March 13, 2020

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USERRA
Uniformed Services Employment and Reemployment Rights Act of 1994

FY 2018
Annual Report to Congress

Prepared by the Veterans’ Employment and Training Service • August 2019
The purposes of the Uniformed Services Employment and Reemployment Rights Act (USERRA) are: to encourage non-career service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service; to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and to prohibit discrimination against persons because of their service in the uniformed services. It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of USERRA.

38 U.S.C. § 4301, *Purpose and Sense of Congress*
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INTRODUCTION

The Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301-4335 (USERRA or the Act), was signed into law on October 13, 1994. USERRA prohibits discrimination in employment based on an individual’s prior service in the uniformed services; current service in the uniformed services; or intent to join the uniformed services. An employer is also prohibited from discriminating against a person because of such person’s attempt to enforce his or her rights under the Act. In addition, an employer may not retaliate against an individual for filing a USERRA claim, testifying, or otherwise providing assistance in any proceeding under the Act. USERRA also provides reemployment rights with the pre-service employer following qualifying service in the uniformed services. In general, the protected person is entitled to be reemployed with the status, seniority, and rate of pay as if he or she had been continuously employed during the period of service. USERRA applies to private employers, the Federal Government, and State and local governments. It also applies to United States employers operating overseas and foreign employers operating within the United States.

This Fiscal Year (FY) 2018 report was prepared in accordance with 38 U.S.C. § 4332(a), which requires the Secretary of Labor, after consultation with the Attorney General and the Special Counsel, to prepare and transmit an annual report to Congress containing the following information for the preceding fiscal year:

1. The number of cases reviewed by the Department of Labor (DOL) under USERRA during the fiscal year for which the report is made.

2. The number of cases reviewed by the Secretary of Defense under the National Committee for Employer Support of the Guard and Reserve (ESGR) of the Department of Defense (DOD) during the fiscal year for which the report is made.

3. The number of cases referred to the Attorney General or the Special Counsel pursuant to Section 4323 or 4324, respectively, during such fiscal year and the number of actions initiated by the Office of Special Counsel (OSC) before the Merit Systems Protection Board (MSPB) pursuant to Section 4324 during such fiscal year.

4. The number of complaints filed by the Attorney General pursuant to Section 4323 during such fiscal year.

5. The number of cases reviewed by the Secretary of Labor and the Secretary of Defense through ESGR of DOD that involve the same person.

6. With respect to the cases reported on pursuant to paragraphs 1, 2, 3, 4, and 5 above:
   A. the number of such cases that involve a disability-related issue; and
   B. the number of such cases that involve a person who has a service-connected disability.
7. The nature and status of each case reported on pursuant to paragraph 1, 2, 3, 4, or 5 above.

8. With respect to the cases reported on pursuant to paragraphs 1, 2, 3, 4, and 5, the number of such cases that involve persons with different occupations or persons seeking different occupations, as designated by the Standard Occupational Classification System (SOCS).

9. An indication of whether there are any apparent patterns of violation of the provisions of USERRA together with an explanation thereof.

10. Recommendations for administrative or legislative action that the Secretary of Labor, the Attorney General, or the Special Counsel considers necessary for the effective implementation of USERRA, including any action that could be taken to encourage mediation, before claims are filed under USERRA, between employers and persons seeking employment or reemployment.

**OVERVIEW OF USERRA PROTECTIONS**

USERRA generally requires U.S. employers, regardless of size or location of operation, as well as foreign employers operating in the United States or its territories, to reemploy eligible veterans returning to their civilian employment after a period of service in the uniformed services. It requires employers, with certain exceptions, to provide training to restore competency in duties, and to restore seniority, status, pay, pensions, and other benefits that would have accrued but for the employee’s absence due to military service. Under USERRA, employers are generally liable for funding their share, if any, to the civilian retirement plan(s) of employed service members away on military service.

Eligibility requirements for service members seeking reemployment generally provide that the absence must be due to service; advance notice (oral or in writing) must be given to the employer; the cumulative period(s) of service while employed by the employer must not exceed five years; the application for reemployment must be timely; and the discharge from service must not be disqualifying.

Employers are also prohibited from discriminating on the basis of service in the military, the National Disaster Medical System, and the commissioned corps of the Public Health Service. USERRA also protects anyone—veteran or non-veteran—from reprisal for either exercising rights or assisting in any proceeding under the statute.

DOL is statutorily tasked with providing assistance to any person with respect to USERRA employment and reemployment rights and benefits and may request the assistance of other Federal and State agencies engaged in similar or related activities to do so. DOL, DOD, and the Department of Veterans Affairs share responsibility for promoting a clear understanding of USERRA among employers and individuals concerning their respective rights and responsibilities under USERRA. In addition, USERRA requires all Federal agencies to provide USERRA awareness training to human resources personnel, in consultation with the U.S. Office of Personnel Management (OPM). OPM issues guidance on ways to improve USERRA protection policies and practices for Federal agencies. DOL’s Veterans’ Employment and Training Service (VETS) and DOD’s ESGR provide extensive public education, outreach, and compliance assistance with the goals of preventing violations caused by ignorance or
misunderstanding of the law and ensuring that protected individuals understand their rights and know what assistance is available to help them secure those rights.

An individual who believes his or her USERRA rights have been violated may file a complaint with VETS, which will then investigate the claim(s). Alternatively, an individual may seek to informally mediate his or her claims utilizing ESGR Ombudsmen’s informal mediation services to try to resolve his or her USERRA-related issues. Informal mediation is not required and an individual may file a complaint with VETS at any time. Once a complaint is filed with VETS, VETS will formally investigate the complaint and attempt to resolve those complaints found meritorious. If, following VETS’ investigation, there is no resolution of the complaint, the claimant may request referral of his or her case to the Department of Justice (DOJ) for cases involving a private, State, or local government employer, and to OSC for cases involving a Federal employer. Claimants also have the right at any time to withdraw their case to pursue enforcement at their own expense in U.S. District court or before the MSPB, either on their own or with the assistance of a private attorney.

This report begins by describing the various roles each of the Federal agencies referenced above play in the administration of USERRA. Next, the report responds to each of the statutorily-mandated reporting requirements described in the introduction to this report. In addition, the report contains other information of interest, including USERRA case outcomes for cases closed by DOJ, OSC, and VETS.

**USERRA SERVICES PROVIDED BY THE DEPARTMENT OF DEFENSE’S EMPLOYER SUPPORT OF THE GUARD AND RESERVE**

**OVERVIEW**

ESGR is a DOD program established in 1972 to promote cooperation and understanding between Reserve Component (RC) service members and their civilian employers, and to assist in the informal resolution of USERRA-related employment conflicts arising from an employee’s military commitment. ESGR helps develop and promote supportive work environments for service members in the RCs through employer outreach and recognition, and through educational opportunities that increase awareness of applicable laws.

ESGR is a volunteer-centric program with a nationwide network of nearly 3,750 volunteers that works to ensure all employers support and value the employment of RC members. ESGR volunteers operate out of 54 State Committees located across all 50 States, the District of Columbia, Guam and the Commonwealth of the Northern Mariana Islands, the U.S. Virgin Islands, and Puerto Rico. Headquarters (HQ) ESGR in Alexandria, Virginia, provides guidance, resources, and support to the 54 volunteer-led ESGR committees.

In FY 2018, ESGR volunteers engaged 95,229 employers and 268,662 service members, educating both groups on their rights and responsibilities under USERRA.

**Outreach Programs**

ESGR conducts awareness and recognition programs aimed at employers of RC service members to engender positive support for National Guard and Reserve service. It also assists in preventing, resolving, or reducing employer/employee conflicts and misunderstandings that result from RC service.

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1 The U.S. Office of Special Counsel (OSC) is an independent Federal investigative and prosecutorial agency. OSC’s primary mission is to safeguard the merit system by protecting Federal employees and applicants from prohibited personnel practices, including protections included in USERRA.
training, or duty requirements by providing information and educating National Guard and Reserve members and employers about their rights and responsibilities under USERRA. ESGR also communicates directly with military units to promote better understanding of the importance of maintaining positive working relations between employers and their RC employees to sustain military participation and readiness.

Outreach programs also include the voluntary participation by employers in the Statement of Support Program. Employers who sign Statements of Support pledge that they will:

- Fully recognize, honor, and comply with the USERRA.
- Provide managers and supervisors with the tools they need to effectively manage employees who serve in the National Guard and Reserve.
- Appreciate the values, leadership, and unique skills service members bring to the workforce, and encourage opportunities to hire Guardsmen, Reservists, transitioning service members, and Veterans.
- Continually recognize and support our country’s service members and their families, in peace, in crises, and in war.

Outreach programs also include the ESGR Awards Program, designed to recognize employers for policies and practices that are supportive of their employees’ participation in the National Guard and Reserve. Most employer awards originate from nominations submitted by service members, recognizing supportive supervisors with the Patriot Award. ESGR administers the Secretary of Defense Employer Support Freedom Award, the U.S. Government’s highest honor bestowed on employers. The Freedom Award is presented annually to a maximum of 15 select large, small, and public-sector employers that have demonstrated exceptional support to RC employees.

During FY 2018, ESGR recognized 10,783 supervisors of RC service members with the Patriot Award, received 2,351 nominations for the 2018 Secretary of Defense Employer Support Freedom Award, and obtained 9,997 Statements of Support from employers across the Nation.

**Ombudsman Services**

ESGR assists National Guard and Reserve members with USERRA employment conflicts through its nationwide Ombudsman Services Program. While ESGR is not an enforcement agency and does not participate in formal litigation processes, the Ombudsman Services Program provides education, information, and neutral, informal third-party mediation services to resolve employee-employer USERRA conflicts. The program has over 500 volunteers nationwide that work to reduce, resolve, and help prevent employer-employee conflicts and misunderstandings related to uniformed service. ESGR ombudsmen are specifically trained on the rights and responsibilities outlined in USERRA, the use of neutral, informal mediation techniques to help resolve employment conflicts between service members and employers, and how to further an understanding of and compliance with USERRA regulations.

In addition to the Ombudsman Services Program, ESGR also operates a Customer Service Center (CSC) for USERRA-related inquiries and information requests from customers worldwide. The CSC provides prompt, expert telephonic and email responses to service members and civilian employers on USERRA-related matters. During FY 2018, ESGR received 17,568 contacts by telephone and email, of which 1,655 contacts resulted in actual USERRA mediation cases. ESGR’s mediation efforts covered an array of USERRA-related issues that included 1,033 complaints involving some type of military discrimination; 602 complaints involving job reinstatement; and 20 complaints involving possible retaliation or reprisal. There were 429 USERRA mediation cases in which ESGR was unable to
facilitate an agreement between the employee and employer. In those instances, ESGR ombudsmen informed both parties that the employee had the right to file a case with DOL or seek assistance through a private attorney.

ESGR and DOL coordinate closely on USERRA-related issues, and track problems, coordinate issues, and identify trends as part of their efforts to protect service members’ and employers’ rights.

**DOD USERRA Working Group**
In June 2017, the Deputy Assistant Secretary of Defense for Reserve Integration (DASD RI) established a DOD USERRA Working Group, led by ESGR, to review USERRA application and policy in the context of current utilization rates of the RC. Participants in the USERRA Working Group include representatives from the DASD RI office, ESGR, each of the Military Departments and RC, and DOL. The working group’s efforts in FY 2018 focused on clarifying DOD policies and processes to assist employers with verification of uniformed service and service dates, and to assist both service members and employers to better understand the authority under which orders are written in order to determine which periods of uniformed service count against the five-year service limitation for reemployment protections as established in USERRA.

**DEPARTMENT OF LABOR’S USERRA OUTREACH AND CLAIMS INVESTIGATION**

**VETS Public Education and Compliance Assistance Efforts**
VETS conducts a robust public outreach campaign to educate service members, employers, and others on their rights and responsibilities under USERRA. Since the terrorist attacks of September 11, 2001, which resulted in the single greatest mobilization of reserve components, VETS has briefed more than one million individuals on USERRA. In FY 2018, VETS presented USERRA information to 7,731 individuals, including service members, members of professional groups, and members of the general public. To help facilitate these efforts, VETS maintains a USERRA page on its website at: [https://www.dol.gov/agencies/vets/programs/userra](https://www.dol.gov/agencies/vets/programs/userra), containing compliance assistance materials such as the USERRA elaws Advisor, fact sheets, applicable laws and regulations, and other useful information. Briefings to mobilizing and demobilizing members of the Guard and Reserve are given in collaboration with ESGR. Together, VETS and ESGR strive to ensure that every service member receives a USERRA briefing upon mobilization and demobilization from active military service. In FY 2018, VETS and OSC also coordinated their efforts to provide technical assistance on USERRA to a number of Federal agencies. Also in FY 2018, VETS continued its customer satisfaction survey (CSS) to obtain feedback on its investigations from USERRA claimants and their employers. VETS will use the information gathered to improve and shape its USERRA program.

**VETS Investigative Process**
USERRA investigations are complaint-driven. An individual who believes that his or her USERRA rights have been violated may file a complaint (Form 1010) with VETS online or submit a signed form in person or via mail or facsimile. Form 1010 is available to the public online through the VETS’ web page. Upon receipt of an electronically-filed or signed and completed hard-copy Form 1010, VETS immediately opens a formal investigation. A brief notification of process rights, written in easy-to-understand question-and-answer format, is sent to each claimant within five days of VETS’ receipt of a complaint.

The assigned investigator collects and reviews pertinent documentary evidence and interviews necessary witnesses, and may use an administrative subpoena to obtain the necessary evidence. To
ensure investigations are of the highest quality and are conducted in a uniform and timely manner, VETS investigators are extensively trained in the legal aspects of USERRA, in investigative techniques, and in the agency’s operating procedures. If the evidence compiled in a USERRA investigation supports the allegations made, the agency will attempt to obtain satisfactory resolution through negotiation or mediation. VETS encourages all parties to resolve disputes promptly and avoid litigation.

VETS has 90 days to complete its investigation, unless VETS obtains an extension of time from the claimant for VETS to continue the investigation and attempt to resolve the case. At any point during the investigative process, the claimant may elect to withdraw the complaint from VETS and pursue the claim with private counsel or pro se.

**CASE REFERRAL PROCESS**

Upon completion of the investigation, if VETS does not resolve the case to the claimant’s satisfaction, VETS advises the claimant in a written closing letter of his or her right to have the case referred to either DOJ or to OSC, as appropriate, for consideration of legal representation at no cost to the claimant. If a claimant requests that his or her case be referred, VETS must refer the claim regardless of whether VETS has found merit in the complaint. Each VETS’ case referral contains a memorandum analyzing the USERRA claim and providing an assessment on whether or not the claim has merit. VETS has 60 days to complete this referral process, unless VETS obtains an extension of time from the claimant.

**DEPARTMENT OF JUSTICE ENFORCEMENT**

DOJ and DOL work collaboratively to meet the goal of ensuring service members’ USERRA rights are protected. If DOL is unable to resolve a service member’s USERRA claim against a private, State, or local government employer, the service member may ask DOL to refer the service member’s claim to the Attorney General for review.

Upon receipt of an unresolved USERRA claim from DOL, DOJ conducts an independent review of the complete DOL investigative file and analysis. If the Attorney General is reasonably satisfied that the service member is entitled to relief, the Attorney General may exercise DOJ’s prosecutorial authority and commence an action in Federal court on behalf of the service member. If the employer is a State or State agency, the action is brought in the name of the United States. In all other cases, the United States files suit in the name of the service member. DOJ also attempts to seek relief on the service member’s behalf and to settle the claims without commencing an action in court when appropriate. If DOJ determines that it will not offer legal representation to a claimant, or seek relief on the service member’s behalf, it informs the service member of this decision, in writing, and notifies him or her that he or she has the right to proceed with private counsel or pro se. In all cases, DOJ ensures that each USERRA referral receives careful consideration and is processed as expeditiously as practicable.

DOJ continues to ramp up its enforcement of USERRA against private, State, and local employers, through litigation, facilitated settlements, outreach and advocacy. Since 2004, DOJ has filed 104 USERRA lawsuits and favorably resolved 185 USERRA complaints either through consent decrees obtained in those suits or through facilitated private settlements. Under the current administration, the Department of Justice has filed four complaints on behalf of service members and negotiated settlements in excess of $710,000.
The Civil Rights Division of DOJ also works closely with the Solicitor’s Office at DOL in training VETS investigators through both live and remote training sessions, discussing case trends, and collaborating on USERRA strategy. For example, DOJ and the Solicitor’s Office at DOL have a scheduled monthly call where all case referrals and case resolutions are discussed.

In FY 2019, DOJ will continue to work with DOL to ensure that referrals are promptly and carefully processed and that each meritorious referral is resolved to the satisfaction of the service member and the Federal Government. While DOJ will continue to aggressively pursue litigation when warranted, it seeks to resolve meritorious referrals without contested litigation whenever possible, to achieve the best possible result for the service member. The United States will also continue to seek out opportunities to participate as *amicus curiae*.

**OFFICE OF SPECIAL COUNSEL ENFORCEMENT**

OSC’s enforcement responsibilities apply to Federal-sector USERRA cases. Case referrals from DOL to OSC following a VETS investigation are addressed in a manner similar to that used in DOJ referrals discussed above.

**USERRA IN THE FEDERAL SECTOR**

The Federal Government is committed to being a model employer under USERRA. OPM is responsible for administering USERRA policy for the Federal Government to ensure it meets that goal.

During FY 2018, VETS and OSC professional staff collaborated to provide technical assistance and guidance on a number of highly complex issues to Federal agencies, teaching and training agency staff on the law and best practices set forth in OPM’s guidance. VETS and OSC continue to collaborate in this effort, which has earned praise from agencies that received their guidance. These activities were conducted in furtherance of the idea that the Federal Government should be a model employer, particularly with respect to honoring its commitment to preserving and promoting service members’ and veterans’ employment rights.

