LAW REVIEW 14060

May 2014

How Is my Civilian Pension Computed when I Return to Work after Military Service

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

1.3.2.2—Continuous accumulation of seniority-escalator principle
1.3.2.3—Pension credit for service time
1.8—Relationship between USERRA and other laws/policies

Q: I am a Lieutenant Colonel in the Air Force Reserve and a member of ROA. I am also a commercial airline pilot, and I serve as the "military liaison" for my union, in its relationship with the employer and the pilots who are Reserve or National Guard members, like me. For several years, I have read with great interest your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).[1]

Just last week, I read with great interest your Law Review 14051, a very long article about the Department of Defense (DOD) attempt to amend USERRA through the National Defense Authorization Act (NDAA) for Fiscal Year 2015. I was particularly interested in your discussion of the proposed change to section 4318 of USERRA, concerning the way that military service is credited when computing an individual's civilian pension entitlement.

---

[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find 1,051 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. Captain Wright initiated this column in 1997, and we add new articles each week. We added 169 new articles in 2013, and we have added another 60 so far in 2014. More than 800 of the articles are about USERRA.

Let us say that I am away from my civilian airline job for all of 2015 and January of 2016 (13 months), for military service. Let us say further that in February 2015 I meet the five USERRA eligibility conditions for reemployment[2] and return to work for the airline. My pension entitlement from the airline is based on a formula, and part of the formula relates to my earnings from the airline, by calendar year. As I understand section 4318 of USERRA, the airline must compute what I *would have earned from the airline* in the period of January 1, 2015 through January 31, 2016 if I had remained continuously employed by the airline instead of interrupting my airline career for 13 months of active duty.

Under section 4318 as currently enacted, that computation is made as follows:

"(3) For purposes of computing an employer's liability under paragraph (1) or the employee's contributions under paragraph (2), the employee's compensation during the period of service described in subsection (a)(2)(B) shall be computed--
(A) *at the rate the employee would have received but for the period of service described in subsection (a)(2)(B),* or
(B) in the case that the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if

[2] To have the right to reemployment under USERRA, an individual must have left a civilian job (federal, state, local, or private sector) for voluntary or involuntary uniformed service and must have given the employer prior oral or written notice. The individual's cumulative period or periods of uniformed service, relating to the employer relationship for which the individual seeks reemployment, must not have exceeded five years. As is explained in Law Review 201 and other articles, all involuntary service and some voluntary service are exempted from the computation of the five-year limit. The individual must have been released from the period of service without having received a disqualifying bad discharge from the military. After release, the individual must have made a timely application for reemployment with the pre-service employer. After a period of service of 181 days or more, the individual has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

shorter, the period of employment immediately preceding such period).”

38 U.S.C. 4318(b)(3) (emphasis supplied).

If the DOD proposal is enacted, the above provision would be rewritten to read as follows:

“(4) The basis for a computation under paragraph (3) to which subparagraph (B) of that paragraph applies is as follows:

(A) If the period of service described in subsection (a)(2)(B) is one year or less, the computation shall be made on the basis of the employee’s average rate of compensation during the 12-month period immediately preceding such period or, if shorter, the period of employment immediately preceding such period.

(B) If the period of such service is more than one year, the computation shall be made on the basis of the average rate of compensation during such period of service of employees of that employer who are similarly situated to the servicemember in terms of having similar seniority, status, and pay.”

I do not like this change because I believe that this proposed method of computation would be less beneficial to me or somebody like me, as compared to the current law. Under the current law, I am entitled to imputed airline earnings, for pension computation purposes, based on what *I would have earned if continuously employed.* Under the DOD proposal, my imputed airline earnings, for pension computation purposes, would be based on the average rate of compensation of my colleagues—other pilots at the same airline who have seniority, status, and pay rates that are similar to mine. I think that this alternative way of computing my pension entitlement will cost me tens of thousands of dollars in lifetime pension earnings.

At my airline (and this is typical for airlines with unionized pilot workforces) the individual pilot has a lot of flexibility in setting his or her schedule. Some pilots work as few as 70 hours in a month, and some pilots work as many as 90. Some pilots value time off above earnings and only sign up for the minimum required number of work hours in a month. Other pilots value money over time off and routinely work 85-90 hours per month or as many hours as they can. I am definitely in the latter category. In determining how many hours I would have worked and how much money I would have earned if I had remained continuously employed in the civilian job from January 1, 2015 through January 31, 2016, I should receive the benefit of my demonstrated history of working 85-90 hours per month.

At my airline (like other unionized airlines) there is a seniority roster, with all pilots ranked by date of hire, from the most senior to the most junior. Joe Smith was hired one day before I was hired, and he is right above me on the seniority roster. Mary Jones was hired one day after I was hired, and she is right below me on the seniority roster.

