LAW REVIEW[1] 25002
January 2025
Only the Actual Period of Uniformed Service Counts Toward The 5-Year Limit, but you Are Entitled to Seniority and Pension Credit for the Entire Period of Absence from the Job.
By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

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.

Q: I am a Lieutenant Commander (O-4) in the Coast Guard Reserve (USCGR) and a life member of the Reserve Organization of America

[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 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.

(ROA).[3] On the civilian side, I work as an engineer for a large company, let us call it Daddy Warbucks Industries or DWI. I get a lot of opposition from my DWI supervisor and from the DWI personnel office about the days that I am away from my DWI job for USCGR training and service, although all those absences are protected by the Uniformed Services Employment and Reemployment Rights Act (USERRA).

I went to work for DWI in 2014. Just a few weeks later, when I first needed time off from my DWI job for USCGR training and got flak from my civilian supervisor, I researched "USERRA" on-line and found several of your "Law Review" articles about this law, and I found those articles to be most helpful to me in understanding and insisting upon my legal rights. What a great free resource! I joined ROA and became a life member because I want to support what you and ROA are doing for Reserve Component service members like me.

I was recently away from my DWI job for exactly one year of USCG active duty, from 10/1/2023 until 9/30/2024. I was away from my civilian job for one year and 29 days. My last day at work, before this active-duty period, was 9/15/2023. After giving oral and written notice to my DWI supervisor and to the DWI personnel department, I left my job at the end of the workday on 9/15/2023, to get my affairs in order and prepare for a year-long active-duty period. After I was released from active duty on 9/30/2024, I waited ten days to apply for

[3] In 1922, a group of Army Reserve officers who were veterans of "The Great War" (as World War I was then known) met at the historic Willard Hotel in our nation's capital, at the invitation of General of the Armies John J. Pershing, who had commanded American forces in that recent war. General Pershing and all those who attended recognized that calling the recent war "the war to end all wars" was a dangerous conceit and that our nation needed t0 maintain readiness for future conflicts. The attendees agreed to create the Reserve Officers Association (ROA) to advocate for defense readiness. Captain Harry S. Truman was one of the founders of ROA in 1922. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the development and implementation of policies that will provide adequate national defense. In 2018, ROA members amended the ROA Constitution, making enlisted service members and veterans, as well as officers, eligible to join ROA. We adopted the "doing business as" name of Reserve Organization of America to emphasize that we represent and seek to recruit as members service members and veterans of all ranks (from E-1 to O-10) and all services.

reemployment at DWI. As directed by the DWI personnel department, I reported back to work at 0800 on Monday, 10/14/2024.

My year of active duty was voluntary and was not exempt from USERRA's five-year limit under any of the subsections of section 4312(c).[4] I have read and reread your Law Review 16043 (May 2016). I have an exceptional understanding of what counts and what does not count toward exhausting my five-year limit with respect to my employer relationship with DWI.

I know that the DWI personnel office keeps careful track of my absences from work for military training and service, and I carefully audit the DWI tracker. At this point, I am not close to exhausting my five-year limit, but it is likely that I will remain at DWI until retirement in my sixties, and I plan to remain active in the USCGR until I reach mandatory military retirement in 20 or 25 years. I am keeping track of my "burn rate" of the five-year limit because I want to maximize my military opportunities while continuing my civilian career at DWI.

After reading several of your Law Review articles, I insisted to the DWI personnel office that my year of active duty counts toward my five-year limit but the 15 days before and 14 days after the active-duty period do not count. The Personnel Director, Ms. Penelope Pennypincher, told me that if those 29 days do not count toward exhausting my five-year limit they also do not count toward my seniority and pension credit with DWI. She said, "You cannot have it both ways." What do you say about that?

Answer, bottom line up front:

You are entitled to one year and 29 days of seniority and pension credit. The call to the colors made it necessary for you to be away from

[4] 38 U.S.C. § 4312(c).

your job for one year and 29 days, and you are entitled to seniority and pension credit for the entire period of absence.

Explanation:

1. **You were entitled to leave your job 15 days before the date you reported to active duty.**

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.[5]

2. **After you were released from a period of service that lasted more than 180 days, you were permitted to wait up to 90 days to apply for reemployment.**

After a period of service that lasted longer than 180 days, you had 90 days to apply for reemployment.[6] Your application for reemployment on day ten after your release was well within the deadline.

[5] 20 C.F.R. § 1002.74(b).
[6] 38 U.S.C. § 4312(e)(1)(D).

3. **You are entitled to seniority and pension credit for the entire time that you were away from work (one year and 29 days), not just the one-year period of service.**

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 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.[7]

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.[8]

[7] House Committee Report, April 28, 1993, H.R. Rep. 103-65 (Part 1) (emphasis supplied). The entire report is reprinted in Appendix D-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found on page 707 of the 2023 edition of the *Manual.*

[8] 20 C.F.R. § 1002.259(a).

Q: In Law Review 19032 (March 2019) and Law Review 18104 (October 2018), among other articles, you have argued that the period of time between leaving the job and entering active duty and the period between leaving active duty and returning to the job do not count toward exhausting the individual's five-year limit. But now you say that the returning veteran is entitled to seniority and pension credit for these pre-service and post-service periods of absence from the civilian job. Are you being inconsistent?

A: For the last 42 years, I have consistently argued for the most favorable interpretation of provisions of the federal reemployment statute that a harmonious interplay of the various provisions will permit. As I have explained in footnote 2 and in Law Review 15067 (August 2015), among other articles, 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 VRRA, the Supreme 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 for the benefit of the veteran as a harmonious interplay of the separate provisions permits.[9]

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

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.[10] As to the continuous accumulation of seniority while away from work for service, the returning veteran or service member 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 *plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed."*[11] The most reasonable interpretation of this statutory language is that it applies to the entire period of absence from the civilian job necessitated by the service, not just the period of service itself. My position is consistent.

Please join or support ROA.

This article is one of 2,200-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),

[10] 38 U.S.C. § 4312(c). As I have explained in detail in Law Review 16043 (May 2016) and other articles, there are nine exemptions from the five-year limit. That is, there are nine kinds of service that do not count toward exhausting the individual's five-year limit.

[11] 38 U.S.C. § 4316(a) (emphasis supplied). *See also* 38 U.S.C. § 4318(a)(2)(A) for a similar entitlement regarding pension credit.

the Army Reserve (176,171 members), and the Army National Guard (329,705 members).[12]

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 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.

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

If you are now serving or have ever served in any one of our nation's eight[13] uniformed services, you are eligible for membership in ROA,[14] 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 https://www.roa.org/page/memberoptions or call ROA at 800-809-9448.

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[15]

[13] Congress recently established the United States Space Force as the eighth uniformed service.
[14] Spouses, widows, and widowers of past or present members of the uniformed services are also eligible to join.
[15] You can also contribute on-line at www.roa.org.