airlines. *See* Law Review 21014 (March 2021).

[6] *White v. United Airlines, Inc.,* 416 F. Supp. 3d 736 (N.D. Ill. 2019).

[7] The 7th Circuit is the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.

[8] *White v. United Airlines, Inc.,* 987 F.3d 616 (7th Cir. 2021), *rehearing en banc denied* 2021 U.S. App. LEXIS 7038 (7th Cir. March 10, 2021). I discuss this recent decision in detail in Law Review 21014 (March 2021).

[9] The 3rd Circuit is the federal appellate court that sits in Philadelphia and hears appeals from district courts in Delaware, New Jersey, Pennsylvania, and the United States Virgin Islands.

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA and President Bill Clinton signed it into law on 10/13/1994, 27 years ago. USERRA was a long-overdue update and rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act, the law that led to the drafting of millions of young men (including my late father) for World War II.[10] The pertinent clause of USERRA is as follows:

> **(1)** Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be—
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> **(A)** deemed to be on furlough or leave of absence while performing such service; and
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> **(B)** entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.[11]

Like much of USERRA, the furlough or leave of absence clause was carried over from the comparable provision of the VRRA. The prior law provided that a person away from work for military service "shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such [military] forces."[12]

USERRA's legislative history addresses the purpose and effect of the furlough or leave of absence clause as follows:

> New section 4316(b)(1) would provide that, subject to new paragraphs (2) through (6) discussed below, an individual who serves in the uniformed services will be considered to be on furlough or leave of absence while in the service. That person will be entitled to the same rights and benefits not determined by seniority that are generally provided to the employer's other employees with similar seniority, status, and pay who are on furlough or leave of absence. The rights and benefits to which the person is entitled will be those

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[10] Although the VRRA was part of the draft law from 1940 until 1974, it has applied to voluntary enlistees as well as draftees since 1941,

[11] 38 U.S.C. 4316(b)(1). This provision is referred to as the "furlough or leave of absence clause." It means that an employee who is away from his or her civilian job for uniformed service must be given the same benefits, during the absence from work for service, that other employees of the same employer receive while on non-military leaves of absence of comparable duration.

[12] 38 U.S.C. 4301(b)(1) (1988 version of the United States Code).

under a practice, policy, agreement, or plan in force at the beginning of the period of uniformed service or which becomes effective during the period of service.

Current section 4301(b)(1), which is similar to new section 4316(b)(1), provides that an individual restored to or employed in a position under chapter 43 [the reemployment statute] is considered as having been on furlough or leave of absence during the individual's period of training and service and that the individual is entitled to participate in benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time the individual was inducted into the Armed Forces.

The Committee [Senate Committee on Veterans' Affairs] bill would codify court decisions that have interpreted current law [the VRRA] as providing a statutorily-mandated leave of absence for military service that entitles servicemembers to participate in benefits that are accorded other employees. *See Waltermeyer v. Aluminum Company of America,* 804 F.2d 821 (3rd Cir. 1986); *Winders v. People Express Airlines, Inc.,* 595 F. Supp. 1512, 1519 (D.N.J. 1984), *affirmed,* 770 F.2d 1078 (3rd Cir. 1985). The new provision would expand upon the current protection by clarifying that the returning employee would be entitled not only to the rights and benefits of agreements and practices in force at the time he or she left the employment, but also to rights and benefits of agreements and practices which become effective during the period of service.

Current section 4301(b)(1) also provides that an individual who is reemployed under chapter 43 must be considered as having been on furlough or leave of absence and is entitled to participate in insurance offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer when the individual was inducted into the Armed Forces.

The Committee bill would preserve the servicemember's right to retention of existing insurance if that same right would generally be extended to employees during a period of furlough or leave of absence.[13]

On the House side, the legislative history of USERRA makes clear that court decisions under the VRRA remain in effect under USERRA unless the law changed in a pertinent way in 1994:

The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protection against employment-related

[13] 1993 Senate Committee Report, October 18, 1993 (S. Rep. 103-158, 1993 WL 432576 (Leg. History), reprinted in Appendix D-2 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted paragraphs can be found at pages 904-05 of the 2021 edition of the *Manual.*

> discrimination, and the protection of certain other rights and benefits, have been eminently successful for over fifty years. Therefore, the Committee [House Committee on Veterans' Affairs] wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with this Act [USERRA], remains in full force and effect in interpreting these provisions. This is particularly true of the basic principle established by the Supreme Court that the Act is to be "liberally construed." *See Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946); *Alabama Power Co. v. Davis,* 431 U.S. 581, 584 (1977).[14]

Cases like *Waltermeyer* and *Winders,* construing the furlough or leave of absence clause of the VRRA, should be cited and relied upon in construing the similar clause in USERRA. We are most pleased that the 3d Circuit and the 7th Circuit have done exactly that.

The 3d Circuit decision

As is always the case in the Federal appellate courts, the case was assigned to a panel of three judges. In this case, the panel consisted of Judge Paul Matey, Judge Patty Shwartz, and Judge David Porter. Judge Matey wrote the opinion, and the other two judges joined in a unanimous panel decision.

In his scholarly decision, Judge Matey discussed at length the text and history of the Federal reemployment statute (going back to 1940), the Supreme Court caselaw under that statute, and the rules of statutory construction. He concluded his opinion as follows:

> FedEx allegedly pays employees for some leave but declines to compensate Travers for leave taken to serve his country. That states a claim under USERRA, a statute with a long history of protecting the jobs and accompanying benefits of Americans called to our common defense. Best understood, USERRA does not allow employers to treat servicemembers differently by paying employees for some kinds of leave while exempting military service. So we will vacate and remand the District Court's grant of FedEx's motion to dismiss.

Where do we go from here?

FedEx's final appellate step is to petition the Supreme Court for a writ of certiorari. At least four of the nine Justices must vote for certiorari, or it is denied. Certiorari is denied in 99% of the cases where it is sought. It will probably be denied here because there is no conflict among the circuits. The 3d Circuit and the 7th Circuit are in accord on the meaning of USERRA's "furlough or

[14] House Committee Report, April 28, 1993, H.R. Rep. 103-65 (Part 1), reprinted in Appendix D-1 of *The USERRA Manual.* The quoted paragraph can be found at pages 799-800 of the 2021 edition of the *Manual.*

leave of absence" clause, and the other circuits have not yet addressed this question. After the appellate steps have been exhausted, the case will return to the District Court for trial.

We will keep the readers informed of further developments in this important case and on this important issue.

Congratulations

Bravo Zulu to attorney John Paul Schnapper-Casteras, who drafted and filed ROA's excellent amicus curiae (friend of the court) brief and to attorneys Jonathan E. Taylor, Peter Romer-Friedman, R. Joseph Barton, and Colin M. Downes, who represent Gerard Travers and the class of FedEx employees who are similarly situated.

UPDATE—October 2021

This 3rd Circuit decision is now officially published. The citation is *Travers v. FedEx,* 8 F.4th 198 (3rd Cir. 2021).

Please join or support ROA

This article is one of 2200-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.

Through these articles, and by other means, including amicus curiae ("friend of the court") briefs that we have filed in cases like *Travers* and *White,* we have educated service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, 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 eight uniformed services,[15] you are eligible for membership in ROA, and a one-year membership only costs $20 or $450 for a life membership. 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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[15] Congress recently created the United States Space Force as the 8th uniformed service.