Moving forward into the coming fiscal years, VETS plans to continue and increase these activities. Furthermore, in an effort to broaden and strengthen partnerships with other Federal agencies, VETS, in coordination with OSC, DOD, and OPM, will continue to work together to identify and share best practices to ensure that our Nation’s veterans are well served. Through these partnerships, VETS can better respond to ideas and requests for assistance, promote veteran employment, and find additional ways to implement employer-driven ideas and initiatives.
MANDATED REPORTING REQUIREMENTS

Section 4332 of USERRA, 38 U.S.C. § 4332, requires the Secretary of Labor, after consultation with the Attorney General and the Special Counsel, to prepare and transmit an annual report to Congress containing the following information for the preceding fiscal year:

1. **The number of cases reviewed by the Department of Labor under USERRA during the fiscal year for which the report is made.**

DOL reviewed 917 new unique\(^2\) cases in FY 2018 opened pursuant to a submitted VETS 1010 complaint form. The table below provides the numbers of unique USERRA cases reviewed by DOL and OSC in FY 2013 – FY 2018.

*Figure 1. Unique USERRA Cases Reviewed by the Department of Labor and OSC\(^3\)*

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>FY 2013</th>
<th>FY 2014</th>
<th>FY 2015</th>
<th>FY 2016</th>
<th>FY 2017</th>
<th>FY 2018</th>
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<tbody>
<tr>
<td>Total New Cases</td>
<td>1,281</td>
<td>1,286</td>
<td>1,123</td>
<td>930</td>
<td>944</td>
<td>917</td>
</tr>
<tr>
<td>Total Cases</td>
<td>1,553</td>
<td>1,511</td>
<td>1,288</td>
<td>1,107</td>
<td>1,098</td>
<td>1,095</td>
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In FY 2018, DOL carried over an additional 166 unique cases (open investigations) from FY 2017. During FY 2018, DOL reopened 10 cases from FY 2017 and two from FY 2016 or earlier. In sum, DOL reviewed a total of 1,095 unique cases in FY 2018.

2. **The number of cases reviewed by Secretary of Defense under the National Committee for Employer Support of the Guard and Reserve during the fiscal year.**

During FY 2018, ESGR received 17,568 contacts by telephone and email. Of those contacts, 1,655 resulted in actual USERRA cases which were reviewed by ESGR Ombudsmen.

3. **The number of cases referred to the Attorney General or the Special Counsel pursuant to Section 4323 or 4324, respectively, during such fiscal year and the number of actions initiated by the Office of the Special Counsel before the Merit Systems Protection Board pursuant to Section 4324 during such fiscal year.**

In FY 2018, the Attorney General received 50 cases and OSC received 25 cases referred by DOL. During the fiscal year, OSC initiated action on one case before the MSPB. The nature and status of these referred cases is reflected in mandatory reporting requirement number seven of this report.

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\(^2\) This excludes duplicative cases such as cases that are filed multiple times by the same claimant with the same complaint or cases that have been previously investigated and have been reopened.

\(^3\) This table captures unique cases also reviewed by OSC from FY 2011-FY 2014, under a demonstration project established by the Veterans Benefits Act of 2010. New unique cases reviewed by OSC totaled 137 in FY 2013 and 146 in FY 2014. Unique case assignments to OSC under this demonstration project ended in FY 2014.
4. **THE NUMBER OF COMPLAINTS FILED BY THE ATTORNEY GENERAL PURSUANT TO SECTION 4323 DURING SUCH FISCAL YEAR.**

DOJ filed two USERRA complaints in Federal court in FY 2018. Both of these cases were settled.

5. **THE NUMBER OF CASES REVIEWED BY THE SECRETARY OF LABOR AND SECRETARY OF DEFENSE UNDER THE NATIONAL COMMITTEE FOR EMPLOYER SUPPORT OF THE GUARD AND RESERVE THAT INVOLVE THE SAME PERSON.**

ESGR provided VETS with the names of 1,583 individuals who had filed the 1,655 cases reviewed by ESGR Ombudsmen in FY 2018, and the date of each case. VETS compared the ESGR data to its own data4 on cases initially opened between October 1, 2017 and October 31, 2018.5 This comparison resulted in 163 likely matches; thus, it appears that 10% of FY 2017 ESGR cases were subsequently opened as VETS cases.

6. **WITH RESPECT TO THE CASES REPORTED ON PURSUANT TO PARAGRAPHS 1, 2, 3, 4, AND 5—**

**A. THE NUMBER OF SUCH CASES THAT INVOLVE A DISABILITY-RELATED ISSUE.**

i. Eighteen of the new unique cases first reviewed by VETS in FY 2018 (2.0%) involved a disability-related issue.

ii. Twelve of the ESGR cases first reviewed in FY 2018 (0.7%) involved a disability-related issue.

iii. Of the referral cases received by DOJ and OSC from DOL in FY 2018 for consideration of litigation, one of those received by DOJ and none of those received by OSC involved a disability-related issue.

iv. Of the two USERRA complaints filed by DOJ in FY 2018, none involved a disability-related issue.

v. With respect to the 163 cases reviewed by DOL and ESGR involving the same person in FY 2018, two (1.2%) involved a disability-related issue.

**B. THE NUMBER OF SUCH CASES THAT INVOLVE A PERSON WHO HAS A SERVICE-CONNECTED DISABILITY.**

i. In FY 2018, VETS asked claimants whether they had a service-connected disability. Among the 917 new unique cases VETS received, VETS obtained responses from 884 claimants, 227 (26%) of whom reported having such a disability. Among these 227 claimants, 15 also claimed a USERRA-related disability issue. Among the remaining 657 claimants who responded but did not report having a service-connected disability, two claimed a USERRA-related disability issue.

ii. No information is available on the number of cases handled by ESGR that involved a person with a service-connected disability.

iii. Of the referral cases received by DOJ from DOL in FY 2018 for consideration of litigation, 17 involved a claimant who reported a service-connected disability, and one included a

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4 Absent more specific data on the employer(s) and specific allegation(s) involved, case matching cannot be made with complete confidence.

5 October 2018 VETS data was included to capture the ESGR cases that were opened late FY 2018 and may have been filed with VETS in October 2018.
USERRA-related disability issue. Fourteen of the referral cases received by OSC from DOL in FY 2018 involved a claimant who reported a service-connected disability, and none included a USERRA-related disability issue.

iv. Of the two USERRA complaints filed by DOJ in FY 2017, none involved a service-connected disability.

v. With respect to the 163 cases reviewed by VETS and ESGR involving the same person in FY 2018, VETS obtained service-connected disability responses from 157 of these claimants, 25 (15.3%) of whom reported having such a disability. One claimant among the 25 who reported having a service-connected disability also claimed a USERRA-related disability issue. Among the remaining 132 claimants who responded but did not report having a service-connected disability, one claimed a USERRA-related disability issue.
7. **The nature and status of each case reported pursuant to paragraph 1, 2, 3, 4, or 5.**

i. **Cases reviewed by the Department of Labor**

The following issues were raised in the new unique USERRA cases reviewed by DOL. Because many USERRA cases involve multiple issues, the number of cases in this chart exceeds the 917 new unique cases reported by VETS in FY 2018 and the combined percentages exceed 100%.

| **Figure 2. Cases Opened by VETS in FY 2018** | VETS CASES ALLEGING ISSUE |
| **USERRA ISSUE** | **NUMBER** | **PERCENT** |
| Military obligations discrimination | 402 | 43.8% |
| Reinstatement | 140 | 15.3% |
| Other non-seniority benefits | 26 | 2.8% |
| Promotion | 56 | 6.1% |
| Vacation | 19 | 2.1% |
| Status | 14 | 1.5% |
| Pay rate | 29 | 3.2% |
| Reasonable accommodation/retraining for non-qualified/non-disabled | 6 | 0.7% |
| Discrimination as retaliation for any action | 109 | 11.9% |
| Seniority | 14 | 1.5% |
| Pension | 23 | 2.5% |
| Initial hiring discrimination | 60 | 6.5% |
| Layoff | 47 | 5.1% |
| Special protected period discharge | 3 | 0.3% |
| Health benefits | 11 | 1.2% |
| Reasonable accommodations/retraining for disabled | 18 | 2.0% |
| Other | 26 | 2.8% |
DOL investigated and closed 920 cases in FY 2018 under the following closure codes (each code is explained in Figure 4):

<table>
<thead>
<tr>
<th>CLOSURE CODE</th>
<th>VETS CASES CLOSED</th>
<th>NUMBER</th>
<th>PERCENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>No merit</td>
<td></td>
<td>310</td>
<td>33.7%</td>
</tr>
<tr>
<td>Administrative</td>
<td></td>
<td>81</td>
<td>8.8%</td>
</tr>
<tr>
<td>Claim granted</td>
<td></td>
<td>94</td>
<td>10.2%</td>
</tr>
<tr>
<td>Claim settled</td>
<td></td>
<td>76</td>
<td>8.3%</td>
</tr>
<tr>
<td>Claim withdrawn</td>
<td></td>
<td>274</td>
<td>29.8%</td>
</tr>
<tr>
<td>Not eligible</td>
<td></td>
<td>36</td>
<td>3.9%</td>
</tr>
<tr>
<td>Merit, not resolved</td>
<td></td>
<td>47</td>
<td>5.1%</td>
</tr>
<tr>
<td>Merit undetermined</td>
<td></td>
<td>2</td>
<td>0.2%</td>
</tr>
<tr>
<td>TOTAL:</td>
<td></td>
<td>920</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

In addition to the 60 cases that were investigated and closed by VETS, and requested for referral to DOJ or OSC in FY 2018, there were eight cases that requested for referral to DOJ or OSC in FY 2018. Five of those requests were from cases that were closed in FY 2017 (4 “No Merit”; and 1 “Merit, Not Resolved”); and 3 of those requests were from cases that were closed prior to FY 2017 (2 “No Merit”; and 1 “Merit, Not Resolved”). In total there were 68 referrals requested in FY 2018.
**Figure 4. Case Closure Codes Explained**

- **Administrative Closure:** A case should be closed administratively under any of the following circumstances:
  - **Lack of Interest** – Administrative closure is appropriate when the claimant clearly displays lack of interest or is obviously uncooperative. Examples are failure to reply to multiple VETS’ letters, failure to give VETS a change of address, failure to supply information that could be easily obtained, and failure to attend scheduled meetings or conferences.
  - **Continued Unauthorized Contact by Third Party with Employer** – Although a claimant is entitled to be represented by a third party under USERRA while the case is investigated by VETS, if the representation interferes with the investigation, he or she will be informed that VETS can no longer continue its involvement in the case and that the case will be administratively closed.

- **Claim Granted:** When the employer grants all of the claimant’s entitlements.

- **Claim Settled:** When the claimant and the employer agree to settle the case potentially for less than the claimant’s full entitlements under USERRA.

- **Withdrawn Claim:** When the claimant informs VETS in writing of his or her desire to withdraw the claim.

- **Not Eligible:** If a case has already been opened, and VETS finds that the claimant does not meet the eligibility requirements in the statute, the case should be discussed with the claimant and, with his or her concurrence, closed on the basis of no eligibility.

- **No Merit:** The claimant is not entitled to relief for reasons other than failure to meet eligibility requirements.

- **Cases Referred:** Unsettled cases are closed only when they are referred by DOL for appropriate referral action.

- **Merit, Not Resolved:** When the completed investigation finds merit to the complaint, but VETS is unable to obtain a satisfactory resolution.

- **Merit Undetermined:** When the investigation is not complete, but the statutory deadline for case completion (or an extension previously agreed to by the claimant) is reached and the claimant does not agree to a further extension.

### ii. Cases Reviewed by the ESGR on Behalf of the Secretary of Defense

ESGR Ombudsman services covered an array of USERRA issues that included 1,033 complaints involving some type of military discrimination; 602 complaints involving job reinstatement; and 20 complaints involving possible retaliation or reprisal during FY 2018.

ESGR resolved 1,226 of its 1,655 Ombudsman cases. There were 429 USERRA Ombudsman cases in which the employee and employer could not reach an agreement. In these instances, ESGR Ombudsmen informed both parties that the employee had the option to file a case with DOL or seek assistance through a private attorney.

The following crosswalk aligns the issues identified in ESGR case data with VETS data. It shows the number of cases for each separate issue. For three groupings of issues defined as “Primary Categories” – Discrimination; Reinstatement/Reemployment; and Reprisal – the crosswalk also shows both the total cases, and the percentage of all cases, for each category.
## Crosswalk of USERRA Issues, FY 2018

### ESGR Ombudsman Services ↔ VETS’ National Guard & Reserve Complaint Cases

<table>
<thead>
<tr>
<th>ESGR Ombudsman Cases</th>
<th>VETS Complaint Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;Problem Codes&quot;</td>
<td>&quot;Issue Codes&quot; *</td>
</tr>
<tr>
<td>(Converted to VETS’ Issue Codes)</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Military Obligations</th>
<th>ID - Military Obligations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discrimination</td>
<td>Discrimination 366</td>
</tr>
<tr>
<td>Initial Hiring Discrimination</td>
<td>42</td>
</tr>
</tbody>
</table>

**1,033 Ombudsman Cases (62.4%)**

**408 Issues in 407 Complaint Cases (53.0% of Complaint Cases)**

<table>
<thead>
<tr>
<th>Health Benefits</th>
<th>IH - Health Benefits</th>
</tr>
</thead>
<tbody>
<tr>
<td>25</td>
<td>10</td>
</tr>
<tr>
<td>Pension</td>
<td>IP - Pension</td>
</tr>
<tr>
<td>19</td>
<td>20</td>
</tr>
<tr>
<td>Seniority</td>
<td>IS - Seniority</td>
</tr>
<tr>
<td>46</td>
<td>13</td>
</tr>
<tr>
<td>Other Non-Seniority Benefits</td>
<td>IB - Other Non-Seniority Benefits</td>
</tr>
<tr>
<td>14</td>
<td>20</td>
</tr>
<tr>
<td>Status</td>
<td>IZ - Status</td>
</tr>
<tr>
<td>21</td>
<td>13</td>
</tr>
<tr>
<td>Layoff</td>
<td>IL - Layoff</td>
</tr>
<tr>
<td>6</td>
<td>45</td>
</tr>
<tr>
<td>Vacation</td>
<td>IV - Vacation</td>
</tr>
<tr>
<td>80</td>
<td>18</td>
</tr>
<tr>
<td>Reinstatement</td>
<td>IR - Reinstatement</td>
</tr>
<tr>
<td>260</td>
<td>123</td>
</tr>
<tr>
<td>Promotion</td>
<td>IT - Promotion</td>
</tr>
<tr>
<td>65</td>
<td>47</td>
</tr>
<tr>
<td>Reasonable Accommodations/Retraining for Disabled</td>
<td>IA - Reasonable Accommodations/Retraining for Disabled</td>
</tr>
<tr>
<td>12</td>
<td>5</td>
</tr>
<tr>
<td>Reasonable Accommodations/Retraining for Non-Qualified/Non-Disabled</td>
<td>IW - Reasonable Accommodations/Retraining for Non-Qualified/Non-Disabled</td>
</tr>
<tr>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Pay Rate</td>
<td>IM - Pay Rate</td>
</tr>
<tr>
<td>53</td>
<td>26</td>
</tr>
<tr>
<td>Special Protected Period Discharge</td>
<td>IF - Special Protected Period Discharge</td>
</tr>
<tr>
<td>0</td>
<td>2</td>
</tr>
</tbody>
</table>

**602 Ombudsman Cases (36.4%)**

**346 Issues in 286 Complaint Cases (37.2% of Complaint Cases)**

<table>
<thead>
<tr>
<th>Discrimination as Retaliation for Any Action</th>
<th>ID2 - Discrimination as Retaliation for Any Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>20</td>
<td>65</td>
</tr>
</tbody>
</table>

**20 Ombudsman Cases (1.2%)**

**65 Issues in 65 Complaint Cases (8.5% of Complaint Cases)**

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### Figure 5.

*To facilitate comparisons with ESGR data, VETS’ data in this chart reflects only National Guard & Reserve (NG&R) complaint cases, whereas ALL complaint cases were reflected earlier in this Report in the "Mandated Reporting Requirements" section. Also, the percentages of NG&R complaint cases among the three Primary Categories for VETS in this chart total less than 100%. because VETS’ Issue and Case counts here do not include the uncategorized “Other” Problem/Issue Code, thereby excluding 17 “Other” VETS Issues and Cases from this chart.*
iii. **CASES REFERRED TO THE DEPARTMENT OF JUSTICE OR THE OFFICE OF SPECIAL COUNSEL**

**CASES REFERRED TO THE DEPARTMENT OF JUSTICE**

In FY 2018, the Civil Rights Division received a total of 50 referrals from DOL. Seventeen were assessed as having merit and 33 were assessed as not having merit. Out of the cases that were assessed as having merit, DOJ offered representation in six cases, and declined representation in six cases, one of which DOJ facilitated settlement. Three referrals involved State agencies as potential defendants, two of which DOJ declined to pursue litigation in agreement with DOL, and one of which DOJ facilitated settlement. The remaining two referrals were still under consideration by DOJ in FY 2018.

Out of the 33 cases assessed as having non-merit, based on DOL’s assessment and DOJ’s independent analysis of the merits of each referral, DOJ declined representation with respect to 30 referrals and offered representation in one referral. One referral involved a State agency, which DOJ declined to pursue litigation. The remaining referral was still under consideration by DOJ in FY 2018.

The cases referred to the Civil Rights Division in FY 2018 involved a number of USERRA issues. Approximately 28% (14) of these cases involved allegations of termination and/or discharge; approximately 34% (17) of these cases involved reemployment allegations, such as accommodation and disability; and approximately 12% (6) of these cases involved allegations of loss or denial of benefits, such as loss of pay, assignment, reduction or loss of pension or health benefits, and loss of seniority. The remaining cases involved various forms of discrimination, with approximately 4% (2) involving failure to promote, approximately 4% (2) involving failure to hire or recruit, and approximately 56% (28) involving actions affecting the service member’s terms and conditions of employment, such as hostile work environment, discipline or harassment. The remaining 6% (3) of these cases involved allegations of retaliation for asserting USERRA protection.

