

LAW REVIEW¹ 23045

August 2023

You Are Entitled to Seniority and Pension Credit for the Entire Time You Were Away from Your Job for Uniformed Service, But Only the Actual Period of Service Counts Toward Exhausting Your 5-Year Limit.

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

Subject Index Codes:

- 1.3.1.1—Left job for service and gave prior notice.**
- 1.3.1.2—Character and duration of service**
- 1.3.1.3—Timely application for reemployment**
- 1.3.2.2—Continuous accumulation of seniority—escalator principle**
- 1.3.2.3—Pension credit for service time**
- 1.4—USERRA enforcement**
- 1.8—Relationship between USERRA and other laws/policies**

¹ Please see 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, and we add new articles each month. I am the author of more than 90% of the articles published so far, 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 on active duty and in the Navy Reserve as a judge advocate and retired in 2007. I am a life member of ROA, and I currently serve on the Executive Committee and as Chairman of the Membership Committee. I participated in the drafting of USERRA, to replace the 1940 reemployment statute, while employed as an attorney for the United States Department of Labor (DOL). I have also worked with USERRA and the predecessor reemployment statute as a Navy judge advocate, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), and as an attorney for the United States Office of Special Counsel (OSC). For six years (June 2009 through May 2015), I was a full-time employee of ROA, serving as the first Director of the Service Members Law Center (SMLC). Please see Law Review 15052 (June 2015) for a summary of the accomplishments of the SMLC. My paid ROA employment ended 5/31/2015, but I have continued many of the SMLC functions as a volunteer and ROA member. You can reach me by e-mail at SWright@roa.org.

Q: I am an Army Reserve Colonel³ and a life member of the Reserve Organization of America (ROA).⁴ I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those who serve our country in uniform.

I was born in 1972, and I graduated from college in 1994. While in college, I participated in the Army’s Reserve Officers Training Corps (ROTC), and when I graduated on May 15, 1994, I was commissioned a Second Lieutenant. I remained on full-time active duty for exactly five years, until May 1999, when I was released from active duty and affiliated with the Army Reserve. In July 1999, just weeks after I left active duty, a large company hired me—let us call it Daddy Warbucks Industries or DWI.

I have worked continuously for DWI since 1999, but my career has been interrupted several times for military training and service. I have performed drill weekends every month and annual training every year. Three times, I was involuntarily recalled to active duty for service in Southwest Asia, in 2003-04, 2009-10. I volunteered to return to active duty for 24 months in 2020-22.

My last period of extended service lasted exactly two years, from 10/1/2020 until 9/30/2022. I left my DWI job on 9/15/2020 and took 15 days off to get my affairs in order before reporting to active duty at

³ The factual set-up for this article is hypothetical but realistic. This article is a restatement and reiteration of Law Review 19052 (June 2019). That article was based on a real situation.

⁴ In 2018, the members of the Reserve Officers Association amended the organization’s constitution and made all past and present uniformed services personnel (E-1 through O-10) eligible for full membership, including voting and running for office. The organization adopted the “doing business as” name “Reserve Organization of America” (ROA) to emphasize that the organization represents and admits to membership enlisted personnel as well as commissioned officers.

a distant Army base. After I was released from active duty on 9/30/2022, I waited 60 days to apply for reemployment. My husband and I took an extended vacation, and then I applied for reemployment, still well within the 90-day deadline for doing so.

The DWI personnel department and pension administrator have credited me with two years of DWI pension credit for my active-duty period that started on 10/1/2020 and ended on 9/30/2022. They have refused to give me DWI pension credit for the 15 days when I was away from work immediately before I entered active duty on 10/1/2020 or for the 60 days after I left active duty and before I applied for reemployment. The company has also denied me pension credit for all the other periods, before and after active-duty periods, when I have been away from work.

I have read and reread your Law Review 15116 (December 2015). I met and I am prepared to document that I met the five USERRA conditions for reemployment for each short or long period of time that I have been absent from my DWI job for military training or service during the entire time (1999-present) that I have been employed by the company and serving in the Army Reserve.

I began my DWI career in July 1999, and I have worked for the company continuously since that time, except for the periods when my DWI career has been interrupted by military training and service. I figure that I will be eligible to retire from DWI with 25 years of company pension credit in July 2024, 25 years after I began my DWI career. The company says that I am not entitled to DWI pension credit for these periods immediately before and after my military service periods. The company says that I must wait until February 2025 to

retire from the company with 25 years of pension credit. Is the company correct?

Answer, bottom line up front

No, the company is wrong. You are entitled to DWI pension and seniority credit for the entire time that you were away from work for service in the uniformed services. That includes the actual period of uniformed service, and it also includes these periods of absence from your civilian job, immediately before and after your military periods, when your absences from your civilian job were necessitated by your service.

