LAW REVIEW 17083[1]
August 2017

Accrual and Use of Vacation Before, During and After a Period of Military Service

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Update on Sam Wright

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Q: I am a Lieutenant Colonel in the Army Reserve and a life member of the Reserve Officers Association (ROA). For several years, I have read and utilized your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

For almost 21 years, I have worked for a major corporation—let's call it Daddy Warbucks Industries (DWI). Six times over the past 21 years, I have been away from my DWI job for significant periods of military service (181 days or more). I have also been away from work scores of times for shorter periods of military training or service, like drill weekends and two-

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1500 "Law Review" articles about military voting rights, reemployment rights, and other military-legal topics, along with a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1300 of the articles.

[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. I have 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 35 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 SWright@roa.org or by telephone at 800-809-9448, ext. 730. I will provide up to one hour of information without charge. If you need more than that, I will charge a very reasonable hourly rate. If you need a lawyer, I can suggest several well-qualified USERRA lawyers.

week annual training tours. I have used your "Law Review" articles to understand and protect my USERRA rights.

I have been on active duty continuously since January 1, 2015. My current orders expire December 31, 2017, and I fully expect to leave active duty at that time. I have read and reread Law Review 15116 (December 2015), concerning the five conditions that a returning service member or veteran must meet to have the right to reemployment under USERRA. I meet or will soon meet the five conditions.

I left my DWI job to reenter active duty on January 1, 2015, and I gave written and oral notice six weeks in advance, in November 2014. I have read and reread your Law Review 16043 (May 2016), concerning the five-year limit under USERRA and the nine exemptions from the limit—kinds of service that do not count toward exhausting my limit with respect to my employer relationship with DWI. My current three-year active duty period, ending at the end of this year, counts toward the limit, but all my earlier periods of service were exempt. Thus, at the end of this period of active duty I still have two years of "head room" in my five-year limit.

I have served honorably, and I will not receive a disqualifying bad discharge.[3] Because my period of service has lasted more than 180 days, I have 90 days (starting on December 31) to apply for reemployment.[4] I plan to apply for reemployment at DWI on Tuesday, January 2, 2018.

At DWI, employees with up to ten years of seniority earn two weeks of vacation per year. Employees with ten to 20 years of seniority earn three weeks of vacation per year, and employees with more than 20 years of seniority earn four weeks of vacation per year. I began my DWI career in January 1997. If I had not left DWI for military service in January 2015, I would have passed the 20-year point in January 2017. If I meet the USERRA conditions and return to work in January 2018, will my three years of service (January 2015 to January 2018) count in putting me over the 20-year point for purposes of the rate of vacation accrual? If I work at DWI all of 2018, will I receive four rather than three weeks of vacation?

At DWI, the vacation that an employee earns during a calendar year must be used by the end of the next calendar year. When I left DWI to go on active duty on January 1, 2015, I had three weeks of vacation in the bank—vacation that I earned during 2014. The DWI personnel office asked me, just before I left to report to active duty, what I wanted to do with the three

[3] Under section 4304 of USERRA, 38 U.S.C. 4304, disqualifying bad discharges include punitive discharges, by court martial, and other-than-honorable administrative discharges.
[4] 38 U.S.C. 4312(e)(1)(D).

weeks of vacation that I earned during 2014. I told them that I wanted to preserve the three weeks of vacation, to use after I return to work.

Just recently, I learned that my three weeks of vacation was "cashed out" by the company at the end of 2015. I received a mysterious direct deposit in my checking account in December 2015. I have wondered what that was for. Just recently, I learned that this was a pay-out of my three weeks of vacation that I earned in 2014 and that I had in the bank when I entered active duty in January 2015.

I have read in at least one of your articles that it is unlawful for an employer to *force* a service member to use vacation days during a period of military service. Did DWI violate USERRA when it cashed out my vacation balance despite my request to preserve the balance?

If I had remained continuously employed at DWI, instead of reporting to active duty in January 2015, I would have earned three weeks of vacation in 2015, three weeks in 2016, and four weeks in 2017. When I return to work at DWI in January 2018, do I have ten weeks of vacation in the bank? Do I continue accruing vacation days while I am away from work for military service?