**CASES REFERRED TO THE OFFICE OF THE SPECIAL COUNSEL**

In FY 2018, OSC received a total of 25 referrals from DOL. Additionally, three cases referred to OSC during previous fiscal years remained pending at the beginning of FY 2018. Thus, 28 total cases were pending at OSC during the fiscal year. OSC closed 22 of the 28 cases during FY 2018 (approximately 80% within the 60-day time limit), while six cases remained pending at the end of the fiscal year. OSC also represented one service member in a USERRA appeal before the MSPB during FY 2018. The case is still pending.

The cases referred to OSC in FY 2018 involved a number of USERRA issues. Approximately 76% (19) of the 25 cases involved allegations of discrimination based on uniformed service, including termination, non-promotion, non-selection, or improper denial of employment benefits; 16% (4) involved allegations of violations of reemployment rights; and 28% (7) involved allegations of retaliation for exercising USERRA rights.

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7 In contrast with Figure 3 above, this section counts the referrals actually received by DOJ and OSC during FY 2018. Therefore this section includes referrals from requests that were made in FY 2017 that were received in FY 2018, and excludes requests that were made in FY 2018 that were not received until FY 2019.

8 Several cases involved multiple issues. Each issue was counted separately.

9 Some cases involved multiple issues. Each issue was counted separately.
iv. **COMPLAINTS FILED BY THE ATTORNEY GENERAL**

DOJ filed two USERRA complaints in FY 2018. Both of these cases were settled.

On December 17, 2017, DOJ filed a complaint on behalf of Bobby Lindsay, a reservist in the Coast Guard who deployed for a three-month tour of duty after giving notice to his employer, Bridges Consulting, Inc. Towards the end of Mr. Lindsay’s deployment, he notified his employer that he expected to return to work at the conclusion of his deployment, but Bridges Consulting responded that he was no longer an employee of the company. Mr. Lindsay extended his orders several times and several times requested reemployment. DOJ’s complaint alleged both that Bridges Consulting failed to reemploy Mr. Lindsay in violation of USERRA’s reemployment provisions and that Bridges Consulting terminated Mr. Lindsay on the basis of his membership in the Coast Guard, his absence to perform military service, and/or his military service obligations, in violation of USERRA’s discrimination provisions.

On March 1, 2018, DOJ filed a complaint on behalf of Charles “Chip” O’Donnell, a U.S. Army Reservist who was terminated from his job as a program manager as part of a reduction in force less than a month after returning from military service, despite having more seniority than other program managers who were not terminated and positive performance reviews.

v. **COMPLAINTS FILED BY THE OFFICE OF SPECIAL COUNSEL**

OSC filed a USERRA case before the MSPB on March 14, 2018, seeking reinstatement of a U.S. Postal Service (USPS) employee, John D. Patrie. Mr. Patrie, a letter carrier in Maine, and a member of the Maine Air National Guard, had previously filed a USERRA complaint with VETS alleging that USPS denied him his USERRA rights when it failed to reinstate him in his escalator position following completion of his military service. USPS claimed that Mr. Patrie abandoned his civilian position in order to pursue a military career. Following a VETS investigation, which found that Mr. Patrie’s allegations were substantiated, Mr. Patrie exercised his right to referral to OSC. On April 25, 2019, an administrative judge (AJ) with the MSPB issued a decision ordering USPS to reinstate Mr. Patrie retroactive to January 2016, and provide him with appropriate back pay and benefits. The USPS has appealed this decision to the MSPB.

vi. **CASES REVIEWED BY DOL AND ESGR INVOLVING THE SAME PERSON**

DOL’s response to paragraph 5 of the Mandated Reporting Requirements, setting forth the number of cases reviewed by DOL and DOD through ESGR that involve the same person, indicates that in comparing ESGR data on USERRA cases during the fiscal year, 163 likely matches were identified. This figure indicates that first ESGR, and subsequently DOL, handled the same individuals’ claims.

DOL closed all but one of these 163 likely matches by June 18, 2019, under the following closure codes: no merit, 57 (35.2%); administrative, 15 (9.3%); claim granted, 17 (10.5%); claim settled, 17 (10.5%); claim withdrawn, 43 (26.5%); not eligible, 4 (2.5%); and merit, not resolved, 8 (4.9%); merit undetermined, 1 (0.6%). An explanation of VETS case closure codes appears in the explanation of the status of cases reviewed by DOL.

The following chart shows how the alleged issues in these 163 likely match cases were distributed among the various VETS’ closure codes.
## VETS' Data For 163 Likely Case Matches with FY 2018 ESGR Cases*

<table>
<thead>
<tr>
<th>VETS' USERRA Issue Codes</th>
<th>Administrative</th>
<th>Claim Granted</th>
<th>Claim Settled</th>
<th>Claim Withdrawn</th>
<th>Merit Undetermined</th>
<th>Merit, Not Resolved</th>
<th>No Merit</th>
<th>Not Eligible</th>
<th>[NRI Open as of 6/18/2019]</th>
</tr>
</thead>
<tbody>
<tr>
<td>Military Obligations Discrimination</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
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<tr>
<td>Reinstatement</td>
<td>0</td>
<td>6</td>
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<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Other Non-Seniority Benefits</td>
<td>14</td>
<td>2</td>
<td>8</td>
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<td>1</td>
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<td>30</td>
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<td>Promotion</td>
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<td>0</td>
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<td>Vacatiobn</td>
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<td>0</td>
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<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Reasonable Accommodations/Retraining for Non-Qualified/Non-Disabled</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>3</td>
<td>0</td>
<td>1</td>
<td>4</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Discrimination as Retaliation for any Action</td>
<td>0</td>
<td>0</td>
<td>0</td>
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<td>0</td>
<td>0</td>
<td>4</td>
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</tr>
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<td>Seniority</td>
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<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>3</td>
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<td>0</td>
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<tr>
<td>Pension</td>
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<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
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<td>2</td>
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<td>Initial Hiring Discrimination</td>
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<td>6</td>
<td>6</td>
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<td>3</td>
<td>9</td>
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<td>Layoff</td>
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<td>0</td>
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<td>1</td>
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<tr>
<td>Special Protected Period Discharge</td>
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<td>Health Benefits</td>
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<tr>
<td>Reasonable Accommodations/Retraining for Disabled</td>
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<td>1</td>
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<tr>
<td>Other</td>
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<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td><strong>NUMBER OF ISSUE CODES FOR EACH CLOSURE CODE:</strong></td>
<td>15</td>
<td>20</td>
<td>17</td>
<td>45</td>
<td>1</td>
<td>8</td>
<td>64</td>
<td>5</td>
<td>1</td>
</tr>
<tr>
<td><strong>PERCENT OF ALL LIKELY MATCH CASES:</strong></td>
<td>9.2%</td>
<td>12.3%</td>
<td>10.4%</td>
<td>27.6%</td>
<td>0.6%</td>
<td>4.9%</td>
<td>39.3%</td>
<td>3.1%</td>
<td>0.6%</td>
</tr>
</tbody>
</table>

*NOTE: Many USERRA cases involve multiple issues, and VETS records all the USERRA issues involved in a case. As a result, the numbers of cases and issues in this chart exceed the 163 ESGR and VETS cases involving the same person, and the combined percentages exceed 100%. Matching of FY 2018 ESGR cases and VETS cases initially opened 10/1/2017 to 10/31/2018 is based on claim dates and claimant names.*
VETS is the only Federal agency that collected occupational data on USERRA claimants and recorded the respective Standard Occupational Classification System (SOCS) code in FY 2018. Therefore, SOCS code data is not available for ESGR mediation cases. The chart below shows the full distribution of the SOCS codes in FY 2018 USERRA cases, across four different categories: VETS cases; cases common to VETS and ESGR; referrals to DOJ; and referrals to OSC. The predominant occupations found among each of these four categories of cases can be summarized as follows:

- Out of 888 (97%)\(^{10}\) of the unique complaints filed in FY 2018, 20% of complaints involved Protective Service occupations; 11% involved Management occupations; and 9% involved Office and Administrative Support occupations.

- Out of 159 (98%)\(^{11}\) of the cases reviewed by VETS and ESGR likely involving the same person in FY 2018, 19% of those cases involved Protective Service occupations, and each of three categories (Management; Office and Administrative Support; and Transportation and Material Moving) involved 9% of complaints.

- Out of the 50 referral cases received by the Attorney General from DOL in FY 2018, 20% of those cases involved Protective Service occupations; 16% involved Management occupations; and 12% involved Transportation and Material Moving occupations.

- Out of the 25 referral cases received by OSC from DOL in FY 2018, 24% of complaints involved Protective Service occupations; 20% involved Business and Financial Operations occupations; and 16% involved Management occupations.

---

\(^{10}\) Total is less than 100% because the SOCS code was not recorded for some cases.

\(^{11}\) Total is less than 100% because the SOCS code was not recorded for some cases.
### Figure 7. Occupations Involved in FY 2018 USERRA CASES

As designated by the Standard Occupational Classification System (SOCS)

<table>
<thead>
<tr>
<th>SOCS Job Family</th>
<th>Percentage of Cases involving SOCS Code</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>VETS Cases</td>
</tr>
<tr>
<td>Protective Service</td>
<td>20%</td>
</tr>
<tr>
<td>Management</td>
<td>11%</td>
</tr>
<tr>
<td>Office and Administrative Support</td>
<td>9%</td>
</tr>
<tr>
<td>Transportation and Material Moving</td>
<td>8%</td>
</tr>
<tr>
<td>Installation, Maintenance, and Repair</td>
<td>8%</td>
</tr>
<tr>
<td>Business and Financial Operations</td>
<td>6%</td>
</tr>
<tr>
<td>Healthcare Practitioners and Technical</td>
<td>6%</td>
</tr>
<tr>
<td>Production</td>
<td>5%</td>
</tr>
<tr>
<td>Computer and Mathematical</td>
<td>4%</td>
</tr>
<tr>
<td>Sales and Related</td>
<td>4%</td>
</tr>
</tbody>
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9. **An indication of whether there are any apparent patterns of violation of the provisions of USERRA, together with an explanation thereof.**

No patterns of violations of USERRA became apparent in FY 2018. DOL will continue to monitor USERRA cases to identify trends as they arise.

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12 The following occupations accounted for 2% or fewer within each case/referral category shown in this chart with exceptions as noted here: Architecture and Engineering (Exceptions: 3% of VETS Cases; 4% of Referrals to DOJ; and 4% of Referrals to OSC); Community and Social Services (Exceptions: 3% of VETS Cases; 4% of Referrals to DOJ; and 3% of Cases Common to VETS & ESGR); Food Preparation and Serving Related (Exception: 5% of Cases Common to VETS & ESGR); Construction and Extraction (Exceptions: 4% of Referrals to DOJ, and 3% of Cases Common to VETS & ESGR); Education, Training, and Library (Exceptions: 10% of Referrals to DOJ, and 3% of Cases Common to VETS & ESGR); Life, Physical, and Social Science (Exception: 12% of Referrals to OSC); Building and Grounds Cleaning and Maintenance (Exception: 8% of Referrals to OSC); Arts, Design, Entertainment, Sports, and Media (Exception: 4% of Referrals to OSC); Healthcare Support; Farming, Fishing, and Forestry; Legal; Military Specific; and, Personal Care and Service occupations.
10. **Recommendation for Administrative or Legislative Action that the Secretary, the Attorney General, or the Special Counsel Considers Necessary for the Effective Implementation of USERRA, Including Any Action that Could be Taken to Encourage Mediation, Before Claims are Filed Under USERRA, Between Employers and Persons Seeking Employment or Reemployment.**

**Recommendation from DOL:** None at this time.

**Recommendation from DOJ:** DOJ has sent to Congress proposed legislation that would strengthen protections for service members under USERRA and increase DOJ’s enforcement authority. Among other things, this legislation would give DOJ authority to initiate pattern or practice litigation to address systemic violations of service members’ rights, rather than having to wait to receive a referral from DOL. The legislation would also add jurisdiction in State courts for service members seeking to enforce their USERRA rights through private litigation. DOL concurs with these recommendations.
(1) Update, as appropriate, the States’ estimates of TAP workload and reserve sufficient funds for that purpose from the total amount available for allocation to the States. Beyond TAP workload, no funds will be reserved for exigent circumstances because the shortfall in the appropriation will be the primary exigent circumstance to be addressed.

(2) Apply proportionally the remaining balance available for basic grant allocations to the States for that fiscal year. The proportion will be calculated by dividing the remaining balance available for allocation by the total estimated State basic grant allocations for that fiscal year. The proportion resulting from that calculation will be applied to each State’s estimated basic grant allocation to calculate the amount to be awarded.

PART 1002—REGULATIONS UNDER THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994

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APPENDIX TO PART 1002—NOTICE OF YOUR RIGHTS UNDER USERRA

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§ 1002.1 What is the purpose of this part?

This part implements the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA" or "the Act"). 38 U.S.C. 4301–4334. USERRA is a law that establishes certain rights and benefits for employees, and duties for employers. USERRA affects employment, reemployment, and retention in employment, when employees serve or have served in the uniformed services. There are five subparts to these regulations. Subpart A gives an introduction to the USERRA regulations. Subpart B describes USERRA's anti-discrimination and anti-retaliation provisions. Subpart C explains the steps that must be taken by a uniformed service member who wants to return to his or her previous civilian employment. Subpart D describes the rights, benefits, and obligations of persons absent from employment due to service in the uniformed services, including rights and obligations related to health plan coverage. Subpart E describes the rights, benefits, and obligations of the returning veteran or service member. Subpart F explains the role of the Department of Labor in enforcing and giving assistance under USERRA. These regulations implement USERRA as it applies to States, local governments, and private employers. Separate regulations published by the Federal Office of Personnel Management implement USERRA for Federal executive agency employers and employees.

§ 1002.2 Is USERRA a new law?

USERRA is the latest in a series of laws protecting veterans' employment and reemployment rights going back to the Selective Training and Service Act of 1940. USERRA's immediate predecessor was commonly referred to as the Veterans' Reemployment Rights Act (VRRA), which was enacted as section 404 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974. In enacting USERRA, Congress emphasized USERRA's continuity with the VRRA and its intention to clarify and strengthen that law. Congress also emphasized that Federal laws protecting veterans' employment and reemployment rights for the past fifty years had been successful and that the large body of case law that had developed under those statutes remained in full force and effect, to the extent it is consistent with USERRA. USERRA authorized the Department of Labor to publish regulations implementing the Act for State, local government, and private employers. USERRA also authorized the Office of Personnel Management to issue regulations implementing the Act for Federal executive agencies (other than some Federal intelligence agencies). USERRA established a separate program for employees of some Federal intelligence agencies.

§ 1002.3 When did USERRA become effective?

USERRA became law on October 13, 1994. USERRA's reemployment provisions apply to members of the uniformed services seeking civilian reemployment on or after December 12, 1994. USERRA's anti-discrimination and anti-retaliation provisions became effective on October 13, 1994.

§ 1002.4 What is the role of the Secretary of Labor under USERRA?

(a) USERRA charges the Secretary of Labor (through the Veterans' Employment and Training Service) with providing assistance to any person with respect to the employment and reemployment rights and benefits to which such person is entitled under the Act. More information about the Secretary's role in providing this assistance is contained in Subpart F.

(b) USERRA also authorizes the Secretary of Labor to issue regulations implementing the Act with respect to
§ 1002.5 What definitions apply to USERRA?

(a) Attorney General means the Attorney General of the United States or any person designated by the Attorney General to carry out a responsibility of the Attorney General under USERRA.

(b) Benefit, benefit of employment, or rights and benefits means any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues to the employee because of an employment contract, employment agreement, or employer policy, plan, or practice. The term includes rights and benefits under a pension plan, health plan, or employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or the location of employment.

(c) Employee means any person employed by an employer. The term also includes any person who is a citizen, national or permanent resident alien of the United States who is employed in a workplace in a foreign country by an employer that is an entity incorporated or organized in the United States, or that is controlled by an entity organized in the United States. “Employee” includes the former employees of an employer.

(d)(1) Employer, except as provided in paragraphs (d)(2) and (3) of this section, means any person, institution, organization, or other entity that pays salary or wages for work performed, or that has control over employment opportunities, including—

(i) A person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities, except in the case that such entity has been delegated functions that are purely ministerial in nature, such as maintenance of personnel files or the preparation of forms for submission to a government agency;

(ii) The Federal Government;

(iii) A State;

(iv) Any successor in interest to a person, institution, organization, or other entity that has denied initial employment in violation of 38 U.S.C. 4311, USERRA’s anti-discrimination and anti-retaliation provisions.

(2) In the case of a National Guard technician employed under 32 U.S.C. 709, the term “employer” means the adjutant general of the State in which the technician is employed.

(3) An employee pension benefit plan as described in section 3(2) of the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. 1002(2)) is considered an employer for an individual that it does not actually employ only with respect to the obligation to provide pension benefits.

(e) Health plan means an insurance policy, insurance contract, medical or hospital service agreement, membership or subscription contract, or other arrangement under which health services for individuals are provided or the expenses of such services are paid.

(f) National Disaster Medical System (NDMS) is an agency within the Federal Emergency Management Agency, Department of Homeland Security, established by the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Public Law 107–188. The NDMS provides medical-related assistance to respond to the needs of victims of public health emergencies. Participants in the NDMS are volunteers who serve as intermittent Federal employees when activated. For purposes of USERRA coverage only, these persons are treated as members of the uniformed services when they are activated to provide assistance in response to a public health emergency or to be present for a short period of time when there is a risk of a public health emergency, or when they are
participating in authorized training. See 42 U.S.C. 300hh–11(e).

(g) **Notice**, when the employee is required to give advance notice of service, means any written or verbal notification of an obligation or intention to perform service in the uniformed services provided to an employer by the employee who will perform such service, or by the uniformed service in which the service is to be performed.

(h) **Qualified**, with respect to an employment position, means having the ability to perform the essential tasks of the position.

(i) **Reasonable efforts**, in the case of actions required of an employer, means actions, including training provided by an employer that do not place an undue hardship on the employer.

