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Fishgold v. Sullivan Drydock & Repair Corporation, the First Supreme Court Decision under the 1940 Reemployment Statute.

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1.3.2.2—Continuous accumulation of seniority-escalator principle
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10.1—Supreme Court cases on the reemployment statute

Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946).[3]

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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 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 1946 decision of the United States Supreme Court. The citation means that you can find this decision in Volume 328 of *United States Reports,* starting on page 275.

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) and President Bill Clinton signed it into law on 10/13/1994. USERRA was a long-overdue update and rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940.

In Category 10.1 of our Law Review Subject Index, we have 18 case note articles on the 16 Supreme Court decisions applying and construing the VRRA and the two decisions (so far) applying and construing USERRA. Law Review 08001 (January 2008) was about the first Supreme Court decision applying and construing the VRRA. Due to a technical glitch, Law Review 08001 has been irretrievably lost. Accordingly, I have authored this article as a replacement for the lost article.

Facts of the *Fishgold* case

Mr. Fishgold[4] was hired by the Sullivan Drydock & Repair Corporation on 12/21/1942 and worked as a welder until 5/22/1943, when he left his job to report to basic training, in response to the draft notice that he had received. He was honorably discharged on 7/12/1944. He promptly applied for reemployment, and he met the VRRA's eligibility requirements for reemployment.[5] He was promptly reemployed and returned to work at the shipyard.

As World War II approached its end, the need for shipyard work (building and repairing vessels) declined precipitously. On nine dates in

[4] Fishgold's first name is not mentioned in any of the three published court decisions in this case.
[5] The VRRA's eligibility requirements were similar but not identical to the USERRA requirements, which are discussed in detail in Law Review 15116 (December 2015).

1945, Fishgold did not work and was not paid because other employees in the bargaining unit had more seniority than he did and there was no need for additional employees. For example, on 4/9/1945 46 men were allowed to work at the shipyard, and all of them were nonveterans. Although the evidence was not exactly clear, it appears that all 46 nonveterans were hired prior to 12/21/1942, when Fishgold was hired.

Fishgold in the District Court

Fishgold v. Sullivan Drydock & Repair Corp., 62 F. Supp. 25 (E.D.N.Y. 1945).

Fishgold sued the Sullivan Drydock & Repair Corporation in the United States District Court for the Eastern District of New York, and the case was assigned to Judge Matthew T. Abruzzo. Attorney Knowlton Durham of New York City represented Fishgold in this case.[6] Local 13 of the Industrial Union of Marine and Shipbuilding Workers of America intervened on the side of the employer-defendant. After hearing evidence and legal arguments, Judge Abruzzo ruled for Fishgold, holding:

> The plaintiff claims that he is entitled to be employed under Section 8(b)(B) of the Selective Training and Service Act of 1940, as amended, 50 U.S.C.A. Appendix § 308(b)(B), which reads as follows referring to the plaintiff's position:
>
> 'If such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority * * * .' and I take that to mean that this

[6] The United States Department of Justice (DOJ) did not participate in the District Court but intervened on behalf of Fishgold in the appellate court.

> plaintiff is entitled to come back to his work as a first class welder and that he is entitled to come back to work in preference to anybody else who might be working on any of the days that he applied for work, except a veteran in his own category.[7]

Fishgold in the United States Court of Appeals for the Second Circuit

Fishgold v. Sullivan Drydock & Repair Corp., 154 F.2d 785 (2d Cir. 1946).

The defendant, Sullivan Drydock & Repair Corporation, did not appeal, but the intervenor, Local 13, appealed to the United States Court of Appeals for the Second Circuit.[8] As is always the case in the federal appellate courts, the case was assigned to a panel of three appellate judges. After receiving and reading briefs and hearing oral argument, the panel reversed Judge Abruzzo's decision in favor of Fishgold, holding:

> Subsection B of Sec. 8(b) is the operative source of the privilege on which the plaintiff relies; it reads as follows: 'Such employer shall restore such person to such position or to a position of like seniority, status and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so.' 'Such position' is nowhere defined except as 'a position other than a temporary position, in the employ of any employer.' Taking this clause by itself, it seems to us beyond debate that it was not intended that the veteran should gain in seniority. It will be observed that the grant is in the alternative: he is to be 'restored' to his original position, or to one of 'like seniority, status and pay,'

[7] *Fishgold,* 62 F. Supp. at 26.

[8] The Second Circuit is the intermediate appellate court that sits in New York City and hears appeals from district courts in Connecticut, New York, and Vermont.

whenever possible. The phrase, 'like seniority' means the 'same seniority' as before; and it necessarily precludes any gain in seniority. It follows that, if the original position is no longer open, the substitute shall be a position of no greater, though no less, seniority than the lost position. But if that be true, there can be no implication that, if the original position be not lost, but be still available, the veteran shall be restored to it with a gain in priority; for that would pre-suppose that Congress did not intend the substitute to be as nearly a complete substitute for the lost original as it was possible to make it, a hypothesis absurd on its face. Hence we must start with the proposition that subsection B of Sec. 8(b) not only did not grant any step up in seniority, but positively denied any.

