The Uniformed Services Employment and Reemployment Rights Act (USERRA):
A Review of the Last Twenty (20) Years

Statutory reemployment rights for veterans date from the United States first peacetime draft law, the Selective Training and Service Act, passed in 1940, which provided that a veteran returning to civilian employment from active duty was entitled to reinstatement to the position that he had left or one of like seniority, status and pay. *See Monroe v. Standard Oil*, 452 U.S. 549, 54-55 (1981). Since its original enactment, veterans' reemployment rights have gone through a series of amendments to clarify and where necessary strengthen veterans' rights:

- In 1951, Congress extended reinstatement rights to employees returning from training duty. *See Pub L. 51, ch. 144 §1(s), 65 Stat. 75, 86-87.*

- In 1955, through the enactment of the Reserves Forces Act of 1955, employees returning from active duty of more than three months in the Ready Reserve were provided the same employment rights as inductees, with limited exceptions. *See Pub. L. 305, ch. 655, § 262(f), 69 Stat. 598, 602.*

- In 1955, veterans reemployment rights were further amended by virtue of the Military Selective Service Act of 1967 *See 50 U.S.C. App. § 459* (1970 ed.).

- In 1974, Congress passed the Veterans' Reemployment Rights Act, providing that any employee of a private employer "shall not be denied retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a reserve component of the Armed Forces." *See Pub. L. No. 93-508, §404(a), 88 Stat. 1578, 1594* (codified at 38 U.S.C. §2021 *et seq*.).

- In 1994, USERRA was enacted "to clarify, simplify, and where necessary strengthen the *existing* veterans' employment and reemployment rights provisions." *H.R. Rep. No. 103-65(I),* at 18 (1993) (emphasis added).

USERRA did not establish a new cause of action in 1994, but instead amended its predecessors. Since 1994, Congress has amended USERRA on several occasions to provide further protection where USERRA has fallen short in the past.

USERRA is extremely important and relevant as nearly 850,000 National Guard and Reserve members have been called to active duty since 9/11/01 – some more than once.

Under USERRA, it is unlawful to discriminate against military service members, including members of the National Guard and Reserves due to their military performance or obligations.

- USERRA requires employers to reemploy service members following a period of service of less than five (5) years where employee provides notice and a request for reemployment.

- USERRA includes protection for employees denied benefits of employment, not just reemployment itself.

- USERRA forbids discrimination in hiring, retention and promotion.

Cannot discriminate because of membership in service, application to join, performance of service, application or obligation to perform service

USERRA further provides protection against retaliation for exercising rights, action to enforce, etc.

Applicability of the Statute

When a service member leaves a civilian job for voluntary or involuntary service in military, USERRA protects the service member.

Types of employment that is eligible

- Applies to temporary, probationary and at-will jobs

- Applies to executive employees

- Applies to laid-off employees

- Does not apply to spouses or family members of service members

- Does not apply to partners, independent contractors, but that label is not controlling

Handling a USERRA Case

Step 1: Does USERRA Apply to the Client's Case?

USERRA accords rights to an individual that has let their civilian job for voluntary or involuntary service in the uniformed services.

- *See* 38 USC §4303(13): "Service in the uniformed services means the performance of duty on a voluntary *or* involuntary basis…"

- *See* 38 USC §4303(16): The term "uniformed services" means the Air Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full time National Guard duty, the commissioned corps of the Public Health Service and any other category of persons designated by the President in time of war or national emergency."

- *Davison v. Department of Veterans Affairs*, 2011 MSPB 25 (Feb. 18, 2011). VA Doctor, who was a disabled veteran himself, took leave without pay for certain medical conditions pursuant to Executive Order 5396 which gave federal employees who are disabled veterans unlimited unpaid leave for medical treatment and recuperation. On seeking to return to employment, his re-employment was refused. On appeal, the MSPB held that the right to leave-without-pay for medical treatment and recuperation under Executive Order 5396 is a "benefit of employment" protected by section 4311 of USERRA, so Dr. Davison had a non-frivolous USERRA claim that the MSPB Administrative Judge should have heard.

USERRA applies to the relationship between an employer and employee; it does not apply to other kinds of relationships.

- *See* 38 USC §4311: 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.

- The statute does not have a threshold on the size of the employer or the number of employees. You only need one employee to be an employer for purposes of USERRA. *See Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992).

