

## **Beware of Asserting Inconsistent Claims**

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

- 1.3.1.3—Timely application for reemployment
- 1.3.2.2—Continuous accumulation of seniority-escalator principle
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**Q: I am a Captain in the Army Reserve and a member of the Reserve Officers Association (ROA). I am writing to you because I found your “Law Review” articles on the Uniformed Services Employment and Reemployment Rights Act (USERRA) to be very interesting and helpful.**

**I have worked for a major corporation (Daddy Warbucks International or DWI) for more than a decade. In 2012, I was involuntarily called to active duty for a year and deployed to Afghanistan, where I was wounded in action. My year of active duty was extended to three years, while I had three surgeries and physical rehabilitation for my wounds. I was finally released from active duty on May 31, 2015. I am still recuperating from the wounds.**

**I applied for reemployment at DWI, but the company’s personnel office told me to “pound sand.” I complained to the Veterans’ Employment and Training Service of the United States Department of Labor (DOL-VETS) and my case was assigned to an “Assistant Director Veterans’ Employment and Training” (ADVET) in my state.**

**I am interested in returning to work at DWI, but I have many other legal issues and questions. It has been suggested that I need to apply to the Department of Veterans Affairs (VA) for veterans’ disability benefits and that perhaps I should apply to the Social Security Administration (SSA) for disability retirement benefits. I also think that I may be entitled to benefits under the short-term disability policy and the long-term disability policy of DWI. I**

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<sup>1</sup> We invite the reader’s attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find more than 1,350 “Law Review” articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997.

<sup>2</sup> Captain Wright was the Director of ROA’s Service Members Law Center (SMLC), as a full-time employee of ROA, from June 2009 through May 2015. During that six-year period, he received and responded to more than 35,000 telephone and e-mail inquiries. He is continuing the SMLC as a part-time volunteer effort, as a member of ROA. He answers telephone calls and e-mails on Wednesday and Thursday evenings at ROA headquarters. The telephone number is (800) 809-9448, ext. 730, and the e-mail is [SWright@roa.org](mailto:SWright@roa.org). Please understand that Captain Wright is a volunteer, and he may not be able to respond to your call or e-mail the same day.

**asked the ADVET for assistance with these issues, but he told me that these questions are outside his expertise and his role as an employee of DOL-VETS. Help!**

**A:** First, you should recognize that the ADVET is not an attorney and he does not represent you and cannot advise you on legal issues, even about USERRA. You need a lawyer to assist you in sorting out all of these legal issues. Since my full-time employment at ROA ended on 31 May 2015, I have returned to Tully Rinckey PLLC, the law firm where I worked before ROA established the Service Members Law Center (SMLC) in June 2009. Our firm represents service members and veterans all over the country and has expertise in all of the laws that may apply to your situation.

You need to be very careful about asserting inconsistent claims because of the equitable doctrine of estoppel. The Oxford Dictionary of Law defines estoppel as follows: “A rule of evidence or a rule of law that prevents a person from denying the truth of a statement he has made or from denying the existence of facts that he has alleged to exist.”

For example, there could be an estoppel problem if you tell the SSA that you are permanently and totally disabled while at the same time telling DOL-VETS that you are ready, willing, and able to return to work. You need a lawyer to assist you in sorting out your situation and deciding which claims you will make and which claims you will defer. Of course, this assessment may change as your physical condition improves or deteriorates.

Now let’s turn specifically to your USERRA claim. As I have explained in Law Review 1281 and other articles, you must meet five conditions to have the right to reemployment under USERRA:

- a. You must have left a civilian position of employment (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services. You clearly met this condition.
- b. You must have given the employer prior oral or written notice that you were leaving for service. For purposes of this article, I shall assume that you gave such notice.
- c. You must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which you seek reemployment. There are nine exemptions—kinds of service that do not count toward exhausting your five-year limit. Please see Law Review 201. Your involuntary year of active duty, starting in 2012, does not count toward your five-year limit. The two-year exemption, necessitated by your wounds and recovery, may also be exempted. For purposes of this article, I shall assume that you have not exceeded your five-year limit with respect to DWI.
- d. You have been released from the period of service without having received a disqualifying bad discharge from the military. For purposes of this article, I shall assume that you served honorably and did not receive a bad discharge.
- e. After release from the period of service, you made a timely application for reemployment. More on this condition below.

Because your period of service lasted more than 180 days, you had 90 days (starting on the date of release) to apply for reemployment.<sup>3</sup> The deadline to apply for reemployment can be extended in some circumstances under section 4312(e)(2)(A), which reads as follows:

(2) (A) A person who is hospitalized for, or *convalescing from*, an illness or injury incurred in, or aggravated during, the performance of service in the uniformed services shall, *at the end of the period that is necessary for the person to recover from such illness or injury*, report to the person's employer (in the case of a person described in subparagraph (A) or (B) of paragraph (1)) or submit an application for reemployment with such employer (in the case of a person described in subparagraph (C) or (D) of such paragraph). Except as provided in subparagraph (B), such period of recovery may not exceed two years.<sup>4</sup>

If at the time of your release from active duty you were still hospitalized for or convalescing from the injury or illness incurred during your active duty period, you could have waited until after the end of the hospitalization or convalescence period (up to two years) to apply for reemployment. You rendered this provision moot by applying for reemployment already.

Let us say that you now meet the five conditions for reemployment, in that you left your DWI job for service, gave DWI prior notice, have not exceeded the five-year limit and have not received a disqualifying bad discharge from the military, and have made a timely application for reemployment. In that case, the employer (DWI) has the legal obligation to reemploy you in the position of employment that you *would have attained if you had been continuously employed* or another position (for which you are qualified) that is of like seniority, status, and pay.<sup>5</sup>

If you meet the five USERRA conditions and return with a temporary or permanent disability incurred or aggravated during the period of service, the employer must make reasonable efforts to accommodate the disability.<sup>6</sup> Of course, there are some disabilities that cannot be reasonably accommodated in some jobs. A blinded veteran cannot return to the cockpit of an airliner.

If your disability cannot be reasonably accommodated in the position that you would have attained if continuously employed, the employer must reemploy you in some other position for which you are qualified or can become qualified with reasonable employer efforts and that provides like seniority, status, and pay or the closest approximation thereof consistent with the circumstances of your case.<sup>7</sup> The employer is not required to create a new position for you, but

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<sup>3</sup> 38 U.S.C. 4312(e)(1)(D).

<sup>4</sup> 38 U.S.C. 4312(e)(2)(A) (emphasis supplied).

<sup>5</sup> 38 U.S.C. 4313(a)(2)(A). The position that you would have attained if you had been continuously employed is not necessarily the position you left. The position that you would have attained may be better than, equal to, or worse than the position you left, or no position at all, depending upon what would have happened. To determine what would have happened, we need to examine what has happened to your DWI colleagues in similar jobs.

<sup>6</sup> 38 U.S.C. 4313(a)(3).

<sup>7</sup> *Id.*

if there is a position anywhere in the employer's organization for which you are qualified or can become qualified, the employer must reemploy you in that position *even if the position is not vacant and reemploying you there necessitates displacing another employee.*<sup>8</sup>

You need competent and diligent private legal counsel to advise you and represent you with respect to USERRA and all the other statutes and legal theories under which you may have rights.

#### **UPDATE-JULY 2018**

Please see Law Review 18059 (July 2018) for further information about the equitable doctrine of estoppel as applied to inconsistent claims made by the same individual in separate legal proceedings.

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<sup>8</sup> See Law Review 0640.