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# USERRA'S Escalator Principle Is Great, But There Are Limits

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

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***Foster v. Dravo Corp.,* 420 U.S. 92 (1975).[3]**

***Moss v. United Airlines, Inc.,* 2021 U.S. App. LEXIS 36959 (7th Cir. Dec. 14, 2021).[4]**

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

[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 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.

[3] This is a 1975 decision of the United States Supreme Court. The decision was written by Justice Thurgood Marshall, for a unanimous Court. The citation means that you can find the decision in Volume 420 of *United States Reports,* and the decision starts on page 92.

[4] This is a recent (December 2021) decision of the United States Court of Appeals for the 7th Circuit, the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin. As is

**The escalator principle in the Supreme Court in 1975**

Since Congress enacted the reemployment statute in 1940, there have been 17 decisions of the United States Supreme Court under this statute. In Category 10.1 of our Law Review Subject Index, you will find a "Law Review" article about each of these 17 cases. The 12th case came in 1975, and I discuss that case in detail in Law Review 09007 (February 2009). That case is *Foster v. Dravo Corp.*

In its first case construing the 1940 reemployment statute,[5] 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."[6]

In subsequent cases, the Supreme Court refined the escalator principle. It does not apply to all that might have happened to the veteran if he or she had remained continuously employed in the civilian job, instead of being away from the job for military service. The escalator principle applies to "perquisites of seniority." A two-pronged test determines whether a benefit qualifies as a perquisite of seniority. First, the benefit must be something that was intended to be a reward for length of service, rather than a form of short-term compensation for services rendered, or in this case not rendered because the veteran was away from work for military service at the time. Second, it must be reasonably certain (not necessarily absolutely certain) that the veteran would have received the benefit if he or she had remained continuously employed.

Earl R. Foster was employed by Dravo Corporation until March 6, 1967, when he was drafted into the Army. He was honorably discharged about 18 months later, and he returned to work on October 2, 1968. He claimed that the escalator principle entitled to him to the vacation time that he would have earned if he had remained in the civilian job for all of 1967 and 1968, but the Supreme Court rejected his principal argument.

The Supreme Court held that Foster's claim for full vacation benefits for 1967 and 1968 failed under the first prong of the two-pronged test. An employee earns vacation by working. Foster was not entitled to vacation for the weeks that he did not work in the first part of 1967 and the latter part of 1968.

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always the case in our federal intermediate appellate courts, the case was heard and decided by a panel of three judges. Judge Kenneth F. Ripple wrote the decision, and Judges Ilana K. Rovner and Michael Y Scudder joined in a unanimous panel decision.

[5] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275 (1946).

[6] *Fishgold,* 328 U.S. at 284-85.

Foster's back-up argument was that he should receive, at a minimum, a pro rata share of the vacation that he earned, based on the nine weeks that he worked for the company in early 1967 (before he was drafted) and the 13 weeks that he worked in late 1968 (after he was discharged). The Supreme Court remanded the case to the district court to give Foster to provide evidence in support of his back-up argument.[7]

An employee earns vacation days by working, so vacation days do not qualify as a perquisite of seniority to which the veteran is entitled upon reemployment, but the *rate at which an employee earns vacation* is a perquisite of seniority. For example, at Daddy Warbucks Industries (DWI), new employees with zero to three years of seniority earn one week of vacation per year; employees with 3-15 years of seniority earn two weeks of vacation per year; and employees with more than 15 years of seniority earn three weeks of vacation per year.

Mary Jones worked for DWI for two years, then she left for military service for two years. She met the five USERRA conditions for reemployment[8] and returned to work. Upon reemployment, she is entitled to start earning two weeks of vacation per year, because she would have passed the three-year threshold but for her military service. But Mary is not entitled to vacation for the two years that she was away from work for service.

**Q: *Foster v. Dravo Corporation* was decided by the Supreme Court in 1975, 19 years before the Congress enacted USERRA in 1994. Why is this case relevant in determining the meaning and effect of USERRA?**

**A:** 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 as a long-overdue update and rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA was not a new law in 1994—it was an improvement upon a law that was already 54 years old.