(j) **Secretary** means the Secretary of Labor or any person designated by the Secretary of Labor to carry out an activity under USERRA and these regulations, unless a different office is expressly indicated in the regulation.

(k) **Seniority** means longevity in employment together with any benefits of employment that accrue with, or are determined by, longevity in employment.

(l) **Service in the uniformed services** means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority. Service in the uniformed services includes active duty, active and inactive duty for training, National Guard duty under Federal statute, and a period for which a person is absent from a position of employment for an examination to determine the fitness of the person to perform such duty. The term also includes a period for which a person is absent from employment to perform funeral honors duty as authorized by law (10 U.S.C. 12503 or 32 U.S.C. 115). The Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. 107–188, provides that service as an intermittent disaster-response appointee upon activation of the National Disaster Medical System (NDMS) or as a participant in an authorized training program is deemed “service in the uniformed services.” 42 U.S.C. 300hh–11(e)(3).

(m) **State** means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and other territories of the United States (including the agencies and political subdivisions thereof); however, for purposes of enforcement of rights under 38 U.S.C. 4323, a political subdivision of a State is a private employer.

(n) **Undue hardship**, in the case of actions taken by an employer, means an action requiring significant difficulty or expense, when considered in light of—

1. The nature and cost of the action needed under USERRA and these regulations;

2. 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;

3. 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,

4. 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.

(o) **Uniformed services** means the Armed 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. For purposes of USERRA coverage only, service as an intermittent disaster response appointee of the NDMS when federally activated or attending authorized training in support of their Federal mission is deemed “service in the uniformed services,” although such appointee is not a member of the “uniformed services” as defined by USERRA.
§ 1002.6 What types of service in the uniformed services are covered by USERRA?

USERRA’s definition of “service in the uniformed services” covers all categories of military training and service, including duty performed on a voluntary or involuntary basis, in time of peace or war. Although most often understood as applying to National Guard and reserve military personnel, USERRA also applies to persons serving in the active components of the Armed Forces. Certain types of service specified in 42 U.S.C. 300hh-11 by members of the National Disaster Medical System are covered by USERRA.

§ 1002.7 How does USERRA relate to other laws, public and private contracts, and employer practices?

(a) USERRA establishes a floor, not a ceiling, for the employment and reemployment rights and benefits of those it protects. In other words, an employer may provide greater rights and benefits than USERRA requires, but no employer can refuse to provide any right or benefit guaranteed by USERRA.

(b) 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 USERRA, including the establishment of additional prerequisites to the exercise of any USERRA right or the receipt of any USERRA benefit. For example, an employment contract that determines seniority based only on actual days of work in the place of employment would be superseded by USERRA, which requires that seniority credit be given for periods of absence from work due to service in the uniformed services.

(c) USERRA does not supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes an employment right or benefit that is more beneficial than, or is in addition to, a right or benefit provided under the Act. For example, although USERRA does not require an employer to pay an employee for time away from work performing service, an employer policy, plan, or practice that provides such a benefit is permissible under USERRA.

(d) If an employer provides a benefit that exceeds USERRA’s requirements in one area, it cannot reduce or limit other rights or benefits provided by USERRA. For example, even though USERRA does not require it, an employer may provide a fixed number of days of paid military leave per year to employees who are members of the National Guard or Reserve. The fact that it provides such a benefit, however, does not permit an employer to refuse to provide an unpaid leave of absence to an employee to perform service in the uniformed services in excess of the number of days of paid military leave.

Subpart B—Anti-Discrimination and Anti-Retaliation

Protection from Employer Discrimination and Retaliation

§ 1002.18 What status or activity is protected from employer discrimination by USERRA?

An employer must not deny initial employment, reemployment, retention in employment, promotion, or any benefit of employment to an individual on the basis of his or her membership, application for membership, contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by USERRA, including the establishment of additional prerequisites to the exercise of any USERRA right or the receipt of any USERRA benefit. For example, an employment contract that determines seniority based only on actual days of work in the place of employment would be superseded by USERRA, which requires that seniority credit be given for periods of absence from work due to service in the uniformed services.

§ 1002.19 What activity is protected from employer retaliation by USERRA?

An employer must not retaliate against an individual by taking any adverse employment action against him or her because the individual has taken an action to enforce a protection afforded any person under USERRA; testified or otherwise made a statement in or in connection with a proceeding under USERRA; assisted or participated in a USERRA investigation; or, exercised a right provided for by USERRA.
§ 1002.20 Does USERRA protect an individual who does not actually perform service in the uniformed services?

Yes. Employers are prohibited from taking actions against an individual for any of the activities protected by the Act, whether or not he or she has performed service in the uniformed services.

§ 1002.21 Do the Act’s prohibitions against discrimination and retaliation apply to all employment positions?

The prohibitions against discrimination and retaliation apply to all covered employers (including hiring halls and potential employers, see sections 1002.36 and 38) and employment positions, including those that are for a brief, nonrecurring period, and for which there is no reasonable expectation that the employment position will continue indefinitely or for a significant period. However, USERRA’s reemployment rights and benefits do not apply to such brief, nonrecurring positions of employment.

§ 1002.22 Who has the burden of proving discrimination or retaliation in violation of USERRA?

The individual has the burden of proving that a status or activity protected by USERRA was one of the reasons that the employer took action against him or her, in order to establish that the action was discrimination or retaliation in violation of USERRA. If the individual succeeds in proving that the status or activity protected by USERRA was one of the reasons the employer took action against him or her, the employer has the burden to prove the affirmative defense that it would have taken the action anyway.

§ 1002.23 What must the individual show to carry the burden of proving that the employer discriminated or retaliated against him or her?

(a) In order to prove that the employer discriminated or retaliated against the individual, he or she must first show that the employer’s action was motivated by one or more of the following:

1. Membership or application for membership in a uniformed service;
2. Performance of service, application for service, or obligation for service in a uniformed service;
3. Action taken to enforce a protection afforded any person under USERRA;
4. Testimony or statement made in or in connection with a USERRA proceeding;
5. Assistance or participation in a USERRA investigation; or,
6. Exercise of a right provided for by USERRA.

(b) If the individual proves that the employer’s action was based on one of the prohibited motives listed in paragraph (a) of this section, the employer has the burden to prove the affirmative defense that the action would have been taken anyway absent the USERRA-protected status or activity.

Subpart C—Eligibility For Reemployment

GENERAL ELIGIBILITY REQUIREMENTS FOR REEMPLOYMENT

§ 1002.32 What criteria must the employee meet to be eligible under USERRA for reemployment after service in the uniformed services?

(a) In general, if the employee has been absent from a position of civilian employment by reason of service in the uniformed services, he or she will be eligible for reemployment under USERRA by meeting the following criteria:

1. The employer had advance notice of the employee’s service;
2. The employee has five years or less of cumulative service in the uniformed services in his or her employment relationship with a particular employer;
3. The employee timely returns to work or applies for reemployment; and,
4. The employee has not been separated from service with a disqualifying discharge or under other than honorable conditions.

(b) These general eligibility requirements have important qualifications and exceptions, which are described in detail in §§1002.73 through 1002.138. If the employee meets these eligibility criteria, then he or she is eligible for
§ 1002.33 Does the employee have to prove that the employer discriminated against him or her in order to be eligible for reemployment?

No. The employee is not required to prove that the employer discriminated against him or her because of the employee's uniformed service in order to be eligible for reemployment.

COVERAGE OF EMPLOYERS AND POSITIONS

§ 1002.34 Which employers are covered by USERRA?

(a) USERRA applies to all public and private employers in the United States, regardless of size. For example, an employer with only one employee is covered for purposes of the Act.

(b) USERRA applies to foreign employers doing business in the United States. A foreign employer that has a physical location or branch in the United States (including U.S. territories and possessions) must comply with USERRA for any of its employees who are employed in the United States.

(c) An American company operating either directly or through an entity under its control in a foreign country must also comply with USERRA for all its foreign operations, unless compliance would violate the law of the foreign country in which the workplace is located.

§ 1002.35 Is a successor in interest an employer covered by USERRA?

USERRA’s definition of “employer” includes a successor in interest. In general, an employer is a successor in interest where there is a substantial continuity in operations, facilities, and workforce from the former employer. The determination whether an employer is a successor in interest must be made on a case-by-case basis using a multi-factor test that considers the following:

(a) Whether there has been a substantial continuity of business operations from the former to the current employer;

(b) Whether the current employer uses the same or similar facilities, machinery, equipment, and methods of production;

(c) Whether there has been a substantial continuity of employees;

(d) Whether there is a similarity of jobs and working conditions;

(e) Whether there is a similarity of supervisors or managers; and,

(f) Whether there is a similarity of products or services.

§ 1002.36 Can an employer be liable as a successor in interest if it was unaware that an employee may claim reemployment rights when the employer acquired the business?

Yes. In order to be a successor in interest, it is not necessary for an employer to have notice of a potential reemployment claim at the time of merger, acquisition, or other form of succession.

§ 1002.37 Can one employee be employed in one job by more than one employer?

Yes. Under USERRA, an employer includes not only the person or entity that pays an employee’s salary or wages, but also includes a person or entity that has control over his or her employment opportunities, including a person or entity to whom an employer has delegated the performance of employment-related responsibilities. For example, if the employee is a security guard hired by a security company and he or she is assigned to a work site, the employee may report both to the security company and to the site owner. In such an instance, both employers share responsibility for compliance with USERRA. If the security company declines to assign the employee to a job because of a uniformed service obligation (for example, National Guard duties), then the security company could be in violation of the reemployment requirements and the anti-discrimination provisions of USERRA. Similarly, if the employer at the work site causes the employee’s removal from the job position because of his or her uniformed service obligations, then the work site employer could be in violation of the reemployment requirements and the anti-discrimination provisions of USERRA.
§ 1002.38 Can a hiring hall be an employer?

Yes. In certain occupations (for example, longshoreman, stagehand, construction worker), the employee may frequently work for many different employers. A hiring hall operated by a union or an employer association typically assigns the employee to the jobs. In these industries, it may not be unusual for the employee to work his or her entire career in a series of short-term job assignments. The definition of "employer" includes a person, institution, organization, or other entity to which the employer has delegated the performance of employment-related responsibilities. A hiring hall therefore is considered the employee's employer if the hiring and job assignment functions have been delegated by an employer to the hiring hall. As the employer, a hiring hall has reemployment responsibilities to its employees. USERRA's anti-discrimination and anti-retaliation provisions also apply to the hiring hall.

§ 1002.39 Are States (and their political subdivisions), the District of Columbia, the Commonwealth of Puerto Rico, and United States territories, considered employers?

Yes. States and their political subdivisions, such as counties, parishes, cities, towns, villages, and school districts, are considered employers under USERRA. The District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and territories of the United States, are also considered employers under the Act.

§ 1002.40 Does USERRA protect against discrimination in initial hiring decisions?

Yes. The Act's definition of employer includes a person, institution, organization, or other entity that has denied initial employment to an individual in violation of USERRA's anti-discrimination provisions. An employer need not actually employ an individual to be his or her "employer" under the Act, if it has denied initial employment on the basis of the individual's membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services. Similarly, the employer would be liable if it denied initial employment on the basis of the individual's action taken to enforce a protection afforded to any person under USERRA, his or her testimony or statement in connection with any USERRA proceeding, assistance or other participation in a USERRA investigation, or the exercise of any other right provided by the Act. For example, if the individual has been denied initial employment because of his or her obligations as a member of the National Guard or Reserves, the company or entity denying employment is an employer for purposes of USERRA. Similarly, if an entity withdraws an offer of employment because the individual is called upon to fulfill an obligation in the uniformed services, the entity withdrawing the employment offer is an employer for purposes of USERRA.

§ 1002.41 Does an employee have rights under USERRA even though he or she holds a temporary, part-time, probationary, or seasonal employment position?

USERRA rights are not diminished because an employee holds a temporary, part-time, probationary, or seasonal employment position. However, an employer is not required to reemploy an employee if the employment he or she left to serve in the uniformed services was for a brief, nonrecurrent period and there is no reasonable expectation that the employment would have continued indefinitely or for a significant period. The employer bears the burden of proving this affirmative defense.

§ 1002.42 What rights does an employee have under USERRA if he or she is on layoff, on strike, or on a leave of absence?

(a) If an employee is laid off with recall rights, on strike, or on a leave of absence, he or she is not entitled to reemployment during the period of service. Similar principles
§ 1002.43 Does an individual have rights under USERRA even if he or she is an executive, managerial, or professional employee?

Yes. USERRA applies to all employees. There is no exclusion for executive, managerial, or professional employees.

§ 1002.44 Does USERRA cover an independent contractor?

(a) No. USERRA does not provide protections for an independent contractor.

(b) In deciding whether an individual is an independent contractor, the following factors need to be considered:

   (1) The extent of the employer’s right to control the manner in which the individual’s work is to be performed;

   (2) The opportunity for profit or loss that depends upon the individual’s managerial skill;

   (3) Any investment in equipment or materials required for the individual’s tasks, or his or her employment of helpers;

   (4) Whether the service the individual performs requires a special skill;

   (5) The degree of permanence of the individual’s working relationship; and,

   (6) Whether the service the individual performs is an integral part of the employer’s business.

   (c) No single one of these factors is controlling, but all are relevant to determining whether an individual is an employee or an independent contractor.

Coverage of Service in the Uniformed Services

§ 1002.54 Are all military fitness examinations considered “service in the uniformed services”?

Yes. USERRA’s definition of “service in the uniformed services” includes a period for which an employee is absent from a position of employment for the purpose of an examination to determine his or her fitness to perform duty in the uniformed services. Military fitness examinations can address more than physical or medical fitness, and include evaluations for mental, educational, and other types of fitness. Any examination to determine an employee’s fitness for service is covered, whether it is an initial or recurring examination. For example, a periodic medical examination required of a Reserve component member to determine fitness for continued service is covered.

§ 1002.55 Is all funeral honors duty considered “service in the uniformed services”?

(a) USERRA’s definition of “service in the uniformed services” includes a period for which an employee is absent from employment for the purpose of performing authorized funeral honors duty under 10 U.S.C. 12503 (members of Reserve ordered to perform funeral honors duty) or 32 U.S.C. 115 (Member of Air or Army National Guard ordered to perform funeral honors duty).

(b) Funeral honors duty performed by persons who are not members of the uniformed services, such as members of veterans’ service organizations, is not “service in the uniformed services.”

§ 1002.56 What types of service in the National Disaster Medical System are considered “service in the uniformed services”?

Under a provision of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, 42
§ 1002.57 Is all service as a member of the National Guard considered "service in the uniformed services?"

The National Guard has a dual status. It is a Reserve component of the Army, or, in the case of the Air National Guard, of the Air Force. Simultaneously, it is a State military force subject to call-up by the State Governor for duty not subject to Federal control, such as emergency duty in cases of floods or riots. National Guard members may perform service under either Federal or State authority, but only Federal National Guard service is covered by USERRA.

(a) National Guard service under Federal authority is protected by USERRA. Service under Federal authority includes active duty performed under Title 10 of the United States Code. Service under Federal authority also includes duty under Title 32 of the United States Code, such as active duty for training, inactive duty training, or full-time National Guard duty.

(b) National Guard service under authority of State law is not protected by USERRA. However, many States have laws protecting the civilian job rights of National Guard members who serve under State orders. Enforcement of those State laws is not covered by USERRA or these regulations.

§ 1002.58 Is service in the commissioned corps of the Public Health Service considered "service in the uniformed services?"

Yes. Service in the commissioned corps of the Public Health Service (PHS) is "service in the uniformed services" under USERRA.

§ 1002.59 Are there any circumstances in which special categories of persons are considered to perform "service in the uniformed services?"

Yes. In time of war or national emergency the President has authority to designate any category of persons as a "uniformed service" for purposes of USERRA. If the President exercises this authority, service as a member of that category of persons would be "service in the uniformed services" under USERRA.

§ 1002.60 Does USERRA cover an individual attending a military service academy?

Yes. Attending a military service academy is considered uniformed service for purposes of USERRA. There are four service academies: The United States Military Academy (West Point, New York), the United States Naval Academy (Annapolis, Maryland), the United States Air Force Academy (Colorado Springs, Colorado), and the United States Coast Guard Academy (New London, Connecticut).

§ 1002.61 Does USERRA cover a member of the Reserve Officers Training Corps?

Yes, under certain conditions.

(a) Membership in the Reserve Officers Training Corps (ROTC) or the Junior ROTC is not "service in the uniformed services." However, some Reserve and National Guard enlisted members use a college ROTC program as a means of qualifying for commissioned officer status. National Guard and Reserve members in an ROTC program may qualify for reemployment protection under USERRA's reemployment and anti-discrimination provisions.

(b) Typically, an individual in a College ROTC program enters into an agreement with a particular military service that obligates such individual to either complete the ROTC program and accept a commission or, in case he or she does not successfully complete the ROTC program, to serve as an enlisted member. Although an individual does not qualify for reemployment protection, except as specified in (a) above, he or she is protected under...
USERRA’s anti-discrimination provisions because, as a result of the agreement, he or she has applied to become a member of the uniformed services and has incurred an obligation to perform future service.

§ 1002.62 Does USERRA cover a member of the Commissioned Corps of the National Oceanic and Atmospheric Administration, the Civil Air Patrol, or the Coast Guard Auxiliary?

No. Although the Commissioned Corps of the National Oceanic and Atmospheric Administration (NOAA) is a “uniformed service” for some purposes, it is not included in USERRA’s definition of this term. Service in the Civil Air Patrol and the Coast Guard Auxiliary similarly is not considered “service in the uniformed services” for purposes of USERRA. Consequently, service performed in the Commissioned Corps of the National Oceanic and Atmospheric Administration (NOAA), the Civil Air Patrol, and the Coast Guard Auxiliary is not protected by USERRA.

§ 1002.73 Does service in the uniformed services have to be an employee’s sole reason for leaving an employment position in order to have USERRA reemployment rights?