Subdivision (c) confirms the intention so disclosed. As subsection B reads, it would probably be understood to restore the veteran only to that same position which he held when he was inducted. That was, however, thought to be unfair; for while he was in the service, there were likely to be such changes in the personnel that when he came back, he might find himself junior to those over whom he had had priority when he left. To remedy this, by an amendment made while the bill was in Congress, he was given the same status that he would have had, if he had been 'on furlough or leave of absence' while he was in the service. How far that differed from his position, had he remained actively at work, does not appear; but clearly the amendment presupposed that a difference there might be. Having in this way declared how the veteran's interim position 'shall be considered,' Congress added that he should be 'restored without loss of seniority.' Had the purpose been, not only to ensure the veteran that he should not lose any more steps upon the ladder than if he had been on leave, but also that he should go to the top, we cannot conceive that Congress would have expressed itself in the words, 'without loss

> of seniority.' They have no such express meaning, and their implications are directly the opposite; for they disclose a concern against his possible demotion inconsistent with any implied belief in his promotion. For these reasons we are satisfied that, except for the concluding phrase of subdivision (c) there can be no doubt that textually the union's construction is the right one. It remains to consider that phrase which as we understand it, is the chief reliance of those who take the opposite view.[9]

Under this holding, Fishgold was entitled to the seniority that he had on 5/22/1943, when he left his job to report to active duty, and he was entitled to the additional seniority that he would have attained if he had remained in the drydock job instead of interrupting his civilian career for military service, but he was not entitled to preference over fellow employees who had been continuously employed by the employer since a date prior to 12/21/1942, when Fishgold was hired. The 46 nonveteran employees who were permitted to work on 4/9/1945 were all hired prior to 12/21/1942 and had remained continuously employed by the company. Accordingly, the appellate court reversed the decision for Fishgold.

Fishgold **in the Supreme Court**

In a civil case in federal court, the final appellate step is to apply to the Supreme Court for a writ of certiorari (discretionary review). Certiorari is granted if four or more of the nine justices vote for certiorari at a conference during which certiorari petitions are considered. The

[9] *Fishgold,* 154 F.2d at 787-88.

Supreme Court denies certiorari in 99% of the cases where it is sought.[10]

Fishgold applied for certiorari, and the United States (through the DOJ) joined him in the application. The Supreme Court granted certiorari because of the overriding importance of the interpretation of the VRRA in the months following the end of World War II. After victory was achieved, millions of individuals who had left their civilian jobs for voluntary or involuntary military service returned to civilian life and demanded the right to resume their interrupted civilian careers.

The Supreme Court unanimously affirmed the decision of the Second Circuit.[11] Thus, Fishgold suffered a tactical defeat while achieving a strategic victory for all veterans of his generation and all succeeding generations.

In the eloquent decision written by Justice William O. Douglas and joined by all of his colleagues, the Supreme Court enunciated the "escalator principle" when it held: "Thus he [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."[12]

The Supreme Court also 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

[10] The 99% figure reflects the current reality. In the 1940s, the Supreme Court granted certiorari in a greater percentage of cases.
[11] Justice Robert H. Jackson did not participate in this case. At the time, he was in Nuremberg, Germany, serving as the chief American prosecutor in the trials of major Nazi war criminals.
[12] *Fishgold,* 328 U.S. at 284-85.

need. *See Boone v. Lightner,* 319 U.S. 561, 575. And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act. Our problem is to construe the separate parts of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits.[13]

Q: The Supreme Court decided *Fishgold* 48 years before Congress enacted USERRA in 1994. Is this case still relevant in interpreting the current reemployment statute?

A: Yes. The pertinent paragraph of USERRA's legislative history is as follows:

> 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 fifty 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 & Repair Corp.,* 328

[13] Id. at 285.+

U.S. 275, 285 (1946); *Alabama Power Co. v. Davis,* 431 U.S. 581, 584 ((1977).[14]

Q: Can the seniority escalator descend as well as ascend?

A: Yes. Today, as in 1946, the seniority escalator can descend as well as ascend. The pertinent section of the Department of Labor (DOL) USERRA regulation is as follows:

> **Can the application of the escalator principle result in adverse consequences when the employee is reemployed?**
>
> **Yes.** The Act does not prohibit lawful adverse job consequences that result from the employee's restoration on the seniority ladder. Depending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated. For example, if an employee's seniority or job classification would have resulted in the employee being laid off during the period of service, and the layoff continued after the date of reemployment, reemployment would reinstate the employee to layoff status. Similarly, the status of the reemployment position requires the employer to assess what would have happened to such factors as the employee's opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he or she had remained continuously employed. The reemployment position may involve transfer to another shift or

[14] House Committee Report, April 28, 1993 , H.R. Rep. No. 103-65 (Part 1). This committee report is reprinted in full in Appendix D-1 of *The USERRA Manual* by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found on page 690 of the 2023 edition of the *Manual.*

location, more or less strenuous working conditions, or changed opportunities for advancement, depending upon the application of the escalator principle.[15]

USERRA does not protect the returning veteran from a bad thing, like a layoff, that clearly would have happened anyway even if he or she had not interrupted the civilian job for military service. If layoffs at the employer are based on seniority, and if employees who were hired on the same date that the veteran was hired (before the military service) have been laid off, the returning veteran is not exempted from this adverse consequence.

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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

[15] 20 C.F.R. § 1002.194 (bold question and bold "Yes" in original).
[16] *See* https://crsreports.congress.gov/product/pdf/IF/IF10540/. These are the authorized figures as of 9/30/2022.

organization at a meeting in Washington's historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing, who had commanded American troops in the recently concluded "Great War." 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 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 defense needs.

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[17] Congress recently established the United States Space Force as the eighth uniformed service.

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[18] You can also contribute on-line at www.roa.org.