- The term "employee" means any person employed by an employer. Such term includes any person who is a citizen, national, or permanent resident alien of the United States employed in a workplace in a foreign country by an employer that is an entity incorporated or otherwise organized in the United States or that is controlled by an entity organized in the United States…" *See* 38 USC §4303(3).

- The term "employer" means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment. *See* 38 USC §4303(4)(a).

- USERRA generally applies to brand-new employees, probationary employees and other "at will" employees. *See* 20 C.F.R. 1002.41 (USERRA rights are not diminished because an employee holds a temporary, part-time, probationary, or seasonal employment position).

Step 2: What Type of USERRA Claim is it?

A. Discrimination and Reprisal – 38 USC §4311

- Section 4311 of USERRA makes it unlawful for an employer or prospective employer to deny an individual initial employment, retention in employment, promotion or any benefit of employment because of the individual's membership in a uniformed service, application to join a uniformed service, performance of uniformed service, or application or obligation to perform future service. *See* 38 USC §4311(a).

- "Benefit," "Benefit of Employment," or "rights and benefits" – means the terms, conditions, or privileges of employment, including any advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment. *See* 38 U.S.C. §4303(2)

- This term has been broadly construed by the courts to include almost all kinds of employment related benefits.

- Notably, the Veterans Opportunity to Work ("VOW") to Hire Heroes Act of 2011 amends the definition of a "benefit of employment" under Section 4303(2) of USERRA to include "the terms, conditions, or privileges of employment."

- The language "terms, condition, or privileges of employment" was specifically added in November 2011 to resolve the issue of whether USERRA covered claims of hostile work environment. By adopting this language, Congress made it clear that hostile work environment claims are actionable under USERRA. *Contra Carder v. Continental Airlines*, (CITE) (5th Cir. 2010).

- Section 4311 also prohibits "acts of reprisal" and specifically bars an employment from discriminating in employment or taking any adverse employment action against any person because such person: (1) has taken an action to enforce a protection under USERRA, (2) has testified or otherwise made a statement in or in connection with any proceeding under USERRA, (3) has assisted or otherwise participated in an investigation under USERRA, or (4) has exercise a right provided for under USERRA. *See* 38 USC §4311(b)

- Section 4311(c) establishes that claims of discrimination and retaliation are to be analyzed under the "motivating factor" test. The motivating factor is a low standard which only requires a plaintiff to show that the discriminatory intent was at least one of the motivating factors behind the employer's action; it need not be the biggest factor so long as it is a factor.

- *Note: Compare Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013)(finding that Title VII only allows the motivating factor test in direct discrimination claims, not for retaliatory discrimination claims.)

B. Right to Reemployment After Service – 38 USC §4312

Section 4312 of USERRA gives an individual the right to reemployment (and all associated rights and benefits) after voluntary or involuntary service in the uniformed services. *See* 38 USC §4312.

C. Other Causes of Action under USERRA

38 U.S.C. §4313 – "Failure to Reemploy"

- Failure to reemploy in a position of employment in accordance with the proper seniority or failure to make reasonable efforts to qualify the servicemember for that position

38 U.S.C. §4316 – "Seniority Rights"

- Person is entitled to the seniority and other rights and benefits determined by seniority that they would have otherwise been entitled to had they remained continuously employed.

38 U.S.C. §4316 – "Safe Harbor

- A person who is reemployed under USERRA shall not be discharged except for cause within one year of reemployment if their service was more than 180 days, or within 180 days if their service was more than 30 days but less than 181 days.

38 U.S.C. §4318 – "Employee pension benefit plans"

- An employer shall be liable to an employee benefit plan and allocate the amount of any employer contribution the employer would otherwise contribute for other employees during the period of service.

Step 3: Where Can I Bring a USERRA claim?

A. Enforcement of Rights with respect to Federal Executive Agencies

- 38 USC §4324 provides that an individual may submit a complaint alleging a violation of USERRA against a Federal executive agency or the Office of Personnel Management to the Merit Systems Protection Board.

- Note: If the individual has already sought the assistance of the Department of Labor and has a pending complaint, they must obtain notification from DOL of their right to proceed to MSPB prior to filing a claim.

B. Jurisdictional Issues

Statute of Limitations: No statute of limitations shall apply to USERRA:

- However, the doctrine of Laches may still apply and the burden is on the employer to prove this defense.

