

LAW REVIEW¹ 22067

October 2022

DOJ and DOL Secure Favorable Settlement in USERRA Pension Case Involving ROA Life Member and American Airlines.

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

1.3.2.3—Pension credit for service time

1.8—Relationship between USERRA and other laws/policies

Bottom line up front

Congratulations to the United States Department of Justice (DOJ) and the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS) for obtaining a favorable settlement of the pension claims of Major General Thomas P. Harwood, III, USAFR (Ret.) under the Uniformed Services Employment and Reemployment Rights Act (USERRA). After General Harwood returned to his civilian job at American Airlines (AA)

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 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>.

following several active-duty periods, AA unduly delayed making the required contributions to his defined contribution plan pension account for the periods when he was away from work for military service, and the amount of the AA contribution was insufficient. Under the settlement, AA will pay \$15,671 to the Harwood pension account, and the company will also ensure that its employees who process pension accounts receive appropriate training in USERRA.

Explanation

General Harwood is a life member of the Reserve Organization of America (ROA).³ He graduated from the United States Air Force Academy in 1981 and then served on active duty for ten years as a junior officer. He left active duty in 1991 and affiliated with the United States Air Force Reserve (USAFR). He served a distinguished career and was promoted to Major General before he retired on 10/1/2016.

Harwood was hired by AA as a pilot in 1992 and is still so employed. His AA career was interrupted many times by periods of uniformed service, some voluntary and some involuntary. He met the five conditions for reemployment under USERRA for each period of uniformed service that interrupted his AA career.⁴ He was on active duty from 2013 to early 2016 and then for several short periods in April, May, and July 2016. His final active duty period, before retirement, was for two months in August-September 2016.⁵

³ 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 organization now represents and admits to membership all military personnel, from the most junior enlisted personnel to the most senior officers.

⁴ As I have explained in detail in Law Review 15116 (December 2015) and many other articles, a service member or veteran must meet five simple conditions to have the right to reemployment under USERRA. First, he or she must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary service in the uniformed services. See 38 U.S.C. § 4312(a). Second, he or she must have given the employer prior oral or written notice. See 38 U.S.C. § 4312(a)(1). Third, his or her cumulative periods of uniformed service, related to the employer relationship for which he or she seeks reemployment, must not have exceeded five years. See 38 U.S.C. § 4312(c). Under that subsection, there are nine exemptions—kinds of service that do not count toward exhausting the individual’s five-year limit. See Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting the five-year limit. Fourth, the person must have served honorably and must have been released from the period of service without having received a disqualifying bad discharge from the military. See 38 U.S.C. § 4304. Fifth, the person must have made a timely application for reemployment with the pre-service employer, after release from the period of service. After a period of service of 181 days or more, the person has 90 days to apply for reemployment. See 38 U.S.C. § 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

⁵ These multiple periods of military duty did not cause him to exceed USERRA’s cumulative five-year limit because most of the periods were exempt from the limit. See Law Review 16043 (May 2016) for a detailed discussion of the nine exemptions—kinds of service that do not count toward exhausting the limit.

Under section 4318 of USERRA, AA was required to contribute to General Harwood's AA pension account⁶ after he returned to work, following his final active duty period. Section 4318 provides:

(1)

(A) Except as provided in subparagraph (B), in the case of a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974) or a right provided under any Federal or State law governing pension benefits for governmental employees, the right to pension benefits of a person reemployed under this chapter shall be determined under this section.

(B) In the case of benefits under the Thrift Savings Plan, the rights of a person reemployed under this chapter shall be those rights provided in section 8432b of title 5. The first sentence of this subparagraph shall not be construed to affect any other right or benefit under this chapter.

(2)

(A) A person reemployed under this chapter shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services.

(B) Each period served by a person in the uniformed services shall, upon reemployment under this chapter, be deemed to constitute service with the employer or employers maintaining the plan for the purpose of determining the nonforfeitality of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan.