No. If absence from a position of employment is necessitated by service in the uniformed services, and the employee otherwise meets the Act’s eligibility requirements, he or she has reemployment rights under USERRA, even if the employee uses the absence for other purposes as well. An employee is not required to leave the employment position for the sole purpose of performing service in the uniformed services. For example, if the employee is required to report to an out of State location for military training and he or she spends off-duty time during that assignment moonlighting as a security guard or visiting relatives who live in that State, the employee will not lose reemployment rights simply because he or she used some of the time away from the job to do something other than attend the military training. Also, if an employee receives advance notification of a mobilization order, and leaves his or her employment position in order to prepare for duty, but the mobilization is cancelled, the employee will not lose any reemployment rights.

§ 1002.74 Must the employee begin service in the uniformed services immediately after leaving his or her employment position in order to have USERRA reemployment rights?

No. At a minimum, an employee must have enough time after leaving the employment position to travel safely to the uniformed service site and arrive fit to perform the service. Depending on the specific circumstances, including the duration of service, the amount of notice received, and the location of the service, additional time to rest, or to arrange affairs and report to duty, may be necessitated by reason of service in the uniformed services. The following examples help to explain the issue of the period of time between leaving civilian employment and beginning of service in the uniformed services:

(a) If the employee performs a full overnight shift for the civilian employer and travels directly from the work site to perform a full day of uniformed service, the employee would not be considered fit to perform the uniformed service. An absence from that work shift is necessitated so that the employee can report for uniformed service fit for duty.

(b) If the employee is ordered to perform an extended period of service in the uniformed services, he or she may require a reasonable period of time off from the civilian job to put his or her personal affairs in order, before beginning the service. Taking such time off is also necessitated by the uniformed service.

(c) If the employee leaves a position of employment in order to enlist or otherwise perform service in the uniformed services and, through no fault of his or her own, the beginning date of the service is delayed, this delay does not terminate any reemployment rights.
$1002.85 Must the employee give advance notice to the employer of his or her service in the uniformed services?

(a) Yes. The employee, or an appropriate officer of the uniformed service in which his or her service is to be performed, must notify the employer that the employee intends to leave the employment position to perform service in the uniformed services, with certain exceptions described below. In cases in which an employee is employed by more than one employer, the employee, or an appropriate officer of the uniformed service in which his or her service is to be performed, must notify each employer that the employee intends to leave the employment position to perform service in the uniformed services, with certain exceptions described below.

(b) The Department of Defense USERRA regulations at 32 CFR 104.3 provide that an “appropriate officer” can give notice on the employee’s behalf. An “appropriate officer” is a commissioned, warrant, or non-commissioned officer authorized to give such notice by the military service concerned.

(c) The employee’s notice to the employer may be either verbal or written. The notice may be informal and does not need to follow any particular format.

(d) Although USERRA does not specify how far in advance notice must be given to the employer, an employee should provide notice as far in advance as is reasonable under the circumstances. In regulations promulgated by the Department of Defense under USERRA, 32 CFR 104.6(a)(2)(iv)(B), the Defense Department “strongly recommends that advance notice to civilian employers be provided at least 30 days prior to departure for uniformed service when it is feasible to do so.”

§ 1002.86 When is the employee excused from giving advance notice of service in the uniformed services?

The employee is required to give advance notice of pending service unless giving such notice is prevented by military necessity, or is otherwise impossible or unreasonable under all the circumstances.

(a) Only a designated authority can make a determination of “military necessity,” and such a determination is not subject to judicial review. Guidelines for defining “military necessity” appear in regulations issued by the Department of Defense at 32 CFR 104.3. In general, these regulations cover situations where a mission, operation, exercise or requirement is classified, or could be compromised or otherwise adversely affected by public knowledge. In certain cases, the Secretary of Homeland Security, in consultation with the Secretary of Defense, can make a determination that giving of notice by intermittent disaster-response appointees of the National Disaster Medical System is precluded by “military necessity.” See 42 U.S.C. 300hh–11(e)(3)(B).

(b) It may be impossible or unreasonable to give advance notice under certain circumstances. Such circumstances may include the unavailability of the employee’s employer or the employer’s representative, or a requirement that the employee report for uniformed service in an extremely short period of time.

§ 1002.87 Is the employee required to get permission from his or her employer before leaving to perform service in the uniformed services?

No. The employee is not required to ask for or get his or her employer’s permission to leave to perform service in the uniformed services. The employee is only required to give the employer notice of pending service.

§ 1002.88 Is the employee required to tell his or her civilian employer that he or she intends to seek reemployment after completing uniformed service before the employee leaves to perform service in the uniformed services?

No. When the employee leaves the employment position to begin a period of service, he or she is not required to tell the civilian employer that he or she intends to seek reemployment after completing uniformed service. Even if the employee tells the employer before entering or completing uniformed service that he or she does not intend to
seek reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment after completing service. The employee is not required to decide in advance of leaving the civilian employment position whether he or she will seek reemployment after completing uniformed service.

**PERIOD OF SERVICE**

§ 1002.99 Is there a limit on the total amount of service in the uniformed services that an employee may perform and still retain reemployment rights with the employer?

Yes. In general, the employee may perform service in the uniformed services for a cumulative period of up to five (5) years and retain reemployment rights with the employer. The exceptions to this rule are described below.

§ 1002.100 Does the five-year service limit include all absences from an employment position that are related to service in the uniformed services?

No. The five-year period includes only the time the employee spends actually performing service in the uniformed services. A period of absence from employment before or after performing service in the uniformed services does not count against the five-year limit. For example, after the employee completes a period of service in the uniformed services, he or she is provided a certain amount of time, depending upon the length of service, to report back to work or submit an application for reemployment. The period between completing the uniformed service and reporting back to work or seeking reemployment does not count against the five-year limit.

§ 1002.101 Does the five-year service limit include periods of service that the employee performed when he or she worked for a previous employer?

No. An employee is entitled to a leave of absence for uniformed service for up to five years with each employer for whom he or she works. When the employee takes a position with a new employer, the five-year period begins again regardless of how much service he or she performed while working in any previous employment relationship. If an employee is employed by more than one employer, a separate five-year period runs as to each employer independently, even if those employers share or co-determine the employee’s terms and conditions of employment.

§ 1002.102 Does the five-year service limit include periods of service that the employee performed before USERRA was enacted?

It depends. USERRA provides reemployment rights to which an employee may become entitled beginning on or after December 12, 1994, but any uniformed service performed before December 12, 1994, that was counted against the service limitations of the previous law (the Veterans Reemployment Rights Act), also counts against USERRA’s five-year limit.

§ 1002.103 Are there any types of service in the uniformed services that an employee can perform that do not count against USERRA’s five-year service limit?

(a) USERRA creates the following exceptions to the five-year limit on service in the uniformed services:

(1) Service that is required beyond five years to complete an initial period of obligated service. Some military specialties require an individual to serve more than five years because of the amount of time or expense involved in training. If the employee works in one of those specialties, he or she has reemployment rights when the initial period of obligated service is completed;

(2) If the employee was unable to obtain orders releasing him or her from service in the uniformed services before the expiration of the five-year period, and the inability was not the employee’s fault;

(3)(i) Service performed to fulfill periodic National Guard and Reserve training requirements as prescribed by 10 U.S.C. 10147 and 32 U.S.C. 502(a) and 503; and,

(ii) Service performed to fulfill additional training requirements determined and certified by a proper military authority as necessary for the employee’s professional development, or
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to complete skill training or retraining:

(4) Service performed in a uniformed service if he or she was ordered to or retained on active duty under:
   (i) 10 U.S.C. 688 (involuntary active duty by a military retiree);
   (ii) 10 U.S.C. 12301(a) (involuntary active duty in wartime);
   (iii) 10 U.S.C. 12301(g) (retention on active duty while in captive status);
   (iv) 10 U.S.C. 12302 (involuntary active duty during a national emergency for up to 24 months);
   (v) 10 U.S.C. 12304 (involuntary active duty for an operational mission for up to 270 days);
   (vi) 10 U.S.C. 12305 (involuntary retention on active duty of a critical person during time of crisis or other specific conditions);
   (vii) 14 U.S.C. 331 (involuntary active duty by retired Coast Guard officer);
   (viii) 14 U.S.C. 332 (voluntary active duty by retired Coast Guard officer);
   (ix) 14 U.S.C. 339 (involuntary active duty by retired Coast Guard enlisted member);
   (x) 14 U.S.C. 360 (voluntary active duty by retired Coast Guard enlisted member);
   (xi) 14 U.S.C. 367 (involuntary retention of Coast Guard enlisted member on active duty) and
   (xii) 14 U.S.C. 712 (involuntary active duty by Coast Guard Reserve member for natural or man-made disasters).

(5) Service performed in a uniformed service if the employee was ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;

(6) Service performed in a uniformed service if the employee was ordered to active duty (other than for training) in support of an operational mission for which personnel have been ordered to active duty under 10 U.S.C. 12304, as determined by a proper military authority;

(7) Service performed in a uniformed service if the employee was ordered to active duty in support of a critical mission or requirement of the uniformed services as determined by the Secretary concerned; and,

(8) Service performed as a member of the National Guard if the employee was called to respond to an invasion, danger of invasion, rebellion, danger of rebellion, insurrection, or the inability of the President with regular forces to execute the laws of the United States.

(b) Service performed to mitigate economic harm where the employee’s employer is in violation of its employment or reemployment obligations to him or her.

§ 1002.104 Is the employee required to accommodate his or her employer’s needs as to the timing, frequency or duration of service?

No. The employee is not required to accommodate his or her employer’s interests or concerns regarding the timing, frequency, or duration of uniformed service. The employer cannot refuse to reemploy the employee because it believes that the timing, frequency or duration of the service is unreasonable. However, the employer is permitted to bring its concerns over the timing, frequency, or duration of the employee’s service to the attention of the appropriate military authority. Regulations issued by the Department of Defense at 32 CFR 104.4 direct military authorities to provide assistance to an employer in addressing these types of employment issues. The military authorities are required to consider requests from employers of National Guard and Reserve members to adjust scheduled absences from civilian employment to perform service.

APPLICATION FOR REEMPLOYMENT

§ 1002.115 Is the employee required to report to or submit a timely application for reemployment to his or her pre-service employer upon completing the period of service in the uniformed services?

Yes. Upon completing service in the uniformed services, the employee must notify the pre-service employer of his or her intent to return to the employment position by either reporting to work or submitting a timely application for reemployment. Whether the employee is required to report to work or submit a timely application for reemployment depends upon the length of service, as follows:
§ 1002.116  Is the time period for reporting back to an employer extended if the employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service?

Yes. If the employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service, he or she must report to or submit an application for reemployment to the employer at the end of the period necessary for recovering from the illness or injury. This period may not exceed two years from the date of the completion of service, except that it must be extended by the minimum time necessary to accommodate circumstances beyond the employee’s control that make reporting within the period impossible or unreasonable. This period for recuperation and recovery extends the time period for reporting to or submitting an application for reemployment to the employer, and is not applicable following reemployment.

§ 1002.117  Are there any consequences if the employee fails to report for or submit a timely application for reemployment?

(a) If the employee fails to timely report for or apply for reemployment, he or she does not automatically forfeit entitlement to USERRA’s reemployment and other rights and benefits. Rather, the employee becomes subject to the conduct rules, established policy, and general practices of the employer pertaining to an absence from scheduled work.

(b) If reporting or submitting an employment application to the employer is impossible or unreasonable through no fault of the employee, he or she may report to the employer as soon as possible (in the case of a period of service less than 31 days) or submit an application for reemployment to the employer by the next full calendar day after it becomes possible to do so (in the case of a period of service from 31 to 180 days), and the employee will be considered to have timely reported or applied for reemployment.

(c) Period of service more than 180 days.

If the employee’s period of service in the uniformed services was for more than 180 days, he or she must submit an application for reemployment (written or verbal) not later than 90 days after completing service.
§ 1002.118 Is an application for reemployment required to be in any particular form?

An application for reemployment need not follow any particular format. The employee may apply orally or in writing. The application should indicate that the employee is a former employee returning from service in the uniformed services and that he or she seeks reemployment with the pre-service employer. The employee is permitted but not required to identify a particular reemployment position in which he or she is interested.

§ 1002.119 To whom must the employee submit the application for reemployment?

The application must be submitted to the pre-service employer or to an agent or representative of the employer who has apparent responsibility for receiving employment applications. Depending upon the circumstances, such a person could be a personnel or human resources officer, or a first-line supervisor. If there has been a change in ownership of the employer, the application should be submitted to the employer’s successor-in-interest.

§ 1002.120 If the employee seeks or obtains employment with an employer other than the pre-service employer before the end of the period within which a reemployment application must be filed, will that jeopardize reemployment rights with the pre-service employer?

No. The employee has reemployment rights with the pre-service employer provided that he or she makes a timely reemployment application to that employer. The employee may seek or obtain employment with an employer other than the pre-service employer during the period of time within which a reemployment application must be made, without giving up reemployment rights with the pre-service employer. However, such alternative employment during the application period should not be of a type that would constitute cause for the employer to discipline or terminate the employee following reemployment. For instance, if the employer forbids employees from working concurrently for a direct competitor during employment, violation of such a policy may constitute cause for discipline or even termination.

§ 1002.121 Is the employee required to submit documentation to the employer in connection with the application for reemployment?

Yes, if the period of service exceeded 30 days and if requested by the employer to do so. If the employee submits an application for reemployment after a period of service of more than 30 days, he or she must, upon the request of the employer, provide documentation to establish that:

(a) The reemployment application is timely;

(b) The employee has not exceeded the five-year limit on the duration of service (subject to the exceptions listed at §1002.103); and,

(c) The employee’s separation or dismissal from service was not disqualifying.

§ 1002.122 Is the employer required to reemploy the employee if documentation establishing the employee’s eligibility does not exist or is not readily available?

Yes. The employer is not permitted to delay or deny reemployment by demanding documentation that does not exist or is not readily available. The employee is not liable for administrative delays in the issuance of military documentation. If the employee is reemployed after an absence from employment for more than 90 days, the employer may require that he or she submit the documentation establishing entitlement to reemployment before treating the employee as not having had a break in service for pension purposes. If the documentation is received after reemployment and it shows that the employee is not entitled to reemployment, the employer may terminate employment and any rights or benefits that the employee may have been granted.

§ 1002.123 What documents satisfy the requirement that the employee establish eligibility for reemployment after a period of service of more than thirty days?

(a) Documents that satisfy the requirements of USERRA include the following:
§ 1002.134 What type of discharge or separation from service is required for an employee to be entitled to re-employment under USERRA?

USERRA does not require any particular form of discharge or separation from service. However, even if the employee is otherwise eligible for reemployment, he or she will be disqualified if the characterization of service falls within one of four categories. USERRA requires that the employee not have received one of these types of discharge.

§ 1002.135 What types of discharge or separation from uniformed service will make the employee ineligible for reemployment under USERRA?

Reemployment rights are terminated if the employee is:

(a) Separated from uniformed service with a dishonorable or bad conduct discharge;

(b) Separated from uniformed service under other than honorable conditions, as characterized by regulations of the uniformed service;

(c) A commissioned officer dismissed as permitted under 10 U.S.C. 1161(a) by sentence of a general court-martial; in commutation of a sentence of a general court-martial; or, in time of war, by order of the President; or,

(d) A commissioned officer dropped from the rolls under 10 U.S.C. 1161(b) due to absence without authority for at least three months; separation by reason of a sentence to confinement adjudged by a court-martial; or, a sentence to confinement in a Federal or State penitentiary or correctional institution.

§ 1002.136 Who determines the characterization of service?

The branch of service in which the employee performs the tour of duty determines the characterization of service.

§ 1002.137 If the employee receives a disqualifying discharge or release from uniformed service and it is later upgraded, will reemployment rights be restored?

Yes. A military review board has the authority to prospectively or retroactively upgrade a disqualifying discharge or release. A retroactive upgrade would restore reemployment rights providing the employee otherwise meets the Act’s eligibility criteria.

§ 1002.138 If the employee receives a retroactive upgrade in the characterization of service, will that entitle him or her to claim back wages and benefits lost as of the date of separation from service?

No. A retroactive upgrade allows the employee to obtain reinstatement with the former employer, provided the employee otherwise meets the Act’s eligibility criteria. Back pay and other benefits such as pension plan credits attributable to the time period between discharge and the retroactive upgrade are not required to be restored by the employer in this situation.
EMPLOYER STATUTORY DEFENSES

§ 1002.139 Are there any circumstances in which the pre-service employer is excused from its obligation to reemploy the employee following a period of uniformed service? What statutory defenses are available to the employer in an action or proceeding for reemployment benefits?

(a) Even if the employee is otherwise eligible for reemployment benefits, the employer is not required to reemploy him or her if the employer establishes that its circumstances have so changed as to make reemployment impossible or unreasonable. For example, an employer may be excused from reemploying the employee where there has been an intervening reduction in force that would have included that employee. The employer may not, however, refuse to reemploy the employee on the basis that another employee was hired to fill the reemployment position during the employee’s absence, even if reemployment might require the termination of that replacement employee;

(b) Even if the employee is otherwise eligible for reemployment benefits, the employer is not required to reemploy him or her if it establishes that assisting the employee in becoming qualified for reemployment would impose an undue hardship, as defined in §1002.5(n) and discussed in §1002.198, on the employer; or

(c) Even if the employee is otherwise eligible for reemployment benefits, the employer is not required to reemploy him or her if it establishes that the employment position vacated by the employee in order to perform service in the uniformed services was for a brief, nonrecurrent period and there was no reasonable expectation that the employment would continue indefinitely or for a significant period.

(d) The employer defenses included in this section are affirmative ones, and the employer carries the burden to prove by a preponderance of the evidence that any one or more of these defenses is applicable.

Subpart D—Rights, Benefits, and Obligations of Persons Absent from Employment Due to Service in the Uniformed Services

FURLOUGH AND LEAVE OF ABSENCE

§ 1002.149 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.

§ 1002.150 Which non-seniority rights and benefits is the employee entitled to during a period of service?

(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
§ 1002.151 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.

