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Seventh Circuit Clips United's Wings, Holding USERRA May Require Paid Leave to Reservists

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The Uniformed Services Employment and Reemployment Rights Act ("USERRA") may require employers to pay employees for reserve duty if they provide paid leave for other, "comparable" absences from work, according to a February 3, 2021 decision of the Seventh Circuit Court of Appeals in *White v. United Airlines,* which reversed and remanded a decision of the Northern District of Illinois dismissing the plaintiff United pilots' putative class action.[1]

The plaintiff pilots in *White* serve in the U.S. Military Reserve Forces, and argued that USERRA requires United to grant them paid leave and profit sharing credit for at least some of their reserve duty time because the airline pays, and allows profit sharing credit to, pilots serving jury duty and taking sick leave. In dismissing the *White* case, the trial court rejected the pilots' arguments, finding that granting them the same rights and benefits allowed for jury duty and sick leave would create a *de facto* universal requirement to provide paid military leave, and that jury duty and sick leave were not comparable to military leave because reservists volunteer their time, while jury duty is compulsory and sick time is involuntary.

Is Military Leave Comparable to Jury Duty and Sick Leave for USERRA Purposes?

The *White* pilots predicated their appeal on USERRA and Department of Labor regulations effectuating it.[2] Under USERRA, employers must give employees on reserve duty the same "rights and benefits" provided to other employees taking comparable furloughs or leaves of absence "under a contract, agreement, policy, practice, or plan…" The DOL's regulation interprets this to mean that a reservist 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."

But what is a "comparable form of leave"? According to the DOL, in determining whether a leave is comparable to military leave, the "duration of the leave may be the most significant factor to compare," but "the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered." The *White* pilots maintained that United violated USERRA by paying for sick and jury duty leave, but not paying for time devoted to reserve duty. They maintained that jury duty and sick leave *are* comparable to military leave, and that USERRA requires that reserve duty time be paid.

The Seventh Circuit Decision in White

While the Seventh Circuit did not hold that United must pay for military leave, it did reverse the District Court's dismissal and remand the case for the comparability analysis that it found the District Court had prematurely cut off. The Appellate Court rejected the District Court's conclusion that providing the United pilots with the same rights and benefits associated with other comparable leave would amount to a *de facto* mandate to provide paid military leave, noting that "USERRA mandates only equality of treatment; it does not specify how generous or how parsimonious an employer's paid leave policies must be." So, for example, an employer that provides no paid leave is not required to provide paid military leave; USERRA only requires employers to provide paid military leave if they provide paid leave in other *comparable* nonmilitary

[1] *White v. United Airlines, Inc.*, 987 F.3d 616, 627 (7th Cir. 2021).
[2] 38 U.S.C. § 4316(b)(1) and 20 C.F.R. § 1002.7(c).

leave settings.

The Seventh Circuit also disagreed with the District Court's comparability analysis of jury duty and sick leave on the one hand, and military leave on the other. "Comparability analysis," the Appellate Court said, "is not affected by the fact that the servicemember has voluntarily signed up for military service… Instead, what matters is an employee's control over the timing of her leave of absence—*i.e*., whether she has the option to choose when to take a given stretch of leave." The Seventh Circuit refrained from actually determining whether sick and jury duty leave are comparable to military leave, however, remanding that determination to the trial court. The *White* court emphasized the importance of evaluating comparability with the DOL's three-factor test: considering the duration of the leave together with its purpose, and the reservist's ability to choose when to take leave.

A Developing Area of Law

Federal appellate authority in this area other than *White* remains to be developed.[3] A few federal district courts have, however, provided some additional, albeit not entirely consistent, direction. A Texas federal court, for example, recently held that American Airlines pilots' military leave was not comparable to sick leave, because the annual average of reservists' military leave was 23.2 days, while the same pilots' annual average sick leave was just 6.6 days.[4] The same Texas trial court also addressed the lesser factor of leave purpose, finding that the purposes of American's sick leave and military leave policies were different. "Military leave," the court said, "is provided as the need arises going forward—when the pilot is called to service. Sick leave is provided (accrues or is earned) based on past days worked."[5]

Likewise, another Northern District of Illinois decision involving United Airlines cited similar distinctions between sick leave and military leave, noting that "sick or vacation days which are accrued and spent on vacations and short-term illness… happen to all people every year," while military leaves of absence, "are granted based on the length of some underlying, generally unforeseen circumstance."[6]

But on February 3, 2021, the Northern District of California certified a class of reservist Southwest Airlines pilots by citing, in-part, the 'averaging' approach. The District Court reasoned that the issue of comparability was susceptible to common proof in a class setting precisely because the defendant airline could average the yearly military leave taken by its pilots and compare that to the average yearly sick leave taken.[7]

Battle plan for reservists' employers

The *White* decision requires employers to place military leave on equal footing with the most generous comparable leave they provide for other purposes. Pending additional direction from the courts, employers that maintain a general paid-time-off policy (one that allows employees wide latitude in making their leave elections subject to a stated maximum) are safest granting the same pay and benefits credits for USERRA military leave purposes as are provided for comparable, paid nonmilitary leaves. Employers that grant paid leave only for discreet purposes, however, must determine whether the reasons for which they grant it are comparable to military leave, and should consider erring on the side of granting paid military leave commensurate with the most generous pay and benefits practices they apply to other, comparable, nonmilitary leave events.

In conducting the required comparability analysis, the *White* decision instructs employers to compare the duration of the leave, the purpose of the leave, and the employee's ability to choose when to take the leave, but to weigh most heavily in this equation the length of the leave. Unfortunately, while the length-of-leave factor may appear straightforward, it presents its own challenges. The time reservists require for military leave may vary widely, with some reservists regularly serving just two days at a time, and others being on duty for year-long deployments.

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[3] While the Seventh Circuit refused rehearing in *White,* the time has not yet run for a discretionary appeal to the U.S. Supreme Court through a petition for a writ of *certiorari*.
[4] *Hoefert v. Am. Airlines, Inc.*, 438 F. Supp. 3d 724, 739 (N.D. Tex. 2020).
[5] *Id.*
[6] *Moss v. United Airlines, Inc.,* 420 F. Supp. 3d 768, 775 (N.D. Ill. 2019).
[7] See, *Huntsman v. Sw. Airlines Co.*, No. 19-CV-00083-PJH, 2021 WL 391300, at *7 (N.D. Cal. Feb. 3, 2021), and note that the Ninth Circuit Court of Appeals declined to entertain Southwest's appeal from the district court's class certification decision without opinion on March 10, 2021, in *Jayson Huntsman v. Southwest Airlines Co.*, 21-80010 (stating simply, "[t]he court, in its discretion, denies the petition for permission to appeal the district court's February 3, 2021 order granting class action certification..").

The *White* decision also makes it clear that the ability of an employee to choose when to take military leave is pertinent to the "employee's control over the timing of her leave of absence—*i.e.,* whether she has the option to choose when to take a given stretch of leave." Although in most circumstances a reservist employee will be unable to choose the "timing of her leave of absence," there may be situations in which she can choose when she takes military leave, and/or adjust her work schedule to reconcile it with reserve duty time off work so that paid leave time can be conserved for other purposes.

Finally, employers of reservists should review with counsel their written paid leave policies, and consider listing military leave among the expressly permitted uses for electing PTO against a general paid leave bank, or adopting an express military leave policy that treats paid reserve leave time comparably with other qualifying leave events.

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