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We Are Now 3-0 in the Courts of Appeals on our Interpretation of 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.
1.4—USERRA enforcement

***Clarkson v. Alaska Airlines, Inc.,* 59 F.4th 424 (9th Cir. 2023).[3]**

***Travers v. FedEx Corp.,* 8 F.4th 198 (3d Cir. 2021).[4]**

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,000 "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 Spouses' 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 47 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] The 9th Circuit is the intermediate federal appellate court that sits in San Francisco and hears appeals from district courts in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Northern Mariana Islands, Oregon, and Washington.

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

***White v. United Air Lines,* 987 F.3rd 616 (7th Cir. 2021).[5]**

USERRA's "furlough or leave of absence" clause:

On 10/13/1994, President Bill Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA).[6] USERRA was a long-overdue update and rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940.[7]

USERRA's "furlough or leave of absence" provision reads 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—
>
> **(A)** deemed to be on furlough or leave of absence while performing such service; and
>
> **(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*.[8]

This language, or something very much like it, has been part of the reemployment statute since 1940. When Congress enacted USERRA in 1994, this provision was carried over without significant change. Section 4331 of USERRA gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers.[9] The pertinent subsection of the DOL USERRA Regulation is as follows:

> **Which non-seniority rights and benefits is the employee entitled to during a period of service?**
>
> **(a)** The non-seniority rights and benefits to which an employee is entitled during a period of service are those that the employer provides to similarly situated employees by an employment contract, agreement, policy, practice, or plan in effect at the employee's workplace. These rights and benefits include those in effect at the beginning of the employee's employment and those established after employment began. They also include those rights and benefits that become effective during the employee's

[5] The 7th Circuit is the intermediate federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.
[6] Uniform Services Employment and Reemployment Rights Act, Pub. L. No. 103-353, 108 Stat. 3149 (1994). USERRA has been amended several times since 1994 and is now codified at 38 U.S.C. §§ 4301-35.
[7] *See generally* Law Review 15067 (August 2015) for a detailed discussion of the federal reemployment statute.
[8] 38 U.S.C. § 4316(b)(1) (emphasis added).
[9] 38 U.S.C. § 4331.

period of service and that are provided to similarly situated employees on furlough or leave of absence.

(b) If the non-seniority benefits to which employees on furlough or leave of absence are entitled vary according to the type of leave, the employee must be given the most favorable treatment accorded to any comparable form of leave when he or she performs service in the uniformed services. In order to determine whether any two types of leave are comparable, the duration of the leave may be the most significant factor to compare. For instance, a two-day funeral leave will not be "comparable" to an extended leave for service in the uniformed service. In addition to comparing the duration of the absences, other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered.

(c) As a general matter, accrual of vacation leave is considered to be a non-seniority benefit that must be provided by an employer to an employee on a military leave of absence only if the employer provides that benefit to similarly situated employees on comparable leaves of absence.[10]

In several of the amicus curiae ("friend of the court") briefs that we have filed, and in several of our "Law Review" articles, we (the Reserve Organization of America) have taken the position that an employer must grant *paid* military leave to an employee who is away from his or her civilian job for a short period of military training or service if and to the extent that the employer grants paid leave for comparable periods of leave for non-military reasons (like jury service).[11] In 2021, the 7th Circuit (Chicago) and the 3rd Circuit (Philadelphia) agreed with our position, and now the 9th Circuit (San Francisco) has joined this chorus.[12] The other ten circuits have not yet addressed the question.[13]

The *Clarkson* case.

Casey Clarkson is a Major in the Washington Air National Guard and a member of the Reserve Organization of America (ROA).[14] On the civilian side, he works as a first officer for Alaska

[10] 20 C.F.R. § 1002.150 (bold question in original).

[11] *See generally* Law Review 21067 (October 2021) and Law Review 21014 (March 2021).

[12] *See White v. United Air Lines,* 987 F.3 616 (7th Cir. 2021); *Travers v. FedEx Corp.,* 8 F.4 198 (3d Cir. 2021). The three published Court of Appeals decisions deal with pilots for airlines (United Air Lines and Alaska Air Lines) and a cargo carrier (FedEx), but this legal principle is not limited to pilots.

[13] When the other circuits address this question, they will likely follow the lead of the 7th Circuit, the 3rd Circuit, and now the 9th Circuit. If another circuit reaches the opposite conclusion on this point, that will set up a conflict among the circuits, and it would likely then be necessary for the Supreme Court to grant certiorari to resolve the conflict.