§ 1002.152 If employment is interrupted by a period of service in the uniformed services, are there any circumstances under which the employee is not entitled to the non-seniority rights and benefits ordinarily granted to similarly situated employees on furlough or leave of absence?

If employment is interrupted by a period of service in the uniformed services and the employee knowingly provides written notice of intent not to return to the position of employment after service in the uniformed services, he or she is not entitled to those non-seniority rights and benefits. The employee’s written notice does not waive entitlement to any other rights to which he or she is entitled under the Act, including the right to reemployment after service.

§ 1002.153 If employment is interrupted by a period of service in the uniformed services, is the employee permitted upon request to use accrued vacation, annual or similar leave with pay during the service? Can the employer require the employee to use accrued leave during a period of service?

(a) If employment is interrupted by a period of service, the employee must be permitted upon request to use any accrued vacation, annual, or similar leave with pay during the period of service, in order to continue his or her civilian pay. However, the employee is not entitled to use sick leave that accrued with the civilian employer during a period of service in the uniformed services, unless the employer allows employees to use sick leave for any reason, or allows other similarly situated employees on comparable furlough or leave of absence to use accrued paid sick leave. Sick leave is generally intended to provide income when the employee or a family member is ill and the employee is unable to work.

(b) The employer may not require the employee to use accrued vacation, annual, or similar leave during a period of service in the uniformed services.

§ 1002.163 What types of health plans are covered by USERRA?

(a) USERRA defines a health plan to include an insurance policy or contract, medical or hospital service agreement, membership or subscription contract, or arrangement under which the employee’s health services are provided or the expenses of those services are paid.

(b) USERRA covers group health plans as defined in the Employee Retirement Income Security Act of 1974 (ERISA) at 29 U.S.C. 1191b(a). USERRA applies to group health plans that are subject to ERISA, and plans that are not subject to ERISA, such as those
§ 1002.164 What health plan coverage must the employer provide for the employee under USERRA?

If the employee has coverage under a health plan in connection with his or her employment, the plan must permit the employee to elect to continue the coverage for a certain period of time as described below:

(a) When the employee is performing service in the uniformed services, he or she is entitled to continuing coverage for himself or herself (and dependents if the plan offers dependent coverage) under a health plan provided in connection with the employment. The plan must allow the employee to elect to continue coverage for a period of time that is the lesser of:

(1) The 24-month period beginning on the date on which the employee’s absence for the purpose of performing service begins; or,

(2) The period beginning on the date on which the employee’s absence for the purpose of performing service begins, and ending on the date on which he or she fails to return from service or apply for a position of employment as provided under sections 1002.115–123 of these regulations.

(b) USERRA does not require the employer to establish a health plan if there is no health plan coverage in connection with the employment, or, where there is a plan, to provide any particular type of coverage.

(c) USERRA does not require the employer to permit the employee to initiate new health plan coverage at the beginning of a period of service if he or she did not previously have such coverage.

§ 1002.165 How does the employee elect continuing health plan coverage?

USERRA does not specify requirements for electing continuing coverage. Health plan administrators may develop reasonable requirements addressing how continuing coverage may be elected, consistent with the terms of the plan and the Act’s exceptions to the requirement that the employee give advance notice of service in the uniformed services. For example, the employee cannot be precluded from electing continuing health plan coverage under circumstances where it is impossible or unreasonable for him or her to make a timely election of coverage.

§ 1002.166 How much must the employee pay in order to continue health plan coverage?

(a) If the employee performs service in the uniformed service for fewer than 31 days, he or she cannot be required to pay more than the regular employee share, if any, for health plan coverage.

(b) If the employee performs service in the uniformed service for 31 or more days, he or she may be required to pay no more than 102% of the full premium under the plan, which represents the employer’s share plus the employee’s share, plus 2% for administrative costs.

(c) USERRA does not specify requirements for methods of paying for continuing coverage. Health plan administrators may develop reasonable procedures for payment, consistent with the terms of the plan.

§ 1002.167 What actions may a plan administrator take if the employee does not elect or pay for continuing coverage in a timely manner?

The actions a plan administrator may take regarding the provision or cancellation of an employee’s continuing coverage depend on whether the employee is excused from the requirement to give advance notice, whether the plan has established reasonable rules for election of continuation coverage, and whether the plan has established reasonable rules for the payment for continuation coverage.

(a) No notice of service and no election of continuation coverage: If an employer
§ 1002.168 Provides employment-based health coverage to an employee who leaves employment for uniformed service without giving advance notice of service, the plan administrator may cancel the employee’s health plan coverage upon the employee’s departure from employment for uniformed service. However, in cases in which an employee’s failure to give advance notice of service was excused under the statute because it was impossible, unreasonable, or precluded by military necessity, the plan administrator must reinstate the employee’s health plan retroactively upon his or her election to continue coverage and payment of all unpaid amounts due, and the employee must pay notice of service under the statute.

(b) Notice of service but no election of continuing coverage: Plan administrators may develop reasonable requirements addressing how continuing coverage may be elected. Where health plans are also covered under the Consolidated Omnibus Budget Reconciliation Act of 1985, 26 U.S.C. 4980B (COBRA), it may be reasonable for a health plan administrator to adopt COBRA-compliant rules regarding election of continuing coverage, as long as those rules do not conflict with any provision of USERRA or this rule. If an employer provides employment-based health coverage to an employee who leaves employment for uniformed service for a period of service in excess of 30 days after having given advance notice of service but without making an election regarding continuing coverage, the plan administrator may cancel the employee’s health plan coverage upon the employee’s departure from employment for uniformed service, but must reinstate coverage without the imposition of administrative reinstatement costs under the following conditions:

(1) Plan administrators who have developed reasonable rules regarding the period within which an employee may elect continuing coverage must permit retroactive reinstatement of uninterrupted coverage to the date of departure if the employee elects continuing coverage and pays all unpaid amounts due within the periods established by the plan;

(2) In cases in which plan administrators have not developed rules regarding the period within which an employee may elect continuing coverage, the plan must permit retroactive reinstatement of uninterrupted coverage to the date of departure upon the employee’s election and payment of all unpaid amounts at any time during the period established in section 1002.164(a).

(c) Election of continuation coverage without timely payment: Health plan administrators may adopt reasonable rules allowing cancellation of coverage if timely payment is not made. Where health plans are covered under COBRA, it may be reasonable for a health plan administrator to adopt COBRA-compliant rules regarding payment for continuing coverage, as long as those rules do not conflict with any provision of USERRA or this rule.

§ 1002.168 If the employee’s coverage was terminated at the beginning of or during service, does his or her coverage have to be reinstated upon reemployment?

(a) If health plan coverage for the employee or a dependent was terminated by reason of service in the uniformed services, that coverage must be reinstated upon reemployment. An exclusion or waiting period may not be imposed in connection with the reinstatement of coverage upon reemployment, if an exclusion or waiting period would not have been imposed had coverage not been terminated by reason of such service.

(b) USERRA permits a health plan to impose an exclusion or waiting period as to illnesses or injuries determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated during, performance of service in the uniformed services. The determination that the employee’s illness or injury was incurred in, or aggravated during, the performance of service may only be made by the Secretary of Veterans Affairs or his or her representative. Other coverage, for injuries or illnesses that
§ 1002.181 How is “prompt reemployment” defined?

“Prompt reemployment” means as soon as practicable under the circumstances of each case. Absent unusual circumstances, reemployment must occur within two weeks of the employee’s application for reemployment. For example, prompt reinstatement after a weekend National Guard duty generally means the next regularly scheduled working day. On the other hand, prompt reinstatement following several years of active duty may require more time, because the employer may have to reassign or give notice to another employee who occupied the returning employee’s position.
§ 1002.191  What position is the employee entitled to upon reemployment?

As a general rule, the employee is entitled to reemployment in the job position that he or she would have attained with reasonable certainty if not for the absence due to uniformed service. This position is known as the escalator position. The principle behind the escalator position is that, if not for the period of uniformed service, the employee could have been promoted (or, alternatively, demoted, transferred, or laid off) due to intervening events. The escalator principle requires that the employee be reemployed in a position that reflects with reasonable certainty the pay, benefits, seniority, and other job perquisites, that he or she would have attained if not for the period of service. Depending upon the specific circumstances, the employer may have the option, or be required, to reemploy the employee in a position other than the escalator position.

§ 1002.192  How is the specific reemployment position determined?

In all cases, the starting point for determining the proper reemployment position is the escalator position, which is the job position that the employee would have attained if his or her continuous employment had not been interrupted due to uniformed service. Once this position is determined, the employer may have to consider several factors before determining the appropriate reemployment position in any particular case. Such factors may include the employee's length of service, qualifications, and disability, if any. The reemployment position may be either the escalator position; the pre-service position; a position comparable to the escalator or pre-service position; or, the nearest approximation to one of these positions.

§ 1002.193  Does the reemployment position include elements such as seniority, status, and rate of pay?

(a) Yes. The reemployment position includes the seniority, status, and rate of pay that an employee would ordinarily have attained in that position given his or her job history, including prospects for future earnings and advancement. The employer must determine the seniority rights, status, and rate of pay as though the employee had been continuously employed during the period of service. The seniority rights, status, and pay of an employment position include those established (or changed) by a collective bargaining agreement, employer policy, or employment practice. The sources of seniority rights, status, and pay include agreements, policies, and practices in effect at the beginning of the employee's service, and any changes that may have occurred during the period of service. In particular, the employee's status in the reemployment position could include opportunities for advancement, general working conditions, job location, shift assignment, rank, responsibility, and geographical location.

(b) If an opportunity for promotion, or eligibility for promotion, that the employee missed during service is based on a skills test or examination, then the employer should give him or her a reasonable amount of time to adjust to the employment position and then give a skills test or examination. No fixed amount of time for permitting adjustment to reemployment will be deemed reasonable in all cases. However, in determining a reasonable amount of time to permit an employee to adjust to reemployment before scheduling a makeup test or examination, an employer may take into account a variety of factors, including but not limited to the length of time the returning employee was absent from work, the level of difficulty of the test itself, the typical time necessary to prepare or study for the test, the duties and responsibilities of the reemployment position and the promotional position, and the nature and responsibilities of the service member while serving in the uniformed service. If the employee is successful on the makeup exam and, based on the results of that exam, there is a reasonable certainty that he or she would have been promoted, or made eligible for promotion, during the time that the employee served in the uniformed service, then
the promotion or eligibility for promotion must be made effective as of the date it would have occurred had employment not been interrupted by uniformed service.

§ 1002.194 Can the application of the escalator principle result in adverse consequences when the employee is reemployed?

Yes. The Act does not prohibit lawful adverse job consequences that result from the employee’s restoration on the seniority ladder. Depending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated. For example, if an employee’s seniority or job classification would have resulted in the employee being laid off during the period of service, and the layoff continued after the date of reemployment, reemployment would reinstate the employee to layoff status. Similarly, the status of the reemployment position requires the employer to assess what would have happened to such factors as the employee’s opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he or she had remained continuously employed. The reemployment position may involve transfer to another shift or location, more or less strenuous working conditions, or changed opportunities for advancement, depending upon the application of the escalator principle.

§ 1002.195 What other factors can determine the reemployment position?

Once the employee’s escalator position is determined, other factors may allow, or require, the employer to reemploy the employee in a position other than the escalator position. These factors, which are explained in §§1002.196 through 1002.199, are:

(a) The length of the employee’s most recent period of uniformed service;
(b) The employee’s qualifications; and,
(c) Whether the employee has a disability incurred or aggravated during uniformed service.

§ 1002.196 What is the employee’s reemployment position if the period of service was less than 91 days?

Following a period of service in the uniformed services of less than 91 days, the employee must be reemployed according to the following priority:

(a) The employee must be reemployed in the escalator position. He or she must be qualified to perform the duties of this position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.

(b) If the employee is not qualified to perform the duties of the escalator position after reasonable efforts by the employer, the employee must be reemployed in the position in which he or she was employed on the date that the period of service began. The employee must be qualified to perform the duties of this position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.

(c) If the employee is not qualified to perform the duties of the escalator position or the pre-service position, after reasonable efforts by the employer, he or she must be reemployed in any other position that is the nearest approximation first to the escalator position and then to the pre-service position. The employee must be qualified to perform the duties of this position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.

§ 1002.197 What is the reemployment position if the employee’s period of service in the uniformed services was more than 90 days?

Following a period of service of more than 90 days, the employee must be reemployed according to the following priority:

(a) The employee must be reemployed in the escalator position or a position of like seniority, status, and pay. He or she must be qualified to perform the duties of this position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.
§ 1002.198 What efforts must the employer make to help the employee become qualified for the reemployment position?

The employee must be qualified for the reemployment position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.

(a)(1) “Qualified” means that the employee has the ability to perform the essential tasks of the position. The employee’s inability to perform one or more non-essential tasks of a position does not make him or her unqualified.

(2) Whether a task is essential depends on several factors, and these factors include but are not limited to:

(i) The employer’s judgment as to which functions are essential;

(ii) Written job descriptions developed before the hiring process begins;

(iii) The amount of time on the job spent performing the function;

(iv) The consequences of not requiring the individual to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

(b) Only after the employer makes reasonable efforts, as defined in §1002.5(i), may it determine that the employee is not qualified for the reemployment position. These reasonable efforts must be made at no cost to the employee.

§ 1002.199 What priority must the employer follow if two or more returning employees are entitled to reemployment in the same position?

If two or more employees are entitled to reemployment in the same position and more than one employee has reported or applied for employment in that position, the employee who first left the position for uniformed service has the first priority on reemployment in that position. The remaining employee (or employees) is entitled to be reemployed in a position similar to that in which the employee would have been reemployed according to the rules that normally determine a reemployment position, as set out in §§1002.196 and 1002.197.

SENIORITY RIGHTS AND BENEFITS

§ 1002.210 What seniority rights does an employee have when reemployed following a period of uniformed service?

The employee is entitled to the seniority and seniority-based rights and benefits that he or she had on the date the uniformed service began, plus any seniority and seniority-based rights and benefits that the employee would have attained if he or she had remained continuously employed. In determining entitlement to seniority and seniority-based rights and benefits, the period of absence from employment due to or necessitated by uniformed service is not considered a break in employment. The rights and benefits protected by USERRA upon reemployment include those provided by the employer and those required by statute. For example,
Asst. Sec. for Veterans’ Employment and Training, Labor § 1002.225

under USERRA, a reemployed service member would be eligible for leave under the Family and Medical Leave Act of 1993, 29 U.S.C. 2601–2654 (FMLA), if the number of months and the number of hours of work for which the service member was employed by the civilian employer, together with the number of months and the number of hours of work for which the service member would have been employed by the civilian employer during the period of uniformed service, meet FMLA’s eligibility requirements. In the event that a service member is denied FMLA leave for failing to satisfy the FMLA’s hours of work requirement due to absence from employment necessitated by uniformed service, the service member may have a cause of action under USERRA but not under the FMLA.

§ 1002.211 Does USERRA require the employer to use a seniority system?

No. USERRA does not require the employer to adopt a formal seniority system. USERRA defines seniority as longevity in employment together with any employment benefits that accrue with, or are determined by, longevity in employment. In the absence of a formal seniority system, such as one established through collective bargaining, USERRA looks to the custom and practice in the place of employment to determine the employee’s entitlement to any employment benefits that accrue with, or are determined by, longevity in employment.

§ 1002.212 How does a person know whether a particular right or benefit is a seniority-based right or benefit?

A seniority-based right or benefit is one that accrues with, or is determined by, longevity in employment. Generally, whether a right or benefit is seniority-based depends on three factors:

(a) Whether the right or benefit is a reward for length of service rather than a form of short-term compensation for work performed;

(b) Whether it is reasonably certain that the employee would have received the right or benefit if he or she had remained continuously employed during the period of service; and,

(c) Whether it is the employer’s actual custom or practice to provide or withhold the right or benefit as a reward for length of service. Provisions of an employment contract or policies in the employee handbook are not controlling if the employer’s actual custom or practice is different from what is written in the contract or handbook.

§ 1002.213 How can the employee demonstrate a reasonable certainty that he or she would have received the seniority right or benefit if he or she had remained continuously employed during the period of service?

A reasonable certainty is a high probability that the employee would have received the seniority or seniority-based right or benefit if he or she had been continuously employed. The employee does not have to establish that he or she would have received the benefit as an absolute certainty. The employee can demonstrate a reasonable certainty that he or she would have received the seniority right or benefit by showing that other employees with seniority similar to that which the employee would have had if he or she had remained continuously employed received the right or benefit. The employer cannot withhold the right or benefit based on an assumption that a series of unlikely events could have prevented the employee from gaining the right or benefit.

DISABLED EMPLOYEES

§ 1002.225 Is the employee entitled to any specific reemployment benefits if he or she has a disability that was incurred in, or aggravated during, the period of service?

Yes. A disabled service member is entitled, to the same extent as any other individual, to the escalator position he or she would have attained but for uniformed service. If the employee has a disability incurred in, or aggravated during, the period of service in the uniformed services, the employer must make reasonable efforts to accommodate that disability and to help the employee become qualified to perform the duties of his or her reemployment position. If the employee is not qualified
§ 1002.226 For reemployment in the escalator position because of a disability after reasonable efforts by the employer to accommodate the disability and to help the employee to become qualified, the employee must be reemployed in a position according to the following priority. The employer must make reasonable efforts to accommodate the employee’s disability and to help him or her to become qualified to perform the duties of one of these positions:

(a) A position that is equivalent in seniority, status, and pay to the escalator position; or,

(b) A position that is the nearest approximation to the equivalent position, consistent with the circumstances of the employee’s case, in terms of seniority, status, and pay. A position that is the nearest approximation to the equivalent position may be a higher or lower position, depending on the circumstances.

§ 1002.226 If the employee has a disability that was incurred in, or aggravated during, the period of service, what efforts must the employer make to help him or her become qualified for the reemployment position?

(a) USERRA requires that the employee be qualified for the reemployment position regardless of any disability. The employer must make reasonable efforts to help the employee to become qualified to perform the duties of this position. The employer is not required to reemploy the employee on his or her return from service if he or she cannot, after reasonable efforts by the employer, qualify for the appropriate reemployment position.

