

## Another New Case on USERRA Pension Benefits in a Multi-Employer Pension Plan

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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 2300 "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 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

<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 45 years, I have collaborated 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 <mailto:swright@roa.org>.

***Shea v. Iron Workers District Council of New England Pension Fund*, 158 F. Supp. 3d 20 (D. Mass. 2016).**<sup>3</sup>

Thomas M. Shea is a Senior Chief Petty Officer (E-8) in the Navy Reserve. He complained to the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), asserting that the multi-employer pension plan had violated his rights under section 4318 of the Uniformed Services Employment and Reemployment Rights Act (USERRA).<sup>4</sup>

Under section 4322 of USERRA,<sup>5</sup> DOL-VETS had a duty to investigate Shea's complaint, and it did so. The agency found Shea's complaint to have merit and so advised Shea. Shea requested that DOL-VETS refer the case file to the United States Department of Justice (DOJ), and the referral was made. In accordance with section 4323(a)(1) of USERRA,<sup>6</sup> DOJ agreed that Shea's USERRA rights had been violated, and DOJ sued the multi-employer pension fund in the United States District Court for District of Massachusetts. I commend DOL-VETS and DOJ for their work on behalf of Shea in this case.

The named plaintiff in this case is Thomas M. Shea, although the United States, through DOJ, provided free legal representation to Shea. If the defendant employer had been a State government agency, the named plaintiff would have been the United States.<sup>7</sup>

Section 4303 of USERRA,<sup>8</sup> defines 17 terms used in this law, including the term "employer." The definition of "employer" includes the following sentence: "Except as an actual employer of employees, an employee pension plan described in section 3(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(2)) shall be deemed to be an employer only with respect to the obligation to provide benefits described in section 4318."<sup>9</sup>

Section 4318 of USERRA requires employers to treat employees as having been continuously employed in the civilian job, for civilian pension purposes, during the time that the employee was away from work for uniformed service if the employee established that he or she met the five USERRA conditions for reemployment.<sup>10</sup> DOL-VETS and DOJ agreed with Shea's assertion

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<sup>3</sup> This is a scholarly decision written by Judge Nathaniel M. Gorton, United States District Judge for the District of Massachusetts. The citation means that you can find this decision in Volume 158 of *Federal Supplement Third Series*, and the decision starts on page 20.

<sup>4</sup> 38 U.S.C. § 4318.

<sup>5</sup> 38 U.S.C. § 4322.

<sup>6</sup> 38 U.S.C. § 4323(a)(1).

<sup>7</sup> See 38 U.S.C. § 4323(a)(1) (final sentence).

<sup>8</sup> 38 U.S.C. § 4303.

<sup>9</sup> 38 U.S.C. § 4303(4A)(C).

<sup>10</sup> As I have explained in detail in Law Review 15116 (December 2015) and many other articles, the person must have left a civilian job (Federal, State, local, or private sector) to perform uniformed service and must have given the employer prior oral or written notice. The person's cumulative period of uniformed service, relating to the employer relationship for which he or she seeks reemployment, must not have exceeded five years, but there are

that the pension plan trustees had not complied with section 4318 of USERRA in that they had not properly credited Shea for the periods when military service necessitated his absence from his civilian employment. Thus, the pension plan and its trustees qualified as Shea's "employer" for purposes of USERRA enforcement, and they were properly made defendants in this lawsuit.

In Law Review 21031 (April 2021), I described the application of section 4318 of USERRA to multi-employer hiring halls and multi-employer pension funds. This case is another good example of that application.

In a situation of this kind, where employees work for many employers during the course of a career, working through a hiring hall, the group of employers, the hiring hall, and the pension plan constitute the "employer" of a person like Shea. Thus, Shea gave sufficient notice of his impending periods of service when he notified the hiring hall, and when he reported back to the hiring hall after completing a period of service that amounted to a sufficient "application for reemployment."

Shea was away from his civilian employment for more than five years cumulatively, as he was repeatedly called to the colors for service in Iraq and Afghanistan, and elsewhere, in the years following the terrorist attacks of 9/11/2001. Judge Gorton held that several of Shea's active-duty periods were exempt from the five-year limit under various subsections of section 4312(c) of USERRA.<sup>11</sup>

Under the pension plan, an employee needs at least 30 "credits", and the employee earns a credit for any calendar year in which he or she worked at least 1200 hours in covered employment. Shea must be given credit for the hours that he *would have worked* but for his military service.<sup>12</sup> After he is properly credited for his military service time, Shea has enough credits to qualify for the civilian pension.

Like others in this industry, Shea worked for many different companies during his long career. Capco Steel Corporation was his last employer before one of his deployments, and by the time he returned to Massachusetts after his deployment Capco had gone out of business. The financial liability for the cost of treating an employee as if he or she had been continuously

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nine exemptions. That is, there are nine kinds of service that do not count toward exhausting the individual's five-year limit. Please see Law Review 16043 (May 2016) for a detailed description of what counts and what does not count in exhausting the five-year limit. The person must have been released from the period of service without having received a disqualifying bad discharge from the military. After release from service, the person must have made a timely application for reemployment with the pre-service employer. Shea met these five conditions for each of the periods when he was away from his civilian employment for military service.

<sup>11</sup> 38 U.S.C. § 4312(c).

<sup>12</sup> 38 U.S.C. § 4318(a)(2).

employed during the military service period falls upon the last employer, but if that employer is no longer functional the liability falls upon the plan itself.<sup>13</sup>

### **Relationship between USERRA and ERISA**

Judge Gorton correctly rejected the defendants' contention that crediting Shea for time that he did not work, but would have worked, but for his military service, violated the Employee Retirement Income Security Act (ERISA). ERISA preempts State laws that put additional burdens on pension plans, but it does not preempt other Federal laws, like USERRA.<sup>14</sup>

Moreover, it should be noted that ERISA was enacted 21 years before USERRA (1973 vice 1994). The law does not favor repeal by implication, but if there were an irreconcilable conflict between the two laws the more recent law (USERRA) would of course control.

### **Summary**

Without a law like USERRA, the services would not be able to recruit and retain a sufficient quantity and quality of personnel to defend our country.<sup>15</sup> Yes, USERRA sometimes imposes costs and inconvenience on employers, pension plans, and fellow employees, but those costs are eminently justified by our nation's need to defend itself.

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<sup>13</sup> 38 U.S.C. § 4318(b)(2)(B).

<sup>14</sup> See also *Washington v. Shell Oil Co.*, 2018 U.S. Dist. LEXIS 97971 (E.D. La. June 12, 2018).

<sup>15</sup> See Law Review 14080 (July 2014).

state legislative 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.

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<sup>16</sup> Congress recently established the United States Space Force as the 8<sup>th</sup> uniformed service.