Congress clearly intended that the extensive body of case law that had developed over the 54-year period from the enactment of the VRRA in 1940 to the enactment of USERRA in 1994

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[7] On remand, Foster prevailed on his back-up argument. He received $166.28 as compensation for the vacation days that he should have received but did not receive. *See Foster v. Dravo Corp.,* 395 F. Supp. 536 (W.D. Pa. 1975).

[8] As I have explained in detail in Law Review 15116 (December 2015) and many other articles, a 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 service, related to the employer relationship for which he or she seeks reemployment, must not have exceeded five years. There are nine exemptions from the five-year limit. That is, there are nine kinds of service that do not count in exhausting the person's five-year limit with that employer. *See* Law Review 16043 (May 2016) for a detailed discussion 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, the person must have made a timely application for reemployment.

would continue to apply under USERRA, except in those cases where Congress had intentionally changed the text of the law. USERRA's legislative history includes the following instructive paragraph:

> The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protection against employment-related discrimination, and the protection of certain other rights and benefits have been eminently successful for over 50 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 the provisions of this Act, 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 and Repair Corp.,* 328 U.S. 275, 285 (1946); *Alabama Power Co. v. Davis,* 431 U.S. 581, 584 (1977).[9]

Section 4316(a) of USERRA codifies the escalator principle, as follows:

> A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the 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]

It is clear that section 4316(a) codifies the escalator principle, as it had developed in Supreme Court and Court of Appeals caselaw under the VRRA. Section 4316(a) does not change the teachings of *Foster* and other cases decided before the enactment of USERRA in 1994.

**Escalator principle in the 7th Circuit in 2021**

Michael Moss was a Lieutenant Colonel in the Marine Corps Reserve at all times relevant to his case.[11] He is now a Colonel and a life member of the Reserve Organization of America (ROA).[12]

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[9] House Committee Report, April 28, 1993; H.R. Rep. No. 103-65, Part 1. The entire text of this report can be found in Appendix D-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quote paragraph can be found at pages 799-800 of the 2021 edition of the *Manual. See also* S. Rep. 103-158, October 8, 1993, reprinted in Appendix D-2 of *The USERRA Manual.* At pages 879-80 of the 2021 edition, one can find a similar paragraph in the report of the Senate Committee on Veterans' Affairs.

[10] 38 U.S.C. § 4316(a).

[11] *Moss v. United Airlines, Inc.,* 2021 U.S. App. LEXIS 36959 (7th Cir. Dec. 14, 2021).

[12] At its 2018 annual convention, the Reserve Officers Association amended its Constitution to make all military personnel, from E-1 through O-10, eligible for full membership. The organization also adopted a new "doing business as" name—the Reserve Organization of America. The point of the name change is to emphasize that the

Colonel Moss initiated a class-action lawsuit[13] against United Airlines (UAL) in the United States District Court for the Northern District of Illinois. He asserted that UAL had violated section 4316(a) of USERRA by denying sick leave accrual in excess of 90 days to UAL pilots who were military reservists and who were away from their UAL jobs for military service.

After the discovery period, UAL filed a motion for summary judgment, claiming that there were no material issues of fact in dispute and that UAL was entitled to judgment as a matter of law. The District Judge held that UAL's sick leave was not a seniority based benefit. Colonel Moss filed a timely appeal in the 7th Circuit.

In a scholarly opinion written by Judge Kenneth F. Ripple of the 7th Circuit and joined by the other two panel members, the 7th Circuit cited *Foster* and several other Supreme Court VRRA precedents and a 2nd Circuit decision that had followed *Foster* and held that accrual of sick leave, like accrual of vacation, is not a seniority-based benefit.[14] The 7th Circuit panel affirmed the granting of UAL's motion for summary judgment. This case is now over.

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This article is one of 2,300-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 on 10/1/1922 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 almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Through these articles, and by other means, including amicus curiae ("friend of the court") briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and 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

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organization now represents and admits to membership all military personnel, from the most junior enlisted personnel to the most senior officers.

[13] In a class-action lawsuit, the named plaintiff or plaintiffs seeks to represent the entire class of similarly situated persons. The District Judge approved the case for class-action treatment.

[14] *LiPani v. Bohack Corp.,* 546 F.2d 487, 490 (2nd Cir. 1976).

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[15] uniformed services, 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.

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[15] Congress recently established the United States Space Force as the 8th uniformed service.