(b) “Qualified” has the same meaning here as in §1002.198.

RATE OF PAY

§ 1002.236 How is the employee’s rate of pay determined when he or she returns from a period of service?

The employee’s rate of pay is determined by applying the same escalator principles that are used to determine the reemployment position, as follows:

(a) If the employee is reemployed in the escalator position, the employer must compensate him or her at the rate of pay associated with the escalator position. The rate of pay must be determined by taking into account any pay increases, differentials, step increases, merit increases, or periodic increases that the employee would have attained with reasonable certainty had he or she remained continuously employed during the period of service. In addition, when considering whether merit or performance increases would have been attained with reasonable certainty, an employer may examine the returning employee’s own work history, his or her history of merit increases, and the work and pay history of employees in the same or similar position. For example, if the employee missed a merit pay increase while performing service, but qualified for previous merit pay increases, then the rate of pay should include the merit pay increase that was missed. If the merit pay increase that the employee missed during service is based on a skills test or examination, then the employer should give the employee a reasonable amount of time to adjust to the reemployment position and then give him or her the skills test or examination. No fixed amount of time for permitting adjustment to reemployment will be deemed reasonable in all cases. However, in determining a reasonable amount of time to permit an employee to adjust to reemployment before scheduling a makeup test or examination, an employer may take into account a variety of factors, including but not limited to the length of time the returning employee was absent from work, the level of difficulty of the test itself, the typical time necessary to prepare or study for the test, the duties and responsibilities of the reemployment position and the promotional position, and the nature and responsibilities of the service member while serving in the uniformed service. The escalator principle also applies in the event a pay reduction occurred in the reemployment position during the period of service. Any pay adjustment must be made effective as of the date it would have occurred had the employee’s employment not been interrupted by uniformed service.

(b) If the employee is reemployed in the pre-service position or another position, the employer must compensate
him or her at the rate of pay associated with the position in which he or she is reemployed. As with the escalator position, the rate of pay must be determined by taking into account any pay increases, differentials, step increases, merit increases, or periodic increases that the employee would have attained with reasonable certainty had he or she remained continuously employed during the period of service.

Protection Against Discharge

§ 1002.247 Does USERRA provide the employee with protection against discharge?

Yes. If the employee’s most recent period of service in the uniformed services was more than 30 days, he or she must not be discharged except for cause—

(a) For 180 days after the employee’s date of reemployment if his or her most recent period of uniformed service was more than 30 days but less than 181 days; or,

(b) For one year after the date of reemployment if the employee’s most recent period of uniformed service was more than 180 days.

§ 1002.248 What constitutes cause for discharge under USERRA?

The employee may be discharged for cause based either on conduct or, in some circumstances, because of the application of other legitimate nondiscriminatory 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.

Pension Plan Benefits

§ 1002.259 How does USERRA protect an employee’s pension benefits?

On reemployment, the employee is treated as not having a break in service with the employer or employers maintaining a pension plan, for purposes of participation, vesting and accrual of benefits, by reason of the period of absence from employment due to or necessitated by service in the uniformed services.

(a) Depending on the length of the employee’s period of service, he or she is entitled to take from one to ninety days following service before reporting back to work or applying for reemployment (See §1002.115). This period of time must be treated as continuous service with the employer for purposes of determining participation, vesting and accrual of pension benefits under the plan.

(b) If the employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, service, he or she is entitled to report to or submit an application for reemployment at the end of the time period necessary for him or her to recover from the illness or injury. This period, which may not exceed two years from the date the employee completed service, except in circumstances beyond his or her control, must be treated as continuous service with the employer for purposes of determining the participation, vesting and accrual of pension benefits under the plan.

§ 1002.260 What pension benefit plans are covered under USERRA?

(a) The Employee Retirement Income Security Act of 1974 (ERISA) defines an employee pension benefit plan as a plan that provides retirement income to employees, or defers employee income to a period extending to or beyond the termination of employment. Any such plan maintained by the employer or employers is covered under USERRA. USERRA also covers certain pension plans not covered by ERISA, such as those sponsored by a State, government entity, or church for its employees.
§ 1002.261 Who is responsible for funding any plan obligation to provide the employee with pension benefits?

With the exception of multiemployer plans, which have separate rules discussed below, the employer is liable to the pension benefit plan to fund any obligation of the plan to provide benefits that are attributable to the employee’s period of service. In the case of a defined contribution plan, once the employee is reemployed, the employer must allocate the amount of its make-up contribution for the employee, if any; his or her make-up employee contributions, if any; and his or her elective deferrals, if any; in the same manner and to the same extent that it allocates the amounts for other employees during the period of service. In the case of a defined benefit plan, the employee’s accrued benefit will be increased for the period of service once he or she is reemployed and, if applicable, has repaid any amounts previously paid to him or her from the plan and made any employee contributions that may be required to be made under the plan.

§ 1002.262 When is the employer required to make the plan contribution that is attributable to the employee’s period of uniformed service?

(a) The employer is not required to make its contribution until the employee is reemployed. For employer contributions to a plan in which the employee is not required or permitted to contribute, the employer must make the contribution attributable to the employee’s period of service no later than ninety days after the date of reemployment, or when plan contributions are normally due for the year in which the service in the uniformed services was performed, whichever is later. If it is impossible or unreasonable for the employer to make the contribution within this time period, the employer must make the contribution as soon as practicable.

(b) If the employee is enrolled in a contributory plan he or she is allowed (but not required) to make up his or her missed contributions or elective deferrals. These makeup contributions or elective deferrals must be made during a time period starting with the date of reemployment and continuing for up to three times the length of the employee’s immediate past period of uniformed service, with the repayment period not to exceed five years. Make-up contributions or elective deferrals may only be made during this period and while the employee is employed with the post-service employer.

(c) If the employee’s plan is contributory and he or she does not make up his or her contributions or elective deferrals, he or she will not receive the employer match or the accrued benefit attributable to his or her contribution because the employer is required to make contributions that are contingent on or attributable to the employee’s contributions or elective deferrals only to the extent that the employee makes up his or her payments to the plan. Any employer contributions that are contingent on or attributable to the employee’s make-up contributions or elective deferrals must be made according to the plan’s requirements for employer matching contributions.

(d) The employee is not required to make up the full amount of employee contributions or elective deferrals that he or she missed making during the period of service. If the employee does not make up all of the missed contributions or elective deferrals, his or her pension may be less than if he or she had done so.

(e) Any vested accrued benefit in the pension plan that the employee was entitled to prior to the period of uniformed service remains intact whether or not he or she chooses to be reemployed under the Act after leaving the uniformed service.

(f) An adjustment will be made to the amount of employee contributions or elective deferrals the employee will be able to make to the pension plan for any employee contributions or elective deferrals he or she actually made to the plan during the period of service.
§ 1002.263 Does the employee pay interest when he or she makes up missed contributions or elective deferrals?

No. The employee is not required or permitted to make up a missed contribution in an amount that exceeds the amount he or she would have been permitted or required to contribute had he or she remained continuously employed during the period of service.

§ 1002.264 Is the employee allowed to repay a previous distribution from a pension benefits plan upon being reemployed?

Yes, provided the plan is a defined benefit plan. If the employee received a distribution of all or part of the accrued benefit from a defined benefit plan in connection with his or her service in the uniformed services before he or she became reemployed, he or she must be allowed to repay the withdrawn amounts when he or she is reemployed. The amount the employee must repay includes any interest that would have accrued had the monies not been withdrawn. The employee must be allowed to repay these amounts during a time period starting with the date of reemployment and continuing for up to three times the length of the employee’s immediate past period of uniformed service, with the repayment period not to exceed five years (or such longer time as may be agreed to between the employer and the employee), provided the employee is employed with the post-service employer during this period.

§ 1002.265 If the employee is reemployed with his or her pre-service employer, is the employee’s pension benefit the same as if he or she had remained continuously employed?

The amount of the employee’s pension benefit depends on the type of pension plan.

(a) In a non-contributory defined benefit plan, where the amount of the pension benefit is determined according to a specific formula, the employee’s benefit will be the same as though he or she had remained continuously employed during the period of service.

(b) In a contributory defined benefit plan, the employee will need to make up contributions in order to have the same benefit as if he or she had remained continuously employed during the period of service.

(c) In a defined contribution plan, the benefit may not be the same as if the employee had remained continuously employed, even though the employee and the employer make up any contributions or elective deferrals attributable to the period of service, because the employee is not entitled to forfeitures and earnings or required to experience losses that accrued during the period or periods of service.

§ 1002.266 What are the obligations of a multiemployer pension benefit plan under USERRA?

A multiemployer pension benefit plan is one to which more than one employer is required to contribute, and which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer. The Act uses ERISA’s definition of a multiemployer plan. In addition to the provisions of USERRA that apply to all pension benefit plans, there are provisions that apply specifically to multiemployer plans, as follows:

(a) The last employer that employed the employee before the period of service is responsible for making the employer contribution to the multiemployer plan, if the plan sponsor does not provide otherwise. If the last employer is no longer functional, the plan must nevertheless provide coverage to the employee.

(b) An employer that contributes to a multiemployer plan and that reemploys the employee pursuant to USERRA must provide written notice of reemployment to the plan administrator within 30 days after the date of reemployment. The returning service member should notify the reemploying employer that he or she has been reemployed pursuant to USERRA. The 30-day period within which the reemploying employer must provide written notice to the multiemployer plan pursuant to this subsection does not begin until the employer has knowledge that the employee was reemployed pursuant to USERRA.

(c) The employee is entitled to the same employer contribution whether
he or she is reemployed by the pre-service employer or by a different employer contributing to the same multiemployer plan, provided that the pre-service employer and the post-service employer share a common means or practice of hiring the employee, such as common participation in a union hiring hall.

§ 1002.267 How is compensation during the period of service calculated in order to determine the employee's pension benefits, if benefits are based on compensation?

In many pension benefit plans, the employee's compensation determines the amount of his or her contribution or the retirement benefit to which he or she is entitled.

(a) Where the employee's rate of compensation must be calculated to determine pension entitlement, the calculation must be made using the rate of pay that the employee would have received but for the period of uniformed service.

(b)(1) Where the rate of pay the employee would have received is not reasonably certain, such as where compensation is based on commissions earned, the average rate of compensation during the 12-month period prior to the period of uniformed service must be used.

(2) Where the rate of pay the employee would have received is not reasonably certain and he or she was employed for less than 12 months prior to the period of uniformed service, the average rate of compensation must be derived from this shorter period of employment that preceded service.

Subpart F—Compliance Assistance, Enforcement and Remedies

COMPLIANCE ASSISTANCE

§ 1002.277 What assistance does the Department of Labor provide to employees and employers concerning employment, reemployment, or other rights and benefits under USERRA?

The Secretary, through the Veterans’ Employment and Training Service (VETS), provides assistance to any person or entity with respect to employment and reemployment rights and benefits under USERRA. This assistance includes a wide range of compliance assistance outreach activities, such as responding to inquiries; conducting USERRA briefings and Webcasts; issuing news releases; and, maintaining the elaws USERRA Advisor (located at http://www.dol.gov/elaws/userra.htm), the e-VETS Resource Advisor and other web-based materials (located at http://www.dol.gov/vets), which are designed to increase awareness of the Act among affected persons, the media, and the general public. In providing such assistance, VETS may request the assistance of other Federal and State agencies, and utilize the assistance of volunteers.

INVESTIGATION AND REFERRAL

§ 1002.288 How does an individual file a USERRA complaint?

If an individual is claiming entitlement to employment rights or benefits or reemployment rights or benefits and alleges that an employer has failed or refused, or is about to fail or refuse, to comply with the Act, the individual may file a complaint with VETS or initiate a private legal action in a court of law (see §1002.303). A complaint may be filed with VETS either in writing, using VETS Form 1010, or electronically, using VETS Form e1010 (instructions and the forms can be accessed at http://www.dol.gov/elaws/vets/userra/1010.asp). A complaint must include the name and address of the employer, a summary of the basis for the complaint, and a request for relief.

§ 1002.289 How will VETS investigate a USERRA complaint?

(a) In carrying out any investigation, VETS has, at all reasonable times, reasonable access to and the right to interview persons with information relevant to the investigation. VETS also has reasonable access to, for purposes of examination, the right to copy and receive any documents of any person or employer that VETS considers relevant to the investigation.
(b) VETS may require by subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation. In case of disobedience of or resistance to the subpoena, the Attorney General may, at VETS' request, apply to any district court of the United States in whose jurisdiction such disobedience or resistance occurs for an order enforcing the subpoena. The district courts of the United States have jurisdiction to order compliance with the subpoena, and to punish failure to obey a subpoena as a contempt of court. This paragraph does not authorize VETS to seek issuance of a subpoena to the legislative or judicial branches of the United States.

§ 1002.290 Does VETS have the authority to order compliance with USERRA?

No. If VETS determines as a result of an investigation that the complaint is meritorious, VETS attempts to resolve the complaint by making reasonable efforts to ensure that any persons or entities named in the complaint comply with the Act.

If VETS' efforts do not resolve the complaint, VETS notifies the person who submitted the complaint of:
(a) The results of the investigation; and,
(b) The person's right to proceed under the enforcement of rights provisions in 38 U.S.C. 4323 (against a State or private employer), or 38 U.S.C. 4324 (against a Federal executive agency or the Office of Personnel Management (OPM)).

§ 1002.291 What actions may an individual take if the complaint is not resolved by VETS?

If an individual receives a notification from VETS of an unsuccessful effort to resolve his or her complaint relating to a State or private employer, the individual may request that VETS refer the complaint to the Attorney General.

§ 1002.292 What can the Attorney General do about the complaint?

(a) If the Attorney General is reasonably satisfied that an individual's complaint is meritorious, meaning that he or she is entitled to the rights or benefits sought, the Attorney General may appear on his or her behalf and act as the individual's attorney, and initiate a legal action to obtain appropriate relief.
(b) If the Attorney General determines that the individual's complaint does not have merit, the Attorney General may decline to represent him or her.

ENFORCEMENT OF RIGHTS AND BENEFITS AGAINST A STATE OR PRIVATE EMPLOYER

§ 1002.303 Is an individual required to file his or her complaint with VETS?

No. The individual may initiate a private action for relief against a State or private employer if he or she decides not to apply to VETS for assistance.

§ 1002.304 If an individual files a complaint with VETS and VETS' efforts do not resolve the complaint, can the individual pursue the claim on his or her own?

Yes. If VETS notifies an individual that it is unable to resolve the complaint, the individual may pursue the claim on his or her own. The individual may choose to be represented by private counsel whether or not the Attorney General decides to represent him or her as to the complaint.

§ 1002.305 What court has jurisdiction in an action against a State or private employer?

(a) If an action is brought against a State or private employer by the Attorney General, the district courts of the United States have jurisdiction over the action. If the action is brought against a State by the Attorney General, it must be brought in the name of the United States as the plaintiff in the action.

(b) If an action is brought against a State by a person, the action may be brought in a State court of competent jurisdiction according to the laws of the State.

(c) If an action is brought against a private employer or a political subdivision of a State by a person, the district courts of the United States have jurisdiction over the action.
§ 1002.306 Is a National Guard civilian technician considered a State or Federal employee for purposes of USERRA?

A National Guard civilian technician is considered a State employee for USERRA purposes, although he or she is considered a Federal employee for most other purposes.

§ 1002.307 What is the proper venue in an action against a State or private employer?

(a) If an action is brought by the Attorney General against a State, the action may proceed in the United States district court for any district in which the State exercises any authority or carries out any function.

(b) If an action is brought against a private employer, or a political subdivision of a State, the action may proceed in the United States district court for any district in which the employer maintains a place of business.

§ 1002.308 Who has legal standing to bring an action under USERRA?

An action may be brought only by the United States or by the person, or representative of a person, claiming rights or benefits under the Act. An employer, prospective employer or other similar entity may not bring an action under the Act.

§ 1002.309 Who is a necessary party in an action under USERRA?

In an action under USERRA only an employer or a potential employer, as the case may be, is a necessary party respondent. In some circumstances, such as where terms in a collective bargaining agreement need to be interpreted, the court may allow an interested party to intervene in the action.

§ 1002.310 How are fees and court costs charged or taxed in an action under USERRA?

No fees or court costs may be charged or taxed against an individual if he or she is claiming rights under the Act. If the individual obtains private counsel for any action or proceeding to enforce a provision of the Act, and prevails, the court may award reasonable attorney fees, expert witness fees, and other litigation expenses.

§ 1002.311 Is there a statute of limitations in an action under USERRA?

USERRA does not have a statute of limitations, and it expressly precludes the application of any State statute of limitations. At least one court, however, has held that the four-year general Federal statute of limitations, 28 U.S.C. 1658, applies to actions under USERRA. Rogers v. City of San Antonio, 2003 WL 1566502 (W.D. Texas), reversed on other grounds, 392 F.3d 758 (5th Cir. 2004). But see Akhdary v. City of Chattanooga, 2002 WL 32060140 (E.D. Tenn.). In addition, if an individual unreasonably delays asserting his or her rights, and that unreasonable delay causes prejudice to the employer, the courts have recognized the availability of the equitable doctrine of laches to bar a claim under USERRA. Accordingly, individuals asserting rights under USERRA should determine whether the issue of the applicability of the Federal statute of limitations has been resolved and, in any event, act promptly to preserve their rights under USERRA.

§ 1002.312 What remedies may be awarded for a violation of USERRA?

In any action or proceeding the court may award relief as follows:

(a) The court may require the employer to comply with the provisions of the Act;

(b) The court may require the employer to compensate the individual for any loss of wages or benefits suffered by reason of the employer’s failure to comply with the Act;

(c) The court may require the employer to pay the individual an amount equal to the amount of lost wages and benefits as liquidated damages, if the court determines that the employer’s failure to comply with the Act was willful. A violation shall be considered to be willful if the employer either knew or showed reckless disregard for
whether its conduct was prohibited by the Act.