Unlike me, Joe Smith and Mary Jones value time off over earnings. Both of them routinely work 70 hours per month, or only the minimum number of hours required. It is my bad luck to be situated on the seniority roster between two minimum-hours pilots. If I were five spaces lower on the seniority roster, I would find myself between Alex Adams and Wanda Williams, both of whom routinely work 85-90 hours per month. In determining my pension entitlements, we should look at the number of hours that *I would have worked* if I had remained in the civilian job instead of going on active duty for 13 months. I don't like the DOD proposal.

A: I think that you make some interesting points, but we also need to keep in mind the "KISS Principle" or "keep it simple, stupid." We need

a system that is understandable and implementable. And not every workplace is similar to the unionized airline where you work.

In determining the number of hours per month that you would have worked if you had remained continuously employed, we need to look both at your *opportunity to work additional hours beyond the minimum* and your *propensity to work additional hours* when given the opportunity. Your comments address the propensity issue but not the opportunity issue. At many work places, there likely are major year-to-year differences in the opportunity to work overtime or to maximize the number of hours worked per week or per month. Some years, there are too many employees and not enough demand, and employees are fortunate if they are given the opportunity to work a minimal schedule. In other years, and at other employers, there is a shortage of workers and a great demand for work, and employees are given the opportunity to or even expected to work maximum hours.

As I explained in Law Review 104 and other articles, Congress enacted USERRA (Public Law 103-353) and President Bill Clinton signed it into law on October 13, 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA), the law that led to the drafting of millions of young men for World War II. In its first case construing the VRRA, the Supreme Court enunciated the "escalator principle" when it held: "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." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946).[3]

[3] The citation means that you can find the *Fishgold* case in Volume 328 of *United States Reports.* The case starts on page 275. The quoted language can be found at the bottom of page 284 and the top of page 285. I invite the reader's attention to Law Review 0803 (January 2008) for a detailed discussion of *Fishgold* and its implications. I invite the reader's attention to Category 10.1 in our Subject Index for a case note about each of the 16 Supreme Court VRRA cases and the one Supreme Court USERRA case.

The VRRA did not specifically mention pensions, but in 1977, in its 13th VRRA case, the Supreme Court applied the "escalator principle" to pension entitlements in the case of *Alabama Power Company v. Davis,* 431 U.S. 581 (1977).[4] Raymond E. Davis worked for the Alabama Power Company from August 16, 1936, until June 1, 1971, when he retired. His long career with the company was interrupted by 30 months of World War II active duty, from March 1943 until September 1945, when he was honorably discharged at the end of the war.

On July 1, 1944, while Mr. Davis was on active duty, the company established a defined benefit pension plan that rewarded company service both before and after that date. When the company computed Mr. Davis' monthly pension entitlement upon his retirement in 1971, the company excluded the 30 months that he was away from work for military service. This exclusion cost Mr. Davis $18 per month in pension benefits.

Mr. Davis sued, claiming that he was entitled to pension credit for his military service time under the "escalator principle" enunciated by the Supreme Court in *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946). The District Court ruled in his favor. *Davis v. Alabama Power Co.,* 383 F. Supp. 880 (N.D. Ala. 1974). The employer appealed, and the Court of Appeals affirmed the District Court's judgment in a brief *per curiam* decision. *Davis v. Alabama Power Co.,* 542 F.2d 650 (5th Cir. 1976).

The Supreme Court granted *certiorari* and affirmed, in a unanimous decision written by Justice Thurgood Marshall. The Court held that Mr. Davis was entitled to pension credit for the 30 months that he was away from work for military service, because the pension benefit met

[4] Please see Law Review 0915 (April 2009) for a detailed discussion of this case.

the two-pronged test as a perquisite of seniority. A pension benefit is intended to be a reward for length of service rather than a form of short-term compensation for services, and it is reasonably certain that Mr. Davis would have received the 30 months of pension credit if his career with the company had not been interrupted by military service. Justice Marshall's opinion contains an interesting and useful survey of the Supreme Court cases about the escalator principle.

It is important to note that the pension plan at issue in this case was a defined benefit plan. The Court set aside and did not answer how the escalator principle might or might not apply to defined contribution plans. "Petitioner's plan is a 'defined benefit' plan, under which the benefits to be received by employees are fixed and the employer's contribution is adjusted to whatever level is necessary to provide those benefits. The other basic type of pension is a 'defined contribution' plan, under which the employer's contribution is fixed and the employee receives whatever level of benefits the amount contributed on his behalf will provide. See 29 U.S.C. 1002 (34) (35) (1970 ed., Supp. V); Note, Fiduciary Standards and the Prudent Man Rule under the Employee Retirement Income Security Act of 1974, 88 Harv. L. Rev. 960, 961-963 (1975). We intimate no views on whether defined contribution plans are to be treated differently from defined benefit plans under the [reemployment statute]." *Alabama Power Co. v. Davis,* 431 U.S. 581, 593 n. 18 (1977).

