

LAW REVIEW 14099¹

December 2014

My Colleagues Received a Bonus while I Was on Active Duty, and I Missed Out—Help!

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

1.2—USERRA forbids discrimination

1.3.2.2—Continuous accumulation of seniority-escalator principle

As the Director of the Service Members Law Center (SMLC) at the Reserve Officers Association (ROA), I received and responded to 9,193 inquiries (766 per month on average) in 2013, from service members, military family members, attorneys, employers, Employer Support of the Guard and Reserve (ESGR) volunteers, Department of Labor (DOL) investigators, congressional staffers, reporters, and others. Almost half of the inquiries (48.6%) were about the Uniformed Services Employment and Reemployment Rights Act (USERRA), and the other half were about everything you can think of that has something to do with military service and law.

I am here at my post answering e-mails and telephone calls during regular business hours Monday-Friday and until 10 pm Eastern on Mondays and Thursdays. The point of the evening availability is to encourage Reserve Component (RC) personnel to call me or e-mail me from the privacy of their own homes, not from their civilian jobs. As you can appreciate, you have no reasonable expectation of privacy when you use the employer's telephone, computer, or time to complain about the employer and to seek advice and assistance in dealing with the employer. Moreover, if the employer is annoyed with you because you have been called to the colors five times since 9/11/2001 and expect to be called again, and if the employer is looking for an excuse to fire you, the last thing that you should do is give the employer the excuse that he or she is seeking.

ROA is unique in giving RC personnel the opportunity to speak to a live human on these matters after regular business hours. Neither ESGR, nor DOL, nor any other government agency or military association offers this after-hours service.

Among the e-mails and telephone calls that I receive on USERRA, a frequent topic is bonuses. While I was away from my job for military service, my colleagues received a bonus. Am I entitled to that bonus while I am gone? Do I receive it upon reemployment? It depends. What kind of bonus are we talking about? How is eligibility for the bonus determined?

¹ We invite the reader's attention to www.servicemembers-lawcenter.org. You will find almost 1,300 "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, and we add new articles each week.

² Captain Wright is the Director of ROA's Service Members Law Center. He can be reached by telephone at 800-809-9448, ext. 730. His e-mail is SWright@roa.org.

Two subsections of USERRA³ that come into play here. Section 4316(a) provides: “A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that 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.”⁴ If the bonus qualifies as a perquisite of seniority and if the individual meets the USERRA eligibility criteria⁵ the person is entitled to the bonus upon returning to work.

Section 4311(a) provides: “A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any *benefit of employment* by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.”⁶ Even if the bonus does not qualify as a perquisite of seniority, it is unlawful for an employer to deny the individual the bonus *because of* the person’s uniformed service.

To understand the application of these subsections, let us consider three scenarios:

Scenario 1

Robert D. Delee is a noncommissioned officer (NCO) in the Air Force Reserve and a police officer for the City of Plymouth, Indiana. Pursuant to a long-standing local ordinance, the city pays each police officer an annual bonus. The annual payment amounts to \$225 multiplied by the officer’s number of years of police department service. During his twelfth year of police department service Delee qualified for a payment of \$2700.

Faced with financial difficulties in 1989, the city enacted a new ordinance that modifies the computation of these annual payments. Under the 1989 ordinance, if an individual were away from his or her civilian job for a leave of absence (including but not limited to a military leave of absence) during the year in question, the officer’s annual payment would be reduced by that portion of the year that the officer was away from his or her civilian job.

³ USERRA is codified in title 38 of the United States Code, at sections 4301-4335 (38 U.S.C. 4301-4335). There are titles (broad subject areas) of the United States Code, and title 38 relates to veterans’ affairs. Sections are numbered consecutively within each title.

⁴ 38 U.S.C. 4316(a).

⁵ To have the right to reemployment under USERRA, the person must have left a civilian job (federal, state, local, or private sector) for the purpose of performing service in the uniformed services and must have given the employer prior oral or written notice. The person’s cumulative period or periods of uniformed service, relating to the employer relationship with that employer, must not have exceeded the five-year limit. There are nine exemption; these are kinds of service that do not count toward exhausting the individual’s five-year limit. The person must have been released from the period of service without having received a disqualifying bad discharge from the military. After release, the person must have made a timely application for reemployment. 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.

⁶ 38 U.S.C. 4311(a) (emphasis supplied).

During the fiscal year in question, Delee was away from his civilian job for active duty for almost eight months. Accordingly, the city reduced his payment for that year by 2/3, from \$2700 to \$900. Contending that this reduction violated his USERRA rights, Delee sued the city in the United States District Court for the Northern District of Indiana. The District Court granted the city's motion for summary judgment, holding that the reduction of Delee's payment did not violate USERRA.⁷ Delee appealed to the United States Court of Appeals for the 7th Circuit, the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin. The 7th Circuit reversed, holding that the longevity payment qualified as a *reward for length of service* and a *perquisite of seniority* and that reducing Delee's payment because of his military service violated section 4316(a) of USERRA.⁸

In this scenario, the unreduced longevity payment is a perquisite of seniority that the returning service member is entitled to upon reemployment.

Scenario 2

Mary Jones is a petty officer in the Coast Guard Reserve, and she works for a large company called Daddy Warbucks International (DWI). Mary worked at her civilian job through December 31, 2013. On January 2, 2014, she reported to active duty when her Coast Guard Reserve unit was called to active duty.

At DWI, employees get a bonus each year, but the amount varies, depending upon how well the company did during the year. To qualify for the bonus, the employee must have worked at least 225 work days in the year and must be present for work on the first business day of the following year. The first business day of 2014 was Thursday, January 2.

Mary worked far more than 225 days in 2013, but she was not present for work on January 2 because she was ordered to report and did report to active duty on that date. DWI refused to pay her the bonus because she was not present for work on the first business day of 2014. Denying her the bonus under these circumstances violates section 4311(a) of USERRA—she is being denied the bonus, which she earned for her work in 2013, because of her uniformed service in 2014.

Scenario 3

Joe Smith is a Corporal in the Marine Corps Reserve. Like Mary Jones, he works for DWI. Joe was on active duty from September 2012 until March 2014—he missed all of 2013 at DWI. Because he did not work in 2013, and because the bonus is specifically tied to work for the company in that year, he did not earn the bonus, and DWI did not violate USERRA by refusing to pay it to him.

⁷ *Delee v. City of Plymouth*, 11 F. Supp. 3d 893 (N.D. Ind. 2014).

⁸ *Delee v. City of Plymouth*, 2014 773 F.3d 172 (7th Cir. 2014). I discuss the *Delee* case in detail in Law Review 14098, the immediately preceding article in this series.