

New Lawsuit against Southwest Airlines for Violating USERRA

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On 1/7/2019, attorney Thomas G. Jarrard³ and other attorneys filed suit against Southwest Airlines (SWA) in the United States District Court for the Northern District of California. The named plaintiff is Jayson Huntsman, an Air Force Reserve officer who is a first officer for SWA. Huntsman seeks to represent a class of current and former SWA employees who took short-

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1700 "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 Spouse 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 very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1500 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. For 42 years, I have worked 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 (VRRRA—the 1940 version of the federal reemployment statute) for 36 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 VRRRA 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 VRRRA 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.

³ Thomas G. Jarrard recently retired from the Marine Corps Reserve, and he is a life member of the Reserve Officers Association, doing business as the Reserve Organization of America. He is an attorney in Spokane, Washington with a nationwide practice representing service members and veterans.

term military leaves while employed by SWA and who were not paid their regular SWA salary or wages during those short-term military leaves.⁴

Since 10/10/2004, SWA has paid employees their normal wages or salaries during jury duty leave, bereavement leave, sick leave, and other forms of leave, but not during short-term military leave. On behalf of himself and other similarly situated SWA employees in the proposed class, Huntsman claims that section 4316(b) of the Uniformed Services Employment and Reemployment Rights Act (USERRA)⁵ requires the company to treat employees who are away from work for service in the uniformed services no less favorably than it treats other employees who are away from work for comparable periods for other reasons. Thus, Huntsman claims that SWA is required to pay employees their regular salaries or wages during short-term periods of military training or service, like drill weekends.

Section 4316(b) is the so-called “furlough or leave of absence clause.” It reads as follows:

(1) 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--*

(A) *deemed to be on furlough or leave of absence while performing such service; and*

(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.*

(2) (A) Subject to subparagraph (B), a person who--

(i) is absent from a position of employment by reason of service in the uniformed services, and

(ii) knowingly provides written notice of intent not to return to a position of employment after service in the uniformed service,

is not entitled to rights and benefits under paragraph (1)(B).

(B) For the purposes of subparagraph (A), the employer shall have the burden of proving that a person knowingly provided clear written notice of intent not to return to a position of employment after service in the uniformed service and, in doing so, was aware of the specific rights and benefits to be lost under subparagraph (A).

⁴ The judge has not yet ruled on Huntsman’s request for certification of this case as a class action. We will keep the readers informed of developments in this interesting and important case.

⁵ 38 U.S.C. 4316(b).

(3) A person deemed to be on furlough or leave of absence under this subsection while serving in the uniformed services shall not be entitled under this subsection to any benefits to which the person would not otherwise be entitled if the person had remained continuously employed.

(4) Such person may be required to pay the employee cost, if any, of any funded benefit continued pursuant to paragraph (1) to the extent other employees on furlough or leave of absence are so required.

(5) The entitlement of a person to coverage under a health plan is provided for under section 4317.

(6) The entitlement of a person to a right or benefit under an employee pension benefit plan is provided for under section 4318.⁶

As is explained in footnote 2 and in Law Review 15067 (August 2015), among other articles, Congress enacted USERRA and President Bill Clinton signed it into law on 10/13/1994, as a long-overdue update and rewrite of the Veterans' Reemployment Rights Act (VRRRA), which was originally enacted in 1940. The corresponding section of the VRRRA read:

Any person who is restored or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section shall be considered as having been on furlough or leave of absence during such person's period of training or service in the Armed Forces, [and] ... shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practice relating to employees on furlough or leave of absence.⁷

USERRA's legislative history addresses the intent and effect of section 4316(b) as follows:

Section 4315(b) [later renumbered 4316(b)] would reaffirm that a departing serviceperson [an employee leaving a job to perform uniformed service] 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 (3d Cir. 1985).

Accordingly, while away on military leave, the servicemember would be entitled to participate in whatever non-seniority related benefits are accorded to other employees on non-military leaves of absence. *See Winders, supra*. In contrast, benefits which are

⁶ 38 U.S.C. 4316(b) (emphasis supplied).

⁷ 38 U.S.C. 2021(b)(1) (1988 version of the United States Code).

seniority based would not be limited to the treatment accorded employees on non-military leaves of absence, but are to be accorded, after reemployment, as if the servicemember had remained continuously employed under the escalator principle.

The Committee [House Committee on Veterans Affairs] intends to affirm the decision in *Waltermeyer 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 would also be accorded the military leave, regardless of whether the non-military leave is paid or unpaid.⁸

Section 4331 of USERRA⁹ gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. The Department of Labor (DOL) published proposed USERRA regulations in the *Federal Register* in September 2004, for notice and comment. After considering the comments received and making a few adjustments, DOL published the final regulations in December 2005. These regulations are published in Title 20 of the Code of Federal Regulations (C.F.R.), Part 1002. Three sections are particularly relevant to this case:

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.¹⁰

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

⁸ House Committee Report, April 28, 1993, H.R. Rep. 103-65 (Part I), published in Appendix D-1 of *The USERRA Manual*, by Kathryn Piscitelli and Edward Still. The quoted paragraphs can be found on pages 721-22 of the 2018 edition of the *Manual*.

⁹ 38 U.S.C. 4331.

¹⁰ 20 C.F.R. 1002.149 (bold question in original)

(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 absence only if the employer provides that benefit to similarly situated employees on comparable leaves of absence.¹¹

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.¹²

I believe that Huntsman and his attorneys have a strong argument that SWA is required to pay employees who are away from work for short-term military leaves their regular wages or salaries, as it pays employees for comparable periods when they are away from work for jury duty, bereavement, illness, etc. We will keep the readers informed of developments in this interesting case.

¹¹ 20 C.F.R. 1002.150 (bold question in original).

¹² 20 C.F.R. 1002.151 (bold question and bold **Yes** in original).