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If you Meet the Five USERRA Conditions, the Employer Must Treat you as if you Had Been Continuously Employed during the Time that you Were Away from Work for Service for all Purposes.

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

1.3.2.2—Continuous accumulation of seniority, escalator principle. 1.8—Relationship between USERRA and other laws/policies.

Q: I am a Major in the Air Force Reserve and a life member of the Reserve Organization of America (ROA).[3] On the civilian side, I am a

[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] The Reserve Officers Association was founded in 1922 and congressionally chartered in 1950. In 2018, ROA members amended the ROA Constitution and expanded membership eligibility to include enlisted personnel as well as officers. The organization adopted the "doing business as" name of "Reserve Organization of America" to emphasize that the organization represents and seeks to recruit as members service members of all ranks, from E-1 to O-10.

pilot for a major airline—let us call it Very Big Air Line or VBAL.[4] I have read with great interest many of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

I was away from my VBAL job for a one-year active-duty period, from 10/1/2022 until 9/30/2023. I have read and reread your Law Review 15116 (December 2015) concerning the five conditions for the right to reemployment under USERRA, and I am confident that I met the five conditions. I left my civilian job to perform uniformed service, and I gave the employer prior oral and written notice. This one year of active duty did not put me over the cumulative five-year limit with respect to my employer relationship with VBAL. I served honorably and was released from active duty without a disqualifying bad discharge from the Air Force. I applied for reemployment with VBAL on 10/2/2023, well within the 90-day deadline.

I returned to work promptly at VBAL, without issue. Everything was fine until 1/1/2024. After celebrating New Year's Eve, I was on the sidewalk outside the bar, waiting for the Uber that I had called to drive me home. A drunk driver crashed over the curb and hit me on the sidewalk, causing me grievous injuries.

As a result of the injuries and the disability, I am unable to qualify under Federal Aviation Administration (FAA) rules to return to the cockpit of an airliner. The disqualification is likely to be permanent. I am only 35 years old. But for this terrible accident, I likely would have continued my career as an airline pilot for another 30 years, until my 65th birthday.

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[4] This article is based on a real situation, but I have changed several of the facts to disguise the identity of the individual.

Under the collective bargaining agreement (CBA) between VBAL and the VBAL Pilots Association (VBALPA), a VBAL pilot who is medically disqualified from flying receives a monthly payment from the airline until he or she recovers and returns to the cockpit or until he or she reaches the age of 65, whichever comes first. The amount of the monthly payment is determined by a formula. One part of the formula is the number of trips that the pilot flew for VBAL during the year before the accident or illness that caused the medical disqualification. For me, that year is from 1/1/2023 until 1/1/2024, when the accident occurred.

I was on active duty in the Air Force during the first nine months of that year, from 1/1/2023 until 9/30/2023. Because of the military interruption of my VBAL career, the number of trips that I flew in Calendar Year 2023 was only about 25% of what the number would have been if I had not left my VBAL job to serve on active duty for one year.

I am receiving the VBAL disability benefit, but the monthly payment is quite modest because of the low number of trips that I flew for VBAL during the year before the accident. I have read several of your "Law Review" articles about USERRA's "escalator principle." I think that the amount of my monthly disability payment should be computed based on the number of trips that I *would have flown for VBAL but for my having been away from my job for one year for military service.* What do you think?

Answer bottom line up front:

This is an excellent argument and you should retain an attorney to send a formal demand letter to VBAL. If the airline persists in violating USERRA, you should sue.

Explanation

As I have explained in detail in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA[5] and President Bill Clinton signed it into law on 10/13/1994, almost 30 years ago. USERRA was 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 enunciated the "escalator principle" when it held: "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 that he would have occupied had he kept his position continuously during the war."[6] In that same case, 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 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.[7]

The escalator principle is codified in USERRA as follows:

[5] Public Law 103-353, 108 Stat. 3153.
[6] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946). *See also* Law Review 23058 (October 2023) for a detailed discussion of the *Fishgold* case.
[7] *Fishgold,* 328 U.S. at 285 (emphasis supplied).

> A person who is reemployed under this chapter [USERRA]is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.[8]

Section 4316(a) means that VBAL must treat you as if you had been continuously employed by the airline during the year that you were away from work for uniformed service in determining the amount of your monthly disability check.