Section 4318 of USERRA, 38 U.S.C. 4318, applies to both defined benefit plans and defined contribution plans, but slightly less generously in the case of defined contribution plans. Congress enacted USERRA in 1994 as a complete recodification of the 1940 reemployment statute. USERRA applies to "reemployments initiated" on or after December 12, 1994. It is still very much of an open question as to how the escalator principle applies to a defined contribution plan in the case of military

service prior to the effective date of USERRA. Section 4318 provides as follows:

§ 4318. Employee pension benefit plans

(a) (1) (A) Except as provided in subparagraph (B), in the case of a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974) or a right provided under any Federal or State law governing pension benefits for governmental employees, the right to pension benefits of a person reemployed under this chapter shall be determined under this section.
(B) In the case of benefits under the Thrift Savings Plan, the rights of a person reemployed under this chapter shall be those rights provided in section 8432b of title 5. The first sentence of this subparagraph shall not be construed to affect any other right or benefit under this chapter.

(2) (A) A person reemployed under this chapter shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services.
(B) Each period served by a person in the uniformed services shall, upon reemployment under this chapter, be deemed to constitute service with the employer or employers maintaining the plan for the purpose of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan.

(b) (1) An employer reemploying a person under this chapter shall, with respect to a period of service described in subsection (a)(2)(B), be liable to an employee pension benefit plan for funding any obligation of the plan to provide the benefits described in subsection (a)(2) and shall allocate the amount of any employer contribution for the person in the

same manner and to the same extent the allocation occurs for other employees during the period of service. For purposes of determining the amount of such liability and any obligation of the plan, earnings and forfeitures shall not be included. For purposes of determining the amount of such liability and for purposes of section 515 of the Employee Retirement Income Security Act of 1974 or any similar Federal or State law governing pension benefits for governmental employees, service in the uniformed services that is deemed under subsection (a) to be service with the employer shall be deemed to be service with the employer under the terms of the plan or any applicable collective bargaining agreement. In the case of a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability of the plan described in this paragraph shall be allocated--

(A) by the plan in such manner as the sponsor maintaining the plan shall provide; or

(B) if the sponsor does not provide--

(i) to the last employer employing the person before the period served by the person in the uniformed services, or

(ii) if such last employer is no longer functional, to the plan.

(2) A person reemployed under this chapter shall be entitled to accrued benefits pursuant to subsection (a) that are contingent on the making of, or derived from, employee contributions or elective deferrals (as defined in section 402(g)(3) of the Internal Revenue Code of 1986) only to the extent the person makes payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of service described in subsection (a)(2)(B). Any payment to the plan described in this paragraph shall be made during the period beginning with the date of reemployment and whose duration is three times the period of the person's service in the uniformed services, such payment period not to exceed five years.

(3) For purposes of computing an employer's liability under paragraph (1) or the employee's contributions under paragraph (2), the employee's compensation during the period of service described in subsection (a)(2)(B) shall be computed--
(A) at the rate the employee would have received but for the period of service described in subsection (a)(2)(B), or
(B) in the case that the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).

(c) Any employer who reemploys a person under this chapter and who is an employer contributing to a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter, shall, within 30 days after the date of such reemployment, provide information, in writing, of such reemployment to the administrator of such plan.

38 U.S.C. 4318.

When the Supreme Court enunciated the “escalator principle” in 1946, unions represented more than half of the private sector workforce in our country, but today the figure is less than seven percent. In its issue dated April 28, 2014, on pages 17-19, the *Washington Examiner* has an article titled “Big Labor’s Identity Crisis.” The article includes the following sentences: “Union membership has been sliding for years, with only 14.5 million people now in a union, or about 11.3 percent of the U.S. workforce, according to the Bureau of Labor Statistics. Only 6.7 percent of all private sector jobs are unionized, compared with 35.3 percent of the public sector. Organized labor has lost 3 million

members since 1984. As recently as 1980, there were 20 million union members."

Most airlines and railroads are still unionized, and unions are still strong in the traditional "Big Three" U.S. automakers (General Motors, Ford, and Chrysler). Unions have a few other pockets of strength, including what is left of steelmaking and coal mining, but in most of the private sector unions are rare.

Like the VRRA, USERRA applies to non-unionized as well as unionized situations, but in a non-unionized situation it is much more difficult to determine what *would have happened* if the service member had remained continuously employed in the civilian job. In your job situation, it is reasonably easy to determine what would have happened—we just need to look to the individual who is one step ahead of you and the individual who is one step behind you on the seniority roster. Your situation does not exist in most of the private sector today.

Under the DOD USERRA proposal, if it were to be enacted, the determination of the imputed earnings (for pension purposes) of the reemployed veteran returning from more than a year of military service would be based upon the average rate of compensation during such period of service of employees of that employer who are similarly situated to the service member in terms of having similar seniority, status, and pay. I think that this DOD proposal is better than the current law in terms of fairness across the board and ease of implementation in non-union as well as union situations. I favor the DOD approach on this issue.