Answer, bottom line up front:

a. If you meet the five USERRA conditions and return to work in January 2018 and work all of 2018, you will earn four weeks of vacation in 2018, to use in 2019. If you had remained continuously employed at DWI, you would have gone over the 20-year threshold of DWI employment in January 2017. Increasing the rate at which you earn vacation, based on going over the 20-year threshold, is a "perquisite of seniority" and you are entitled to that perquisite upon reemployment, under USERRA's "escalator principle."
b. Vacation days are not a perquisite of seniority, and you do not continue earning vacation days at your civilian job while you are away from the job for service, under the escalator principle. You may be entitled to those vacation days under USERRA's "furlough or leave of absence" clause, if other DWI employees, on non-military leaves of absence of comparable duration, continue earning DWI vacation days while on non-military leaves of absence.
c. Under section 4316(d) of USERRA,[5] you have the right but not the obligation to use, during a period of uniformed service, any vacation, annual leave, or similar leave with pay that you have accrued before the beginning of the period of service, but it is unlawful for the employer to force you to use your vacation days in this way. It is

[5] 38 U.S.C. 4316(d).

unclear whether section 4316(d) overrides DWI's "use it or lose it" policy, but I am prepared to argue that it does.

Explanation

Escalator principle

As I have explained in Law Review 15067 (August 2015) and in footnote 2 of this article, Congress enacted the Veterans' Reemployment Rights Act (VRRA) in 1940, and in 1994 Congress enacted USERRA as a long-overdue update of and improvement upon the VRRA. There have been 16 United States Supreme Court cases construing the VRRA and one (so far) construing USERRA. I invite the reader's attention to Category 10.1 in our Law Review Subject Index. You will find a detailed case note about each of these 17 cases.

In its first case construing the VRRA, the Supreme Court enunciated the "escalator principle" when it held that 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."[6] The escalator principle is codified in section 4316(a) of USERRA, as follows:

> A person who is reemployed under this chapter 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.[7]

The escalator principle does not apply to all benefits that the returning veteran might have earned if he or she had remained continuously employed in the civilian job. Rather, the escalator principle applies only to "perquisites of seniority." A two-part test determines whether a benefit qualifies as a perquisite of seniority:

a. The benefit must be a reward for length of service, rather than a form of short-term compensation. The escalator principle does not require the employer to pay the individual salary or wages for the time that the individual is away from work for service. Some benefits (like vacation days) are a form of short-term compensation—if you work you earn vacation days. If you do not work, you do not earn the vacation days.

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[6] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946). The citation means that you can find the *Fishgold* case in Volume 328 of *United States Reports,* starting on page 275. The specific language quoted can be found at the bottom of page 284 and the top of page 285. I discuss the *Fishgold* case in detail in Law Review 0801 (January 2008).

[7] 38 U.S.C. 4316(a).

b. It must be *reasonably certain* that the returning veteran would have earned the benefit if he or she had remained continuously employed. The certainty need not be absolute, but it must be more than a possibility.

In the DWI system, employees with up to ten years of DWI seniority earn two weeks of vacation per year. Employees with ten to 20 years of seniority earn three weeks of vacation per year, and employees with more than 20 years of seniority earn four weeks of vacation per year. Earning vacation at a quicker rate, with more seniority, is clearly a reward for length of service. Moreover, it is reasonably certain that you would have attained the 20-year point in January 2017 if you had remained continuously employed. You are entitled, under the escalator principle, to earn four weeks of vacation each year, starting in January 2018 when you return to work.

A distinction must be made between the *rate at which you earn vacation while working,* which is a perquisite of seniority, from the *vacation days themselves,* which are a form of short-term compensation and not a perquisite of seniority. More than 40 years ago, the Supreme Court held that the returning veteran (Foster) was not entitled to the vacation days that he would have earned at the Dravo Corporation in 1967 and 1968 if he had remained continuously employed in the civilian job—if he had not been drafted.[8]

Under the escalator principle, you are not entitled to the ten weeks of vacation that you would have earned during your three-year active duty period (January 1, 2015 through December 31, 2017). As discussed below, you may be entitled to those vacation days under USERRA's "furlough or leave of absence" clause.