***Accardi v. Pennsylvania Railroad Company,* 383 U.S. 225 (1966).[9]**

Q: I.R. Shyster, the General Counsel of VBAL, told me that the escalator principle only applies at the moment of reemployment and does not apply to events that happen months or years later. What do you say about that?

A: Your attorney should invite Mr. Shyster's attention to *Accardi v. Pennsylvania Railroad Co.*[10] Pasquale J. Accardi, Jacob Grubesick, Alfred J. Seevers, Anthony J. Vassallo, Abraham S. Hoffman, and Frank D. Pryor (the plaintiffs in this case) were hired as tugboat firemen by the Pennsylvania Railroad in 1941 and 1942 and left their jobs to enter active duty in World War II. All were honorably discharged at the end of the war and reemployed by the railroad as tugboat firemen. In accordance with the escalator principle, each returning veteran received the seniority he had before he was called to the colors plus the

[8] 38 U.S.C. § 4316(a).

[99] This is a 1966 decision of the United States Supreme Court. The citation means that the decision can be found in Volume 383 of *United States Reports,* starting on page 225.

[10] 383 U.S. 225 (1966). *See also* Law Review 08061 (November 2008) for a detailed discussion of the *Accardi* case.

additional seniority he would have received had he remained continuously employed.

In the 1950s, diesel tugboats replaced steam-powered tugboats, and the position of fireman (the man who shoveled coal onto the fire) became obsolete. The railroad sought to abolish the position of fireman, and a strike ensued in 1959. In 1960, the railroad and the union settled the strike. The settlement agreement provided that firemen with more than 20 years of seniority could remain employed until retirement. Firemen with less than 20 years of seniority, and those with more than 20 years of seniority who wished to leave, were to be given a severance payment as compensation for the loss of employment.

Under the agreement, a formula determined each employee's severance payment. The formula credited months of "compensated service" for the railroad. Mr. Accardi and the other five plaintiffs were not given credit for the time (approximately three years) when they were away from work for World War II military service. As a result, each plaintiff's severance payment was $1,242.60 less than it would have been if the military service time had been credited. The parties stipulated that if it were held that these plaintiffs were entitled to that military service credit, the amount of the judgment for each should be $1,242.60.

The District Court held that the plaintiffs were entitled to have their military service time included in computing the amount of "compensated service" in the severance pay formula. The Court of Appeals reversed, holding that the severance pay did not come within the concepts of "seniority, status, and pay" protected by the reemployment statute.[11] The Supreme Court granted certiorari (discretionary review) and reversed the Court of Appeals.

[11] *Accardi v. Pennsylvania Railroad,* 341 F.2d 72 (2d Cir. 1965).

Congress enacted the reemployment statute in 1940, as part of the Selective Training and Service Act (STSA).[12] In its first case construing the STSA's reemployment provision, the Supreme Court enunciated the "escalator principle" when it held that "He [the returning veteran] does not step back on the seniority escalator principle 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."[13]

After *Fishgold,* Congress amended the STSA to codify the escalator principle. At the time the Supreme Court decided *Accardi,* in 1966, section 9(c)(2) of the STSA read as follows:

> It is hereby declared to be the intent of Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) [of this section] should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.[14]

The escalator principle is codified in USERRA as follows:

> A person who is reemployed under this chapter [USERRA] is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.[15]

[12] Public Law 76-783, 54 Stat. 885 (September 16, 1940).
[13] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946).
[14] *Accardi,* 383 U.S. at 229.
[15] 38 U.S.C. § 4316(a).

In *Accardi,* the Supreme Court stressed the breadth of the escalator principle as follows:

> The term "seniority" is nowhere defined in the Act, but it derives its content from private employment practices and agreements. This does not mean, however, that employers and unions are empowered by the use of transparent labels and definitions to deprive a veteran of substantial rights guaranteed by the Act. As we said in *Fishgold* v. *Sullivan Corp., supra*, "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." At 285.
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> The term "seniority" is not to be limited by a narrow, technical definition but must be given a meaning that is consonant with the intention of Congress as expressed in the 1940 Act. That intention was to preserve for the returning veterans the rights and benefits which would have automatically accrued to them had they remained in private employment rather than responding to the call of their country.
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> In this case there can be no doubt that the amounts of the severance payments were based primarily on the employees' length of service with the railroad. The railroad contends, however, that the allowances were not based on seniority, but on the actual total service rendered by the employee. This is hardly consistent with the bizarre results possible under the definition of "compensated service."
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> As the Government points out, it is possible under the agreement for an employee to receive credit for a whole year of "compensated service" by working a mere seven