Failure to Exhaust Administrative Remedies:

- 38 U.S.C. §4302: USERRA supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter.

Step 4: How Can I Prove My Case and Establish an Employer Violated USERRA?

A. Standard for Proving a USERRA Violation under 38 USC §4311

To prove a violation of section 4311, it is necessary to prove that the plaintiff's membership, service, obligation, etc. was a *motivating factor* (not necessarily the sole reason) for the employer's decision to deny initial employment, fire, deny promotion etc.

- The landmark case for Federal Employees in terms of the burden of proof in USERRA cases is *Sheehan v. Department of the Navy*, where the court stated an employee making a USERRA claim of discrimination must bear the initial burden of proof by showing by a preponderance of the evidence that the employer's military service was "substantial or motivating factor" in the adverse employment action. *Sheehan v. Department of the Navy*, 240 F.3d 1009 (Fed. Cir. 2001).

- The factual question of discriminatory motivation or intent may be proven by either direct or circumstantial evidence. *Id. citing FPC Holdings, Inc.*, 64 F.3d at 942 ("Motive may be demonstrated by circumstantial as well as direct evidence and is a factual issue which the expertise of the Board [NLRB] is peculiarly suited to determine."); *Matson Terminals*, 114 F.3d at 303-04; *see also Kumferman v. Dep't of Navy***,** 785 F.2d 286, 290 (Fed. Cir. 1986) (intent is a question of fact to be found by the MSPB).

- As noted by the Court in *Sheehan*, circumstantial evidence will often be a factor in USERRA cases, for discrimination is seldom open or notorious. *Sheehan*, 240 F.3d 1009, 1014. Discriminatory motivation under the USERRA may be reasonably inferred from a variety of factors, including:

    - Proximity in time between the employee's military activity and the adverse employment action;

    - Inconsistencies between the proffered reason and other actions of the employer;

    - Employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity; and

    - Disparate treatment of certain employees compared to other employees with similar work records or offenses.

In determining whether the employee has proven that his protected status was part of the motivation for the agency's conduct, all record evidence may be considered, including the agency's explanation for the actions taken. *Id.*

If the plaintiff proves that protected activity was a motivating factor in the employer's decision, the burden of proof shifts to the employer, to prove that the employer would have made the same decision, for lawful reasons, even if the protected activity had not occurred.

- As stated in *Sheehan*, if the plaintiff has met his initial burden the employer then has the opportunity to come forward with evidence to show, by a preponderance of the evidence, that the employer would have taken the adverse action anyway, for a valid reason. *Sheehan*, 240 F.3d 1009.

B. Standard for Proving a USERRA Violation under 38 USC §4312

A case brought under Section 4312 is inherently easier to establish and prove than a section 4311 case because to prevail, a plaintiff need only prove that he or she meets the five objective USERRA eligibility criteria as set forth as follows under the statute.

1. The employee must have left their civilian position of employment for purposes of performing voluntary or involuntary service in the military. *See* 38 USC §4312(a).

    - USERRA defines "service in the uniformed services" very broadly, to include active duty, active duty for training, inactive duty training (drills), and initial active duty training.

2. The employee must give their employer prior oral or written notice. *See* 38 USC §4312(1).

3. The employee's cumulative period or periods of uniformed service must generally not have exceeded five years. *See* 38 USC §4312(2).

4. The employee must have been released from the period of service without receiving a punitive or other than honorable discharge.

    - *See* 38 USC §4304. (under this section you are disqualified from the right to reemployment if your receive a punitive (by court martial) discharge or an "other than honorable" administrative discharge, or if you are "dropped from the rolls" of your service)

5. The employee must make a timely application for reemployment after release from the period of service. *See* 38 USC §4312(3).

C. <u>Standard for Proving Claims under 38 U.S.C. §§ 4312, 4313, 4316, & 4318</u>

While 38 U.S.C. §4311(c) requires proof of a "motivating factor" for 38 U.S.C. §4311 claims, sections 4312, 4313, 4316, and 4318 are silent on this issue.

- Courts have held that 38 U.S.C. §4311(c) "motivating factor" does not apply to §4312. There is little case law, however, as to whether a person must prove "motivating factor" with regards to the remaining sections.