Furlough or leave of absence clause

USERRA's "furlough or leave of absence" clause reads as follows:

> Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be--
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> - (A) deemed to be on furlough or leave of absence while performing such service; and
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> - (B) *entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.*[9]

[8] *Foster v. Dravo Corp.,* 420 U.S. 92 (1975). I discuss the *Foster* case in detail in Law Review 09007 (February 2009).
[9] 38 U.S.C. 4316(b)(1) (emphasis supplied).

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA and President Bill Clinton signed it into law on October 13, 1994. USERRA was a long-overdue update of and improvement upon the VRRA, which was originally enacted in 1940. The "furlough or leave of absence" language has been in the aw since 1940 and was not significantly changed in 1994.

USERRA's legislative history explains the meaning and effect of the furlough or leave of absence clause as follows:

> Section 4315(b) [later renumbered as 4316(b)] would reaffirm that a departing serviceperson is to be placed on a statutorily-mandated military leave of absence while away from work, regardless of the employer's policy. Thus, terminating a departing serviceperson, or forcing him or her to resign, even with a promise of reemployment, is of no effect. *See Green v. Oktibbeha County Hospital,* 526 F. Supp. 49, 54 (N.D. Miss. 1981); *Winders v. People Express Airlines, Inc.,* 595 F. Supp. 1512, 1518 (D.N.J. 1984), *affirmed,* 770 F.2d 1078 (3rd Cir. 1985).
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> Accordingly, while away on military leave, the servicemember would be entitled to participate in whatever non-seniority related benefits are accorded other employees on non-military leaves of absence, but are to be accorded, after reemployment, as of the servicemember had remained continuously employed under the escalator principle.
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> The Committee [House Committee on Veterans' Affairs] intends to affirm the decision in *Waltermyer v. Aluminum Company of America,* 804 F.2d 821 (3rd Cir. 1986) that, to the extent the employer policy or practice varies among various types of non-military leaves of absence, the most favorable treatment accorded any particular leave, regardless of whether the non-military leave is paid or unpaid, [must be accorded to the employee on military leave].[10]

Section 4331 of USERRA[11] gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL published proposed USERRA regulations in the *Federal Register* in September 2004. After considering the comments received and making a few adjustments, DOL published the final regulations in the *Federal Register* in December 2005. The regulations are published in title 20 of the Code of Federal Regulations (C.F.R.) part 1002. Three sections of the regulations address the furlough or leave of absence clause, as follows:

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[10] House Committee Report, April 28, 1993, H.R. Rep. No. 103-65, Part I, reprinted in Appendix B-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The three quoted paragraphs can be found at pages 703-04 of the 2017 edition of the *Manual.*

[11] 38 U.S.C. 4331.

What is the employee's status with his or her civilian employer while performing service in the uniformed services?

During a period of service in the uniformed services, the employee is deemed to be on furlough or leave of absence from the civilian employer. In this status, the employee is entitled to the non-seniority rights and benefits generally provided by the employer to other employees with similar seniority, status, and pay that are on furlough or leave of absence. Entitlement to these non-seniority rights and benefits is not dependent on how the employer characterizes the employee's status during a period of service. For example, if the employer characterizes the employee as "terminated" during the period of uniformed service, this characterization cannot be used to avoid USERRA's requirement that the employee be deemed on furlough or leave of absence, and therefore entitled to the non-seniority rights and benefits generally provided to employees on furlough or leave of absence.[12]

Which non-seniority rights and benefits is the employee entitled to during a period of service?

- (a) The non-seniority rights and benefits to which an employee is entitled during a period of service are those that the employer provides to similarly situated employees by an employment contract, agreement, policy, practice, or plan in effect at the employee's workplace. These rights and benefits include those in effect at the beginning of the employee's employment and those established after employment began. They also include those rights and benefits that become effective during the employee's period of service and that are provided to similarly situated employees on furlough or leave of absence.