> days. There would be no distinction whatever between the man who worked one day a month for seven months and the man who worked 365 days in a year.
>
> The use of the label "compensated service" cannot obscure the fact that the real nature of these payments was compensation for loss of jobs. And the cost to an employee of losing his job is not measured by how much work he did in the past -- no matter how calculated -- but by the rights and benefits he forfeits by giving up his job. Among employees who worked at the same jobs in the same craft and class the number and value of the rights and benefits increase in proportion to the amount of seniority, and it is only natural that those with the most seniority should receive the highest allowances since they were giving up more rights and benefits than those with less seniority.
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> The requirements of the 1940 Act are not satisfied by giving returning veterans seniority in some general abstract sense and then denying them the perquisites and benefits that flow from it. We think it clear that the amount of these allowances is just as much a perquisite of seniority as the more traditional benefits such as work preference and order of lay-off and recall. We hold that the failure to credit petitioners' "compensated service" time with the period spent in the armed services does not accord petitioners the right to be reinstated "without loss of seniority" guaranteed by §§ 8 (b)(B) and (c).[16]

Accardi was decided 28 years before Congress enacted USERRA in 1994, but *Accardi* is still an important precedent that must be considered and applied in interpreting the 1994 update and rewrite of the

[16] *Accardi,* 383 U.S. at 229-231.

reemployment statute. USERRA's legislative history includes the following instructive paragraph:

> 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 U.S. 275, 285 (1946); *Alabama Power Co. v. Davis,* 431 U.S. 581, 584 (1977).[17]

Applying *Accardi* to your situation, VBAL must credit you for the *trips that you would have flown for the airline but for your absence from work necessitated by service in the uniformed services.* In *Accardi,* the CBA provision (severance pay) was intended to compensate employees who lost their employment because of technological change (the replacement of steam-powered tugboats by diesel-powered tugboats). In your case, the CBA provision (disability pay) is intended to compensate employees who lose their employment because of injuries or illnesses that render them unfit to fly commercial airliners. In either case, the principle is the same. USERRA requires VBAL to credit you for your military service time in computing the amount of your monthly disability check.

[17] House Committee Report, April 28, 1993, H.R. Rep. No. 103-65 (Part 1). The entire text of this committee report is reprinted in Appendix D 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.*

Q: How does this principle apply to short periods of uniformed service, like drill weekends and two-week annual training periods? After I returned to work on 10/2/2023, and before my accident on 1/1/2024, I missed some trips in November and December because of my scheduled November and December drill weekends. Am I entitled to credit for those missed trips in computing the amount of my monthly disability payment?

A: Yes. USERRA, and USERRA's escalator principle, apply to short periods as well as long periods of uniformed service.[18]

Q: What is the relationship between the CBA between VBAL and the VBALPA and USERRA?

A: USERRA is a floor and not a ceiling on your employment and reemployment rights. The CBA can give you *greater or additional rights* that are over and above your USERRA rights. The CBA cannot limit or eliminate your USERRA rights, nor can the CBA impose additional prerequisites on your exercise of USERRA rights. The second section of USERRA 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

[18] *See* Law Review 07003 (February 2007) and Law Review 12050 (May 2012).

> 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.[19]

The CBA is certainly relevant to your case, but the airline must apply the CBA with a "USERRA gloss." In computing the amount of your monthly disability check, the airline must credit you for the trips that you flew during the last 12 months before your injury *and also the additional trips that you would have flown but for your uniformed service.*

Please join or support ROA.

This article is one of 2,100-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 the nation's only national military organization that exclusively and solely supports the nation's reserve components, including the Coast Guard Reserve (6,179 members), the Marine Corps Reserve 32,599 members), the Navy Reserve (55,224 members), the Air Force Reserve (68,048 members), the Air National Guard (104,984 members), the Army Reserve (176,171 members), and the Army National Guard (329,705 members).[20]

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

[19] 38 U.S.C. § 4302.

[20] *See* https://crsreports.congress.gov/product/pdf/IF/IF10540/. These are the authorized figures as of 9/30/2022.

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.

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, Department of Labor (DOL) investigators, Employer Support of the Guard and Reserve (ESGR) volunteers, federal and state legislators and 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[21] 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

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

eligible for ROA membership, please join. You can join on-line at https://www.roa.org/page/memberoptions.

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[22]

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