AL-2008-RET
(April 2008) - Update added June 2017

Alabama Law Violates Federal Law with Respect to State Retirement Credit for Military Service Performed by Teachers Prior to Start of Teaching Career

By CAPT Samuel F. Wright, JAGC, USN (Ret.)

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Alabama law provides that public school teachers who have served on active duty in the Armed Forces may receive teacher retirement credit for the active duty time, under certain circumstances and with specific limitations, as follows:

"Anything in this chapter to the contrary notwithstanding, if any person becoming a member of the Teachers' Retirement System after Oct. 1, 1975, shall have served in the armed forces of the United States, exclusive of service in a Reserve or National Guard component of any branch of the armed forces, such member may be granted by the Board of Control membership service credit for such period of service in the armed forces; provided, that such member pays into the Teachers' Retirement System, in a lump sum within one year next after the first day of the pay period in which the first deduction to the Teachers' Retirement System is made, after having been honorably discharged from the armed forces, an amount equal to 4 percent of the average compensation paid to a teacher during each claimed year of full-time military service, plus and together therewith, 8 percent interest compounded from the last date of such claimed military service; provided further, that no member shall receive more than four years' membership service credit for military service, and *no credit for military service shall be granted if such member is receiving military service retirement benefits, other than disability allowances or benefits, from any branch of the United States armed forces or by reason of any service in any branch of the armed forces* or if such member received anything other than an honorable discharge for and including the claimed military service." Alabama Code, section 16-25-3(e) (emphasis supplied).

The italicized language above directly violates title 10, U.S. Code, section 12736, which provides as follows:

"No period of service included wholly or partly in determining a person's right to, or the amount of, retired pay *under this chapter* may be excluded in determining his eligibility for any annuity, pension, or old-age benefit, under any other law, on account of civilian employment by the United States or otherwise, or in determining the amount payable under that law, if that service is otherwise properly credited under it." 10 U.S.C. 12736 (emphasis supplied).

Section 12736 refers to retired pay *under this chapter*—this refers to the chapter of title 10 of the U.S. Code that provides for retirement benefits at age 60 based on a combination of full-time active duty and part-time service in the National Guard or Reserve. This limitation on state "no double dipping" laws does not apply to persons receiving *regular* military retired pay, based on 20 years or more of full-time active duty.

A state "no double dipping" law that runs afoul of 10 U.S.C. 12736 is void under the Supremacy Clause of the United States Constitution. *See Cantwell v. County of San Mateo,* 631 F.2d 631 (9th Cir), *cert. denied,* 450 U.S. 998 (1980); *Almeida v. Retirement Board of the Rhode Island Employees Retirement System,* 116 F. Supp. 2d 269 (D.R.I. 2000).

To understand the effect of section 16-25-3(e), and how it runs afoul of federal law, let us discuss two hypothetical but very realistic Alabama teachers, Bob Jones and Mary Smith. Both Mr. Jones and Ms. Smith graduated from college in 1976 and then served on active duty in the U.S. Navy for four years, from June 1976 to June 1980. Both Mr. Jones and Ms. Smith started their careers as Alabama public school teachers in September 1980 and retired in June 2010, after 30-year teaching careers.

After leaving active duty in 1980, Mr. Jones performed no further military service, Active or Reserve, so he receives no military retirement benefit based on his four years of active duty before he began his teaching career. Accordingly, section 16-25-3(e) permits Mr. Jones to purchase teacher retirement credit for his 1976-80 active duty period. Thus, Mr. Jones earns a retirement based on 34 years of service—four years of active duty plus 30 years teaching.

Unlike Mr. Jones, Ms. Smith affiliated with the Navy Reserve after leaving active duty in 1980. She continued participating until she retired as a captain (O-6) in 2005, with 29 years of service, including the initial four years of active duty. The four initial active duty years contribute to her accumulation of more than 20 "good years" to qualify for non-regular military retirement benefits at age 60. The 1,460 retirement points that she earned in four years of full-time active duty also contribute to the amount of her Navy Reserve retirement that she receives after she turns 60 in 2014. Section 16-25-3(e) purports to preclude CAPT Smith from purchasing teacher retirement credit for the 197680 active duty period, because she is using that period to help her qualify for Reserve military retirement benefits at age 60.