- (b) If the non-seniority benefits to which employees on furlough or leave of absence are entitled vary according to the type of leave, the employee must be given the most favorable treatment accorded to any comparable form of leave when he or she performs service in the uniformed services. In order to determine whether any two types of leave are comparable, the duration of the leave may be the most significant factor to compare. For instance, a two-day funeral leave will not be "comparable" to an extended leave for service in the uniformed service. In addition to comparing the duration of the absences, other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered.

- (c) *As a general matter, accrual of vacation leave is considered to be a non-seniority benefit that must be provided by an employer to an employee on a military leave of*

[12] 20 C.F.R. 1002.149 (bold question in original).

absence only if the employer provides that benefit to similarly situated employees on comparable leaves of absence.[13]

If the employer provides full or partial pay to the employee while he or she is on military leave, is the employer required to also provide the non-seniority rights and benefits ordinarily granted to similarly situated employees on furlough or leave of absence?

- Yes. If the employer provides additional benefits such as full or partial pay when the employee performs service, the employer is not excused from providing other rights and benefits to which the employee is entitled under the Act.[14]

I have found one case directly on point—a case holding that service members away from work for military duty are entitled to continue accruing vacation days while on military duty because other employees of the same employer who are away from work on other forms of leave continue accruing vacation days while on non-military leave:

> Since it is undisputed that plaintiffs would have accrued annual leave [vacation] if they had not been on military leave, Mooshagian Deposition at 71:7-24, plaintiffs are entitled under USERRA to accrue annual leave while on military leave—even unpaid military leave. Thus, plaintiffs' motion for summary judgment on their annual leave claim should be granted, and City's cross-motion for summary judgment on this claim must be denied.[15]

If you can show that other DWI employees who are away from work for non-military leave (jury leave, educational leave, family leave, etc.) periods of comparable duration continue accruing vacation days while on leave from their DWI jobs, you are similarly entitled to continue accruing vacation days during the three years that you have been away from your DWI job for military duty. If you cannot make that showing, you are not entitled, upon your reemployment in January 2018, to the vacation days that you would have earned if you had remained continuously employed.

Section 4316(d) of USERRA

Section 4316(d) provides:

> Any person whose employment with an employer is interrupted by a period of service in the uniformed services shall be permitted, upon request of that person, to use during such period of service any vacation, annual, or similar leave with pay accrued by the

[13] 20 C.F.R. 1002.150 (bold question in original, emphasis by italics supplied).
[14] 20 C.F.R. 1002.151 (bold question in original).
[15] *Paxton v. City of Montebello,* 712 F. Supp. 2d 1007, 1016 (C.D. Cal. 2010).

> person before the commencement of such service. *No employer may require any such person to use vacation, annual, or similar leave during such period of service.*[16]

As I have explained in Law Review 15067 (August 2015) and many other articles, Congress enacted USERRA[17] and President Bill Clinton signed it into law on October 13, 1994, as a long-overdue rewrite of the VRRA, which was originally enacted in 1940. Congress has amended USERRA several times since 1994, and the first time was just two years later (October 1996), when Congress enacted the Veterans' Benefits Improvement Act of 1996 (VBIA-1996).[18] VBIA-1996 made several "technical amendments" to USERRA, and one of those amendments was to add the second sentence (italicized above) to section 4316(d).

Appendix B-4 of *The USERRA Manual*[19] contains pertinent excerpts from the legislative history of VBIA-1996, including the following three paragraphs:

> Section 4316(d) of title 38, United States Code, expressly allows the service member to choose to use vacation, annual, or similar leave with pay while on military leave. This provision is intended to preclude an employer from forcing a service member to use leave, paid or unpaid, against his or her will.
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> Notwithstanding this intent, as shown in the legislative history of section 4316(d), see H. Rept. 103-65 at 35, it has come to the Committee's [Senate Committee on Veterans' Affairs] attention that questions have arisen concerning this provision. Indeed, the Committee has learned that some employers are reportedly attempting to require that service members use vacation leave while in service when to do so is not pursuant to a service member's request.
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> The Committee bill would clarify that it is a violation of section 4316(d) for an employer to require a service member to use paid or unpaid vacation, annual, or similar leave when the use of such leave is not requested by the service member. This policy, as clarified in the Committee bill, is consistent with existing law. *See Hilliard v. New Jersey Army National Guard,* 527 F. Supp. 405 (D.N.J. 1981); *Graham v. Hall-McMillan Co., Inc.,* 925 F. Supp. 437 (N.D. Miss. 1996).[20]