[14] In 2018, members of the Reserve Officers Association amended the organization's constitution and made enlisted personnel eligible for full membership, including voting and running for office. The organization adopted the "doing business as" name of "Reserve Organization of America" to emphasize that the organization represents and admits to membership enlisted personnel as well as commissioned officers.

Airlines (AA). He previously worked as a pilot for Horizon Air, a wholly owned subsidiary of Alaska Air Group that acts as a feeder airline for Alaska Airlines. He brought this case as a class action, on behalf of himself and all other similarly situated AA and Horizon Air pilots in the United States District Court for the Eastern District of Washington. He is represented by several attorneys, including ROA life member Thomas Jarrard.

On 2017, Clarkson was away from his Horizon Air job for three short periods of military duty (6/8/2017 to 7/8/2017, 9/9/2017 to 9/14/2017, and 10/1/2017 to 10/26/2017). He contended that AA and Horizon are required to grant *paid* military leave for such short periods of military duty because they grant paid leave for pilots who are away from work for non-military absences of comparable duration and purpose.

The *Clarkson* case was assigned to District Judge Thomas O. Rice, who approved the case for class action treatment but then granted the defendants' motion for summary judgment.[15] Pursuant to Federal Rules of Procedure Rule 56, a district judge should grant a motion for summary judgment only if he or she can say, after a careful review of the evidence, that there is no evidence (beyond a "mere scintilla") in support of the non-moving party's claim or defense and that no reasonable jury could find for the non-moving party.

Major Clarkson filed a timely appeal with the United States Court of Appeals for the 9th Circuit. As is always the case in our federal appellate courts, the case was assigned to a panel of three judges. In this case, the judges were Judge Richard A. Paez, Judge Bridget S. Bade, and Judge Haywood S. Gilliam. Judge Paez wrote the opinion, and the other two judges joined in a unanimous panel decision. They held:

> In entering judgment for the Airlines, the district court concluded that no reasonable jury could find military leave comparable to non-military leave. In reaching this conclusion, the district court erred by comparing *all* military leaves, rather than just the short-term military leaves at issue here, with the comparator non-military leaves. The court also erred by disregarding countless factual disputes about each of the three factors in the comparability analysis: duration, purpose, and control. The court seemingly considered only the evidence presented by the Airlines when it concluded no reasonable jury could find for Clarkson. Because factual disputes exist, comparability is an issue for the jury.[16]

Q: Is the *Clarkson* case over?

[15] *Clarkson v. Alaska Airlines, Inc.,* 59 F.4 424 (9th Cir. 2023).
[16] *Id*.

A: No. AA is seeking that the 9th Circuit conduct a rehearing en banc. If that motion is granted, there will be new briefs and a new oral argument session before all of the active judges of the 9th Circuit and then a new decision, either affirming or reversing the panel decision. It is possible but unlikely that the 9th Circuit will grant the motion for rehearing en banc.

The final step available to AA is to ask the United States Supreme Court for a writ of certiorari. Certiorari is granted if four or more of the nine justices vote for certiorari at a conference where certiorari petitions are considered. The Supreme Court grants certiorari in only about 1% of the cases where it is sought. I think that it is most unlikely that the Supreme Court will grant certiorari in this case because there is no conflict among the circuits on this legal issue. The three circuits that have addressed the issue have decided in the same way.

If the 9th Circuit does not grant rehearing en banc, or if the panel decision is upheld on appeal, the case will be remanded to the United States District Court for the Eastern District of Washington for a trial. Judge Rice held, as a matter of law, that the short-term military duty periods that interrupted Clarkson's AA employment were not comparable to the kinds of non-military paid leaves for which AA grants paid leave. The 9th Circuit panel held that this was a question of fact, for the jury, not a question of law, for the district judge. Thus, there needs to be a jury trial.

This case will likely continue for several years. The district judge (Judge Rice or another judge if the case is reassigned) will need to conduct a jury trial and then to fashion an appropriate remedy for Major Clarkson and other similarly situated AA pilots who also serve in the National Guard or Reserve, if the jury finds in their favor. The judge will also need to determine appropriate attorney fees for Clarkson's attorneys, if he and the class prevail. There could be another appeal in this case.

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

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This article is one of 2,000-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. We add new articles each month.

ROA is more than a century old—on 10/2/1922 a group of veterans of "The Great War," as World War I was then known, founded our organization at a meeting in Washington's historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing. 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 advocate for the rights and interests of service members and 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 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[17] 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.

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:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002[18]

[17] Congress recently established the United States Space Force as the 8th uniformed service.
[18] You can also contribute on-line at www.roa.org.