Alabama seeks to penalize Ms. Smith, with respect to her teacher retirement benefits, because she chose to affiliate with the Navy Reserve after she left active duty and because she continued her Navy Reserve participation during her teaching career. This penalty runs afoul of the Supremacy Clause of the U.S. Constitution, which provides: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." U.S. Constitution, Article VI, Clause 2.

Early in our nation's history, the Supreme Court decided that the Supremacy Clause means what it says, and that federal law trumps conflicting state law. *See Gibbons v. Ogden,* 22 U.S. 1 (1824). Just 37 years later, our nation came to blows on the issue of the supremacy of federal or state authority.

Until 1948, there were only two ways to qualify for military retirement. One way was to serve on full-time active duty for at least 20 years, and the other way was to suffer a service-connected disability while on active duty. In 1948, Congress enacted the Reserve Retirement Law and provided for a third way to earn military retirement, based on a combination of full-time active duty and part-time service in the National Guard or Reserve. At ROA headquarters, we have the pen that President Harry Truman used to sign the Reserve Retirement Law in 1948.

In the aftermath of World War II, there were millions of young men and women who had recently served on active duty. President Truman and the Congress had the foresight to recognize that our country might again need the service of some of those young men and women, and that in the meantime our nation needed to keep their military skills fresh and available for recall to active duty if needed. They were needed just two years later, when North Korea invaded South Korea in June 1950. The Korean War was fought largely by recalled Reservists who had recent and relevant World War II combat experience to draw upon.

The Reserve Retirement Law has served as a pillar of the Total Force Policy. The possibility of qualifying for retirement benefits at age 60 serves as an incentive for qualified persons to join the National Guard or Reserve and to remain for a career. The purpose of section 12736 of title 10 is to prevent a state (like Alabama) from undoing the incentive that Congress has sought to create. Alabama's law runs directly contrary to the federal policy and is invalid.

Alabama Code section 16-25-3 applies to military service that the employee performed *before* beginning the relevant civilian employment. The federal *reemployment* statute applies to a period of uniformed service that *interrupts* the employee's civilian career with the relevant civilian employer. The federal reemployment statute dates back to 1940. It has applied to the federal government and to private employers since 1940. In 1974, Congress amended the law to make it apply to state and local governments as well. The federal reemployment statute was colloquially referred to as the Veterans' Reemployment Rights Act (VRRA) and was codified at 38 U.S.C. 2021-2026, until 1994. I invite your attention to Law Review 104 for a detailed discussion of the history of the federal reemployment statute.

CAPT Smith's 30-year career as a public school teacher was interrupted by scores of short periods of military training, including inactive duty training (drill weekends) and active duty for training (annual training tours). Under the federal reemployment statute, CAPT Smith is entitled to be treated *as if she had been continuously employed* in her teaching job during each of those short periods of military training.

Iraq invaded Kuwait on Aug. 2, 1990. Just a few days later, President George Herbert Walker Bush started calling National Guard and Reserve units to active duty, in the first significant Reserve Component call-up since the Korean War. Then LCDR Smith was among the first Navy Reservists mobilized for Operation Desert Shield/Storm. She missed the 199091 academic year, as she was on active duty from August 1990 to May 1991. After the terrorist atrocities of Sept. 11, 2001, CAPT Smith was called to active duty for another year, from March 2003 to March 2004. Under the federal reemployment statute, she is entitled to be treated *as if she had been continuously employed* in her teaching job during those two periods of military duty as well.

In 1946, just nine months after the end of World War II, the Supreme Court decided the first of its 16 (so far) cases under the reemployment statute. The 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." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946). Almost 30 years later, the Supreme Court applied the escalator principle to retirement benefits under a defined benefit plan. *See Alabama Power Co. v. Davis,* 431 U.S. 581 (1977).

The VRRA, as construed by *Alabama Power Co.*, applied to Alabama's defined benefit pension plan for public school teachers after 1974, when Congress amended the VRRA to make it apply to state and local governments. CAPT Smith met the VRRA's eligibility criteria after her 199091 active duty period, so the VRRA requires the state of Alabama and its teacher retirement pension system to treat CAPT Smith *as if she had been continuously employed* in her teaching job during that military service period, in determining when she qualifies to retire from teaching, and also in determining the amount of her monthly teacher retirement benefit.