Explanation

The five USERRA conditions for reemployment

As I have explained in detail in Law Review 15116 (December 2015) and other articles, you must meet five simple conditions to have the right to reemployment under USERRA:

- a. You must leave a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary service in the uniformed services.⁵
- b. You must have given the employer prior oral or written notice.⁶
- c. Your cumulative periods of uniformed service, relating to the employer relationship for which you seek reemployment, must

⁵ 38 U.S.C. § 4312(a).

⁶ 38 U.S.C. § 4312(a)(1).

not have exceeded five years.⁷ I will discuss this condition in detail, below.

- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.⁸
- e. After release from the period of service, you must have made a timely application for reemployment.⁹

You met these requirements for each period of service that necessitated your absence from your DWI job, including the most recent period of service, from 2020 to 2022.

Q: The DWI personnel department said that they added up all the workdays that I missed to “play soldier” (as they call it) during my lengthy career with the company. The personnel department said that I have been away from my job for four years and 11 months for military duty, without including the 60 days that I waited to apply for reemployment in the fall of 2022. The company said that if I am credited with those 60 days of pension credit, I will be beyond the five-year limit by one month and will not have the right to reemployment. What do you say about that?

A: The company is wrong. First, it is the *cumulative period of uniformed service, not the period of absence from the civilian job, that counts toward the five-year limit* (assuming that the period of service is not exempt from the five-year limit under one of the subsections of section 4312(c) of USERRA).¹⁰ The period of absence from the civilian job is

⁷ 38 U.S.C. § 4312(c).

⁸ 38 U.S.C. § 4304. Disqualifying discharges include punitive discharges, awarded by court martial for serious offenses, and other-than-honorable administrative discharges.

⁹ After a period of service of 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. § 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

¹⁰ See Law Review 23022 (May 2023).

almost always at least a few days longer than the period of uniformed service, and your case is typical in that regard.

Second, section 4312(c) of USERRA sets forth nine exemptions—kinds of service that do not count toward exhausting your five-year limit with the school district. Most of the service periods that you have performed are exempt from the five-year limit. Your two periods of involuntary active duty do not count toward exhausting your five-year limit with DWI.¹¹ Your drill weekends and annual training periods and your attendance at the Army War College are exempt from the five-year limit.¹² Your five years of initial active duty, from May 1994 until May 1999, before you began your DWI career, are exempt from the computation of your five-year limit.¹³

Q: How much of my five-year limit have I exhausted?

A: You have exhausted exactly two years of your five-year limit. Your two-year period of voluntary active duty, in 2020-22, counts toward your limit. All your other military service and training periods are exempt. You are well within the five-year limit. The periods immediately before and immediately after your military periods, when your absence from work was necessitated by your service, do not count toward your five-year limit with DWI.

Q: What does USERRA provide about my rights with respect to my civilian pension for the periods when I was away from my civilian job for services in the uniformed services?

¹¹ 38 U.S.C. § 4312(c)(4)(A).

¹² 38 U.S.C. § 4312(c)(3).

¹³ 38 U.S.C. § 4312(c)(3).

A: USERRA provides: “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.”¹⁴ This means that your DWI pension must be computed *as if you had remained continuously employed by the company* for the entire time (July 1999 until July 2024) that you were employed by the company. The short and extended periods that you were away from your job for military training or service did not interrupt your continuous accrual of DWI pension credit.

You were entitled to leave your civilian job 15 days before you reentered active duty on 10/1/2020.

The pertinent section of the Department of Labor (DOL) USERRA regulation is as follows:

If the employee is ordered to perform an extended period of service in the uniformed services, he or she may require a reasonable period of time off from the civilian job to put his or her personal affairs in order, before beginning the service. Taking such time off is also necessitated by the uniformed service.¹⁵

You are entitled to DWI seniority and pension credit for the entire time that you were away from your civilian job for uniformed service, including the time before and after the actual period of service.

¹⁴ 38 U.S.C. § 4318(a)(2)(B). You can find the entire text of section 4318 of USERRA quoted in Law Review 22036 (June 2022) and other articles. Section 4318 applies to defined benefit pension plans as well as defined contribution plans. It applies to pension plans maintained by private employers as well as the Federal Government, the States, and the political subdivisions of States.

¹⁵ 20 C.F.R. § 1002.74(b).