(b)

(1) An employer reemploying a person under this chapter shall, with respect to a period of service described in subsection (a)(2)(B), be liable to an employee pension benefit plan for funding any obligation of the plan to provide the benefits described in subsection (a)(2) and shall allocate the amount of any employer contribution for the person in the same manner and to the same extent the allocation occurs for other employees during the period of service. For purposes of determining the amount of such liability and any obligation of the plan, earnings and forfeitures shall not be included. For purposes of determining the amount of such liability and for purposes of section 515 of the Employee Retirement Income Security Act of 1974 or any similar Federal or State law governing

⁶ The pension account was established under section 401(k) of the Internal Revenue Code, 26 U.S.C. § 401(k), and under the collective bargaining agreement between AA and the Allied Pilots Association (APA), the union that represents AA pilots, including General Harwood.

pension benefits for governmental employees, service in the uniformed services that is deemed under subsection (a) to be service with the employer shall be deemed to be service with the employer under the terms of the plan or any applicable collective bargaining agreement. In the case of a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability of the plan described in this paragraph shall be allocated—

(A) by the plan in such manner as the sponsor maintaining the plan shall provide; or

(B) if the sponsor does not provide—

(i) to the last employer employing the person before the period served by the person in the uniformed services, or

(ii) if such last employer is no longer functional, to the plan.

(2) A person reemployed under this chapter shall be entitled to accrued benefits pursuant to subsection (a) that are contingent on the making of, or derived from, employee contributions or elective deferrals (as defined in section 402(g)(3) of the Internal Revenue Code of 1986) only to the extent the person makes payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of service described in subsection (a)(2)(B). Any payment to the plan described in this paragraph shall be made during the period beginning with the date of reemployment and whose duration is three times the period of the person's service in the uniformed services, such payment period not to exceed five years.

(3) For purposes of computing an employer's liability under paragraph (1) or the employee's contributions under paragraph (2), the employee's compensation during the period of service described in subsection (a)(2)(B) shall be computed—

(A) at the rate the employee would have received but for the period of service described in subsection (a)(2)(B), or

(B) in the case that the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).

(c) Any employer who reemploys a person under this chapter and who is an employer contributing to a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter, shall, within 30 days after the date of such reemployment, provide information, in writing, of such

reemployment to the administrator of such plan.⁷

Under section 4318(b)(1) of USERRA,⁸ AA was required to pay into Harwood's pension account the amount of money that it would have paid into the account during the period of Harwood's most recent active-duty period if Harwood had remained continuously employed by AA during that period. Under the Department of Labor (DOL) USERRA Regulation, AA was required to make that payment "no later than 90 days after reemployment."⁹ The AA payment to General Harwood's pension account was delayed far beyond the 90-day deadline,¹⁰ and the amount of the AA contribution was less than the amount that AA would have contributed to Harwood's account if he had remained continuously employed by the airline.¹¹ The \$15,671 payment is intended to make up for these deficiencies.

Q: What is the relationship between USERRA and the collective bargaining agreement (CBA) between AA and the union that represents AA pilots?

A: Under section 4302 of USERRA, this federal law is a floor and not a ceiling on the employment rights of service members and veterans. Section 4302 provides:

- (a)** Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.
- (b)** This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.¹²

The CBA between AA and the APA is certainly relevant in determining what General Harwood *would have received from AA if he had remained continuously employed*, but the CBA cannot

⁷ 38 U.S.C. § 4318. See generally Law Review 21059 (September 2021) and Law Review 20056 (June 2020) for a detailed discussion of section 4318;

⁸ 38 U.S.C. § 4318(b)(1).

⁹ 20 C.F.R. § 1002.262(a).

¹⁰ One of the payments was 454 days late.

¹¹ The amount of the required employer contribution to the pension account is computed "at the rate the employee would have received but for the period of service." 38 U.S.C. § 4318(b)(3)(A). In this case, it is possible to determine how much Harwood would have received from AA during each of the periods of absence from work necessitated by service based on Harwood's own work history at the airline and the number of hours that other AA pilots were working during those periods. The hourly rate is set forth in the CBA between the airline and the union.

¹² 38 U.S.C. § 4302.

take away his federal statutory rights under USERRA, nor can the CBA establish additional prerequisites to the exercise of those rights.

As I have explained in detail in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA in 1994 as a long-overdue update and rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. In its first case construing the 1940 reemployment statute, the Supreme Court established an important principle: "No practice of employers *or agreements between employers and unions* can cut down the service adjustment benefits that Congress has secured the veteran under the Act."¹³

Please join or support ROA

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. New articles are added each month.

ROA is more than 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 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 eight¹⁴ 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.

¹³ *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (emphasis supplied).

¹⁴ Congress recently established the United States Space Force as the 8th uniformed service.

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 20002¹⁵

¹⁵ You can also contribute on-line at www.roa.org.