The VRRA served the nation reasonably well for more than half a century, but over the decades the law had become confusing and cumbersome because of numerous piecemeal amendments and sometimes conflicting court decisions. In 1994, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) recodifying the VRRA. USERRA's transition rules preserve vested rights under the VRRA, based on military service performed prior to Dec. 12, 1994. Section 4318 of USERRA (38 U.S.C. 4318) applies the escalator principle to pension benefits, including both defined benefit plans and defined contribution plans.

To summarize, CAPT Smith is entitled to purchase credit for her initial 197680 active duty period, based on Alabama Code section 16-25-3(e), with the federal gloss imposed by 10 U.S.C. 12736. Under the VRRA, she is entitled to teacher retirement credit for her 199091 period of active duty. Under USERRA, she is entitled to teacher retirement credit for her 200304 period of active duty. Under the VRRA and USERRA, she is entitled to teacher retirement credit for all of her short periods of military training (drill weekends and annual training) between 1980 (when she began her teaching career) and 2005 (when she retired from the Navy Reserve). When she retires from teaching in June 2010, she is entitled to 34 years of teacher retirement credit. If Alabama denies her any of this credit, Alabama is violating federal law.

UPDATE TO AL-2008-RET

June 2017

By Captain Samuel F. Wright, JAGC, USN (Ret.)[1]

I just checked, and the language of Alabama Code section 16-25-3(e) has not been amended in the nine years since I wrote this article. I adhere to the position stated in the article, that the language of this subsection violates section 12736 of title 10 of the United States Code (10 U.S.C. 12736) and the Supremacy Clause of the United States Constitution (Article VI, Clause 2).

I also believe that Alabama's policy violates section 4311(a) of the Uniformed Services Employment and Reemployment Rights Act (USERRA). That subsection provides:

> A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, *or any benefit of employment* by an employer on the basis of that *membership,* application for membership, *performance of service*, application for service, or obligation.

38 U.S.C. 4311(a) (emphasis supplied).

Let us discuss two University of Alabama classmates, Class of 2013. Both Bob Jones and Mary Smith participated in the Army Reserve Officers Training Corps as undergraduates, and both were commissioned as Army Second Lieutenants upon receiving their undergraduate degrees in May 2013. Both Jones and Smith served on active duty for exactly four years, from May 2013

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[1] 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. I have 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 35 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 or by telephone at 800-809-9448, ext. 730. I will provide up to one hour of information without charge. If you need more than that, I will charge a very reasonable hourly rate. If you need a lawyer, I can suggest several well-qualified USERRA lawyers.

until May 2017, when both were released from active duty. Both are hired as new Alabama teachers in September 2017, at the start of the 2017-18 academic year.

After leaving active duty in May 2017, Bob Jones chose not to affiliate with the Army Reserve or Army National Guard. Accordingly, Jones will receive no military pension, Active or Reserve, based on four years of active duty alone. Under Alabama Code section 16-25-3, Jones can obtain Alabama teacher retirement credit for his four years of Army active duty, from May 2013 until May 2017. To obtain that credit, he must make a modest deposit in the teacher retirement system within one year after he begins his career as an Alabama teacher, or by September 2018. Making that deposit makes sense if Jones plans to teach in Alabama for a career. Making that deposit means that Jones will qualify for teacher retirement four years earlier than he otherwise would qualify, and it may mean more money each month in his teacher retirement check.

After leaving active duty in May 2017, Smith affiliated with the Army Reserve, and she participates as a reservist for the next 25 years, until 2042, when she retires from the Army Reserve as a Colonel. Starting in 2051, when she turns 60, Smith receives Army Reserve retirement monthly checks, based on her four years of active duty (2013-17) plus her 25 years of Army Reserve service (2017-42). Under Alabama Code section 16-25-3(e) as currently written, Smith will be denied teacher retirement credit for her four active duty years because she is also obtaining federal military retirement under chapter 1223 of title 10 (Reserve Component retirement) for the same four years of active duty.

The opportunity to obtain teacher retirement credit for a period of active duty before the start of one's teaching career is a valuable "benefit of employment" for purposes of section 4311(a) of USERRA. Mary Smith is being denied that benefit based on her continued membership in a uniformed service (the Army Reserve) after she starts her teaching career in September 2017 and based on her continuing performance of uniformed service (drill weekends, annual training, etc.) during her teaching career.

If you are in this Mary Smith category, I want to hear from you. Please see footnote 1.