The pertinent paragraph in USERRA's legislative history is as follows:

Section 4315(a) [later renumbered as 4316(a)] would recodify the "escalator" principle as it applies to seniority and all rights and benefits which flow from seniority, calculated as if the person had never left employment. For example, in determining how much vacation (length of vacation) a servicemember is entitled to in the years following reinstatement, *all the time away from work (period between leaving the job and entering military service, period of military service, and period between discharge or release from military service and reemployment) would be required to be considered under this section*, together with the pre-military service period of employment.¹⁶

The pertinent section of the DOL USERRA regulation is as follows:

Depending on the length of the employee's period of service, he or she is entitled to take from one to ninety days following service before reporting back to work or applying for reemployment (See section 1002.115). This period of time must be treated as continuous service with the employer for purposes of determining participation, vesting, and accrual of pension benefits under the plan.¹⁷

Q: Is it inconsistent to argue that the period before and after the period of uniformed service counts for purposes of seniority and pension credit but does not count for purposes of exhausting the five-year limit?

¹⁶ House Committee Report, April 28, 1993, H.R. Rep. 103-65 (Part 1) (emphasis supplied). You can find the entire report in Appendix D-1 of *The USERRA Manual*, by Kathryn Piscitelli and Edward Still. The quoted paragraph is on page 721 of the 2018 edition of the *Manual*.

¹⁷ 20 C.F.R. § 1002.259(a).

A: No. These questions are answered by different subsections of USERRA, and there is no requirement that the answers be consistent.

In September 1982, I left active duty in the Navy's Judge Advocate General's Corps (JAGC) and joined the Department of Labor (DOL) as an attorney. That is how I first developed interest and expertise in the federal reemployment statute. I have made the enforcement of the rights of service members and veterans, especially reemployment rights, the focus of my legal career and my military career.

Over the last ten centuries, the courts in Great Britain, the United States, and other common law countries have developed rules for the interpretation of constitutions, statutes, regulations, and other legal texts. In the articles and briefs that I have written, I have always sought to apply those rules to the interpretation of the federal reemployment statute.

The first rule of statutory interpretation is that one must always start with the words that Congress or the state legislature enacted. As to the five-year limit, it is “such person's cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment” that is subject to the five-year limit.¹⁸ The reasonable interpretation of this language is that the actual period of uniformed service, but not the period of absence from the civilian job immediately before and after the period of service, is subject to the five-year limit.

With respect to the continuous accumulation of seniority while away from the civilian job for uniformed service, the person who meets the five USERRA conditions for reemployment is entitled “to the seniority and other rights and benefits determined by seniority that the person had on the date of commencement of service in the uniformed services

¹⁸ 38 U.S.C. § 4312(c).

plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.”¹⁹ The reasonable interpretation of this language is that the person is entitled to continuous accumulation of seniority and pension credit during the entire time that the person was away from his or her civilian job for uniformed service, and that time is not limited to the actual service time.

In 1946, shortly after the end of World War II, the Supreme Court decided its first case about the 1940 reemployment statute. In that case, the Court held:

This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. *See Boone v. Lightner*, 319 U.S. 561, 575 (1943). And 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. Our [the Supreme Court’s] problem is to construe the separate provisions of the Act as parts of a harmonious whole and give each as liberal a construction as a harmonious interplay of the separate provisions permits.²⁰

Applying the rules of statutory interpretation together with the Supreme Court’s commandment that we interpret the reemployment statute liberally for the benefit of service members and veterans buttresses my conclusion that the returning service member is entitled to seniority and pension credit for the entire period of absence from the civilian job, but only the actual period of service counts toward exhausting the individual’s five-year limit.

¹⁹ 38 U.S.C. § 4316(a). *See also* 38 U.S.C. § 4318(a)(2)(A) for a similar entitlement with respect to civilian pension credit.

²⁰ *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

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, and 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, established ROA. General of the Armies John J. Pershing, the commander of our country’s military forces in that war, invited reserve officers who had served under him to attend a meeting at Washington’s historic Willard Hotel. General Pershing and the reserve officers who attended the meeting at his invitation recognized that calling the recently concluded war “the war to end all wars” was a dangerous conceit and that our nation needed to maintain military readiness.

One of the founders 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 more than a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s national 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, ESGR volunteers, DOL investigators, 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 their membership status, or lack thereof, in our organization, but please understand that ROA members, through their dues and contributions, pay the cost of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any of our country's eight uniformed services,²¹ you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership.²² Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to persons who are serving or have served in the Active Component of the armed forces, as well as the National Guard and Reserve.

If you are eligible, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448. If you are not eligible, please contribute to help us continue our vital work. You can send us a contribution at:

Reserve Organization of America
1 Constitution Avenue NE
Washington, DC 20002²³

²¹ Congress recently created the United States Space Force as the 8th uniformed service.

²² If you are under the age of 35, you can become an associate member for free for five years or when you turn 35, whichever comes first.

²³ You can also contribute on-line at www.roa.org.