I think that a strong argument can be made that when DWI paid you at the end of 2015 for the three weeks of vacation that you had earned in 2014, despite your request that the vacation be preserved for your use after you leave active duty and return to work, the company effectively forced you to use your vacation days during your military service, and this company policy violated section 4316(d). I acknowledge that the matter is not free from doubt, because the

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[16] 38 U.S.C. 4316(d) (emphasis supplied).
[17] Public Law 103-353, 108 Stat. 3162.
[18] Public Law 104-275, 110 Stat. 3335.
[19] Please see footnote 10, above, and Law Review 17068 (June 2017).
[20] Senate Report No. 104-371, September 24, 1996. These three paragraphs can be found on page 855 of the 2017 edition of *The USERRA Manual.*

text of USERRA does not explicitly address your situation, and neither the USERRA regulations nor any case law that I have found specifically address the issue.

If you assert a section 4316(d) claim, you should expect the company to respond along the following lines:

> We did you a favor when we paid you, at the end of 2015, for the vacation that you earned in 2014 but did not use in 2015. We have a strict "use it or lose it" rule here at DWI. Any DWI employee must use his or her annual leave balance by the end of the next year after he or she earned the leave. A positive leave balance at the end of the next year is forfeited. Dozens of DWI employees forfeited leave balances at the end of 2015, and at the end of every year. We do not allow any employee to carry over unused leave to the next year, and we do not ordinarily pay to employees the cash value of forfeited leave balances. We made that accommodation for you because we wanted to be "good guys" and because we figured that you did not have the opportunity to use your DWI vacation days during 2015.

Are you entitled to restoration of the three weeks of DWI vacation time that the company cashed out, despite your contrary request, at the end of 2015? The way that I see it, the answer to that question depends upon the answer to two related questions:

a. Does section 4316(d) of USERRA supersede and override DWI's "use it or lose it" rule?
b. Is DWI's one-year use it or lose it period tolled (suspended) during the time that you are away from your job for military service?

I have searched the text of USERRA, the legislative history, the DOL USERRA regulations, and the USERRA case law, and I have not found an answer to these specific questions. Nonetheless, I believe that the answer to the two questions is *yes,* based on the requirement to construe USERRA liberally for the benefit of service members and veterans. I invite the reader's attention to a most instructive paragraph in USERRA's legislative history:

> 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).[21]

I understand why you want to restore the three weeks of vacation that you earned in 2014 and that you had in the bank when you began your current active duty period in January 2015. As I have explained, you probably have not accrued any additional DWI vacation time while you have been on active duty. If you return to work in January with a zero balance of vacation, you will not be able to take any time off (with pay) during 2018.[22]

I suggest that you send a polite, non-confrontational letter to the DWI personnel director, pointing out that you did not request to be paid for the vacation that you earned in 2014 but did not use, and offering to reimburse the company for the money that it paid you for that vacation at the end of 2015.

We will keep the readers informed of developments on this important issue.

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[21] House Committee Report, April 28, 1993, H.R. Rep. 103-65, Part 1, reprinted in Appendix B-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still, at pages 683-84 of the 2017 edition of the *Manual* (emphasis supplied).

[22] If you need time off in the early part of the year, you can delay submitting your application for reemployment. Because your current active duty period has lasted more than 180 days, you have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Therefore, instead of applying for reemployment on January 2 you can wait until as late as March 31 (90 days after you are released from active duty on December 31, 2017). Of course, if you delay submitting your application for reemployment and thereby delay your return to your DWI job, you will forego the salary that you could have earned from DWI in the opening weeks of 2018.