See Murphree v. Commun. Techs., Inc., 460 F.Supp.2d 702, 710-11 (ED La. 2006) (claims arising under 38 U.S.C. §4312 do not require a showing of discriminatory intent) *citing Coffman v. Chugach Support Services, Inc.*, 411 F.3d 1231 (11th Cir. 2005).

Step 5: What Are Some Defenses to a Reemployment Case I Should Expect from Employers?

A. Employer's Affirmative Defenses to Reemployment under 38 USC §4312

The employer is not required to reemploy a service member returning from service if the employer can establish one of the affirmative defenses listed in Section 4312. The employer would bear the burden of proving:

1. The employer's circumstances have so changed as to make reemployment impossible or unreasonable. *See* 38 USC §4312(d)(1)(A).

2. "In the case of a person entitled to reemployment such employment would impose an undue hardship on the employer." (Applies to specifically identified situations where the employee is disabled during his service and returns to service, and other specific situations) *See* 38 USC §4312(d)(1)(B) (referring to 38 USC §4313). "Undue hardship" means significant difficulty or expense, considering:

    a. the nature and cost of the action needed under this chapter;

    b. the overall financial resources of the facility or facilities involved in the provision of the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;

    c. the overall financial resources of the employer; the overall size of the business of an employer with respect to the number of its employees; the number, type, and location of its facilities; and

    d. the type of operation or operations of the employer, including the composition, structure, and functions of the work force of such employer; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer.

38 U.S.C. §4303(15).

3. The employment from which the person leaves to serve in the uniformed services is for a brief, non-recurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period. *See* 38 USC §4312(d)(1)(C)

B. Employer's Affirmative Defenses to the Rights to Reemployment under 20 C.F.R. §1002.248

The employer may discharge an employee for cause based either on conduct or, in some circumstances, because of the application of other legitimate non-discriminatory reasons:

> (a) In a discharge action based on conduct, the employer bears the burden of proving that it is reasonable to discharge the employee for the conduct in question, and that he or she had notice, which was express or can be fairly implied, that the conduct would constitute cause for discharge.
>
> (b) If, based on the application of other legitimate nondiscriminatory reasons, the employee's job position is eliminated, or the employee is placed on layoff status, either of these situations would constitute cause for purposes of USERRA. The employer bears the burden of proving that the employee's job would have been eliminated or that he or she would have been laid off.

See 20 C.F.R. §1002.248.

Step 6: Damages

Court may require the employer to compensate the person for "any loss" of wages or benefits, including but not limited to:

- Back Pay
- Annual leave
- Military leave
- Pension credit
- Severance Pay

Keep in mind: Duty to mitigate back pay damages by seeking alternative employment.

The Escalator Principle:

Each returning veteran is entitled to receive the seniority he had before he was called to the colors plus the additional seniority he would have received had he remained continuously employed. *Fishgold v. Sullivan Drydock*, 328 U.S. 275 (1946).

- "A person who is reemployed under [USERRA] 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." 38 U.S.C. 4316(a)

Pain & Suffering:

Courts have consistently held that USERRA does not provide for the recovery of damages for mental anguish, pain, or suffering, nor does USERRA allow for the recovery of punitive damages. *See Vander Wal v. Sykes Enters.*, 377 F.Supp. 2d 738, 745 (D.N.D. 2005).

Congresses' adoption of Title VII's "terms, conditions, and privileges of employment" language in the VOW to Hire Heroes Act of 2011 evinces Congresses' intent to harmonize the claims, analysis, and potentially grounds for relief for USERRA with those provided by Title VII. In a recent decision the courts continue to follow the principles set forth in *Vander Wal* with no analysis of the changes to USERRA. *See Dorris v. TXD Services, LP*, 2012 U.S. Dist. LEXIS 107105 (E.D. AR August 1, 2012)

Note: The plaintiff in *Vander Wal* initiated his USERRA claim prior to the enactment of the VOW to Hire Heroes Act of 2011.

Attorney Fees

The court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness costs, and other litigation expenses. 38 U.S.C. §4324(c)(4).

Closing Remarks

Remember, USERRA is not a new law, but a revision from the preexisting reemployment rights laws dating back to the United States first peacetime draft law, the Selective Training and Service Act of 1940.

While case law on USERRA is not as prevalent as we may like, case law on USERRA's predecessors may be helpful in understanding USERRA's provisions.