(d) Any wages, benefits, or liquidated damages awarded under paragraphs (b) and (c) of this section are in addition to, and must not diminish, any of the other rights and benefits provided by USERRA (such as, for example, the right to be employed or reemployed by the employer).

§ 1002.313 Are there special damages provisions that apply to actions initiated in the name of the United States?

Yes. In an action brought in the name of the United States, for which the relief includes compensation for lost wages, benefits, or liquidated damages, the compensation must be held in a special deposit account and must be paid, on order of the Attorney General, directly to the person. If the compensation is not paid to the individual because of the Federal Government’s inability to do so within a period of three years, the compensation must be converted into the Treasury of the United States as miscellaneous receipts.

§ 1002.314 May a court use its equity powers in an action or proceeding under the Act?

Yes. A court may use its full equity powers, including the issuance of temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate the rights or benefits guaranteed under the Act.

APPENDIX TO PART 1002—NOTICE OF YOUR RIGHTS UNDER USERRA

Pursuant to 38 U.S.C. 4334(a), each employer shall provide to persons entitled to rights and benefits under USERRA a notice of the rights, benefits, and obligations of such persons and such employers under USERRA. The requirement for the provision of notice under this section may be met by posting the following notice where employers customarily place notices for employees. Posting one of the original notices published in 70 FR 73634 (Dec. 19, 2005) will also satisfy this requirement. The following text is provided by the Secretary of Labor to employers pursuant to 38 U.S.C. 4334(b).

TEXT FOR USE BY ALL EMPLOYERS

Your Rights Under USERRA

A. The Uniformed Services Employment and Reemployment Rights Act

USERRA protects the job rights of individuals who voluntarily or involuntarily leave employment positions to undertake military service or certain types of service in the National Disaster Medical System. USERRA also prohibits employers from discriminating against past and present members of the uniformed services, and applicants to the uniformed services.

B. Reemployment Rights

You have the right to be reemployed in your civilian job if you leave that job to perform service in the uniformed service and:

• You ensure that your employer receives advance written or verbal notice of your service;
• You have five years or less of cumulative service in the uniformed services while with that particular employer;
• You return to work or apply for reemployment in a timely manner after conclusion of service; and
• You have not been separated from service with a disqualifying discharge or under other than honorable conditions.

If you are eligible to be reemployed, you must be restored to the job and benefits you would have attained if you had not been absent due to military service or, in some cases, a comparable job.

C. Right To Be Free From Discrimination and Retaliation

If you:

• Are a past or present member of the uniformed service;
• Have applied for membership in the uniformed service; or
• Are obligated to serve in the uniformed service; then an employer may not deny you• Initial employment;
• Reemployment;
• Retention in employment;
• Promotion; or
• Any benefit of employment because of this status.

In addition, an employer may not retaliate against anyone assisting in the enforcement of USERRA rights, including testifying or making a statement in connection with a proceeding under USERRA, even if that person has no service connection.

D. Health Insurance Protection

• If you leave your job to perform military service, you have the right to elect to continue your existing employer-based health plan coverage for you and your dependents for up to 24 months while in the military.
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• Even if you do not elect to continue coverage during your military service, you have the right to be reinstated in your employer’s health plan when you are reemployed, generally without any waiting periods or exclusions (e.g., pre-existing condition exclusions) except for service-connected illnesses or injuries.

E. Enforcement

• The U.S. Department of Labor, Veterans’ Employment and Training Service (VETS) is authorized to investigate and resolve complaints of USERRA violations.

For assistance in filing a complaint, or for any other information on USERRA, contact VETS at 1-866-4-USA-DOL or visit its Web site at http://www.dol.gov/vets. An interactive online USERRA Advisor can be viewed at http://www.dol.gov/vets/userra.htm.

• If you file a complaint with VETS and VETS is unable to resolve it, you may request that your case be referred to the Department of Justice or the Office of Special Counsel, as applicable, for representation.

• You may also bypass the VETS process and bring a civil action against an employer for violations of USERRA.

The rights listed here may vary depending on the circumstances. The text of this notice was prepared by VETS, and may be viewed on the Internet at this address: http://www.dol.gov/vets/programs/userra/poster.htm.

Federal law requires employers to notify employees of their rights under USERRA, and employers may meet this requirement by displaying the text of this notice where they customarily place notices for employees.


[73 FR 63632, Oct. 27, 2008]

PART 1010—APPLICATION OF PRIORITY OF SERVICE FOR COVERED PERSONS

Subpart A—Purpose and Definitions

Sec.

1010.100 What is the purpose and scope of this part?

1010.110 What definitions apply to this part?

Subpart B—Understanding Priority of Service

1010.200 What is priority of service?

1010.210 In which Department job training programs do covered persons receive priority of service?

1010.220 How are recipients required to implement priority of service?

1010.230 In addition to the responsibilities of all recipients, do States and political subdivisions of States have any particular responsibilities in implementing priority of service?

1010.240 Will the Department be monitoring for compliance with priority of service?

1010.250 Can priority of service be waived?

Subpart C—Applying Priority of Service

1010.300 What processes are to be implemented to identify covered persons?

1010.310 How will priority of service be applied?

1010.320 Will recipients be required to collect information and report on priority of service?

1010.330 What are the responsibilities of recipients to collect and maintain data on covered and non-covered persons?


SOURCE: 73 FR 78142, Dec. 19, 2008, unless otherwise noted.

Subpart A—Purpose and Definitions

§ 1010.100 What is the purpose and scope of this part?


(b) As provided in §1010.210, this part applies to all qualified job training programs.

§ 1010.110 What definitions apply to this part?

The following definitions apply to this part:

Covered person as defined in section 2(a) of the JVA (38 U.S.C. 4215(a)) means a veteran or eligible spouse.

Department or DOL means the United States Department of Labor, including its agencies and organizational units and their representatives.

Eligible spouse as defined in section 2(a) of the JVA (38 U.S.C. 4215(a)) means the spouse of any of the following:
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In the same notice, the agency will inform the applicant of the right to appeal to the Merit Systems Protection Board under the provisions of the Board’s regulations. The agency must comply with the provisions of §1201.21 of this title.

(b)(1) When an agency has reemployed or returned an employee, it will advise the employee of the right of appeal if he or she considers the reemployment or return not to be in accordance with the Act and this subpart.

(2) An employee in a bargaining unit covered by a negotiated grievance procedure that does not exclude this matter must use the negotiated grievance procedure.

(3) An employee to whom paragraph (b)(2) of this section does not apply is entitled to appeal to the Merit Systems Protection Board under the provisions of the Board’s regulations. The agency must comply with the provisions of §1201.21 of this title.

PART 353—RESTORATION TO DUTY FROM UNIFORMED SERVICE OR COMPENSABLE INJURY

Subpart A—General Provisions

§353.101 Scope.
The rights and obligations of employees and agencies in connection with leaves of absence or restoration to duty following uniformed service under 38 U.S.C. 4301 et seq., and restoration under 5 U.S.C. 8151 for employees who sustain compensable injuries, are subject to the provisions of this part. Subpart A covers those provisions that are common to both of the above groups of employees. Subpart B deals with provisions that apply just to uniformed service and subpart C covers provisions that pertain just to injured employees.

§353.102 Definitions.
In this part:

Agency means.

(1) With respect to restoration following a compensable injury, any department, independent establishment, agency, or corporation in the executive branch, including the U.S. Postal Service and the Postal Rate Commission, and any agency in the legislative or judicial branch; and

(2) With respect to uniformed service, an executive agency as defined in 5 U.S.C. 105 (other than an intelligence agency referred to in 5 U.S.C. 2302(a)(2)(C)(ii), including the U.S. Postal Service and Postal Rate Commission, a nonappropriated fund instrumentality of the United States, or a military department as defined in 5 U.S.C. 102. In the case of a National Guard technician employed under 32 U.S.C. 709, the employing agency is the adjutant general of the State in which the technician is employed.

Subpart B—Uniformed Service

§353.201 Introduction.

§353.202 Discrimination and acts of reprisal prohibited.

§353.203 Length of service.

§353.204 Notice to employer.

§353.205 Return to duty and application for reemployment.

§353.206 Documentation upon return.

§353.207 Position to which restored.

§353.208 Use of paid time off during uniformed service.

§353.209 Retention protections.
Fully recovered means compensation payments have been terminated on the basis that the employee is able to perform all the duties of the position he or she left or an equivalent one.

Injury means a compensable injury sustained under the provisions of 5 U.S.C. chapter 81, subchapter I, and includes, in addition to accidental injury, a disease proximately caused by the employment.

Leave of absence means military leave, annual leave, without pay (LWOP), furlough, continuation of pay, or any combination of these.

Military leave means paid leave provided to Reservists and members of the National Guard under 5 U.S.C. 6323.

Notice means any written or verbal notification of an obligation or intention to perform service in the uniformed services provided to an agency by the employee performing the service or by the uniformed service in which the service is to be performed.

Partially recovered means an injured employee, though not ready to resume the full range of his or her regular duties, has recovered sufficiently to return to part-time or light duty or to another position with less demanding physical requirements. Ordinarily, it is expected that a partially recovered employee will fully recover eventually.

Physically disqualified means that:

(1)(i) For medical reasons the employee is unable to perform the duties of the position formerly held or an equivalent one, or

(ii) There is a medical reason to restrict the individual from some or all essential duties because of possible incapacitation (for example, a seizure) or because of risk of health impairment (such as further exposure to a toxic substance for an individual who has already shown the effects of such exposure).

(2) The condition is considered permanent with little likelihood for improvement or recovery.

Reasonable efforts in the case of actions required by an agency for a person returning from uniformed service means actions, including training, that do not place an undue hardship on the agency.

Service in the uniformed services means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, and a period for which a person is absent from employment for the purpose of examination to determine fitness to perform such duty.

Status means the particular attributes of a specific position. This includes the rank or responsibility of the position, its duties, working conditions, pay, tenure, and seniority.

Undue hardship means actions taken by an agency requiring significant difficulty or expense, when considered in light of—

(1) The nature and cost of actions needed under this part;

(2) The overall financial resources of the facility involved in taking the action; the number of persons employed at the facility; the effect on expenses and resources, or the impact otherwise of the action on the operation of the facility; and

(3) The overall size of the agency with respect to the number of employees, the number, type, and location of its facilities and type of operations, including composition, structure, and functions of the work force.

Uniformed services means the Armed 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 emergency.

§ 353.103 Persons covered.

(a) The provisions of this part pertaining to the uniformed services cover each agency employee who enters into such service regardless of whether the employee is located in the United States or overseas. However, an employee serving under a time-limited appointment completes any unexpired portion of his or her appointment upon return from uniformed service.

(b) The provisions of this part concerning employee injury cover a civil officer or employee in any branch of
§ 353.104 Notification of rights and obligations.

When an agency separates, grants a leave of absence, restores or fails to restore an employee because of uniformed service or compensable injury, it shall notify the employee of his or her rights, obligations, and benefits relating to Government employment, including any appeal and grievance rights. However, regardless of notification, an employee is still required to exercise due diligence in ascertaining his or her rights, and to seek reemployment within the time limits provided by chapter 43 of title 38, United States Code, for restoration after uniformed service, or as soon as he or she is able after a compensable injury.

§ 353.105 Maintenance of records.

Each agency shall identify the position vacated by an employee who is injured or leaves to enter uniformed service. It shall also maintain the necessary records to ensure that all such employees are preserved the rights and benefits granted by law and this part.

§ 353.106 Personnel actions during employee’s absence.

(a) An employee absent because of service in the uniformed services is to be carried on leave without pay unless the employee elects to use other leave or freely and knowingly provides written notice of intent not to return to a position of employment with the agency, in which case the employee can be separated. (NOTE: A separation under this provision affects only the employee’s seniority while gone; it does not affect his or her restoration rights.)

(b) An employee absent because of compensable injury may be carried on leave without pay or separated unless the employee elects to use sick or annual leave.

(c) Agency promotion plans must provide a mechanism by which employees who are absent because of compensable injury or uniformed service can be considered for promotion. In addition, agencies have an obligation to consider employees absent on military duty for any incident or advantage of employment that they may have been entitled to had they not been absent. This is determined by:

1. Considering whether the “incident or advantage” is one generally granted to all employees in that workplace and whether it was denied solely because of absence for military service;

2. Considering whether the person absent on military duty was treated the same as if the person had remained at work; and

3. Considering whether it was reasonably certain that the benefit would have accrued to the employee but for the absence for military service.

§ 353.107 Service credit upon reemployment.

Upon reemployment, an employee absent because of uniformed service or compensable injury is generally entitled to be treated as though he or she had never left. This means that a person who is reemployed following uniformed service or full recovery from compensable injury receives credit for the entire period of the absence for purposes of rights and benefits based upon seniority and length of service, including within-grade increases, career tenure, completion of probation, leave rate accrual, and severance pay.

§ 353.108 Effect of performance and conduct on restoration rights.

The laws covered by this part do not permit an agency to circumvent the
§ 353.110 OPM placement assistance.

(a) Employee returning from uniformed service. (1) OPM will offer placement in the executive branch to the following categories of employees upon notification by the agency and application by the employee: (Such notification should be sent to the Associate Director for Employment, OPM, 1900 E Street, NW., Washington, DC 20415.)

(i) Executive branch employees (other than an employee of an intelligence agency) when OPM determines that:

(A) their agencies no longer exist and the functions have not been transferred, or;

(B) it is otherwise impossible or unreasonable for their former agencies to place them;

(ii) Legislative and judicial branch employees when their employers determine that it is impossible or unreasonable to reemploy them;

(iii) National Guard technicians when the Adjutant General of a State determines that it is impossible or unreasonable to reemploy a technician otherwise eligible for restoration under 38 U.S.C. 4304 and 4312 (pertaining to character and length of service), and the technician is a noncareer military member who was separated involuntarily from the Guard for reasons beyond his or her control; and

(iv) Employees of the intelligence agencies (defined in 5 U.S.C. 2302(a)(2)(C)(ii)) when their agencies determine that it is impossible or unreasonable to reemploy them.

(2) OPM will determine if a vacant position equivalent (in terms of pay, grade, and status) to the one the individual left exists, for which the individual is qualified, in the commuting area in which he or she was employed immediately before entering the uniformed services. If such a vacancy exists, OPM will order the agency to place the individual. If no such position is available, the individual may elect to be placed in a lesser position in the commuting area, or OPM will attempt to place the individual in an equivalent position in another geographic location determined by OPM. If the individual declines an offer of equivalent employment, he or she has no further restoration rights.

(b) Employee returning from compensable injury. OPM will provide placement assistance to an employee with restoration rights in the executive, legislative, or judicial branches who cannot be placed in his or her former agency and who either has competitive status or is eligible to acquire it under 5 U.S.C. 3304(C). If the employee’s agency is abolished and its functions are not transferred, or it is not possible for the employee to be restored in his or her former agency, the employee is eligible for placement assistance under the Interagency Career Transition Assistance Plan (ICTAP) under part 330, subpart G, of this chapter. This paragraph does not apply to an employee serving under a temporary appointment pending establishment of a register (TAPER).

[60 FR 45652, Sept. 1, 1995, as amended at 64 FR 31487, June 11, 1999; 66 FR 29897, June 4, 2001]
Subpart B—Uniformed Service

§ 353.201 Introduction.

The Uniformed Services Employment and Reemployment Rights Act of 1994 revised and strengthened the existing Veterans' Reemployment Rights law, made the Department of Labor responsible for investigating employee complaints, required OPM to place certain returning employees in other agencies, established a separate restoration rights program for employees of the intelligence agencies, and altered the appeals process. The new law applies to persons exercising restoration rights on or after December 12, 1994.

§ 353.202 Discrimination and acts of reprisal prohibited.

A person who seeks or holds a position in the Executive branch may not be denied hiring, retention in employment, or any other incident or advantage of employment because of any application, membership, or service in the uniformed services. Furthermore, an agency may not take any reprisal against an employee for taking any action to enforce a protection, assist or participate in an investigation, or exercise any right provided for under chapter 43 of title 38, United States Code.

§ 353.203 Length of service.

(a) Counting service after the effective date of USERRA (12/12/94). To be entitled to restoration rights under this part, cumulative service in the uniformed services while employed by the Federal Government may not exceed 5 years. However, the 5-year period does not include any service—

(1) That is required beyond 5 years to complete an initial period of obligated service;

(2) During which the individual was unable to obtain orders releasing him or her from service in the uniformed services before expiration of the 5-year period, and such inability was through no fault of the individual;

(3) Performed as required pursuant to 10 U.S.C. 10147, under 32 U.S.C. 502(a) or 503, or to fulfill additional training requirements determined and certified in writing by the Secretary of the military department concerned to be necessary for professional development or for completion of skill training or retraining;

(4) Performed by a member of a uniformed service who is:

(i) Ordered to or retained on active duty under sections 12301(a), 12301(g), 12302, 12304, 12305, or 688 of title 10, United States Code, or under 14 U.S.C. 331, 332, 359, 360, 367, or 712;

(ii) Ordered to or retained on active duty (other than for training) under any provision of law during a war or during a national emergency declared by the President or the Congress, as determined by the Secretary concerned.

(iii) Ordered to active duty (other than for training) in support, as determined by the Secretary of the military department concerned, of an operational mission for which personnel have been ordered to active duty under 10 U.S.C. 12304;

(iv) Ordered to active duty in support, as determined by the Secretary of the military department concerned, of a critical mission or requirement of the uniformed services, or

(v) Called into Federal service as a member of the National Guard under chapter 15 or under section 12406 of title 10, United States Code.

(b) Counting service prior to the effective date of USERRA. In determining the 5-year total that may not be exceeded for purposes of exercising restoration rights, service performed prior to December 12, 1994, is considered only to the extent that it would have counted under the previous law (the Veterans' Reemployment Rights statute). For example, the service of a National Guard technician who entered on an Active Guard Reserve (AGR) tour under section 502(f) of title 32, United States Code, was not counted toward the 4-year time limit under the previous statute because it was specifically considered active duty for training. However, title 32, section 502(f) AGR service is not exempt from the cumulative time limits allowed under USERRA and service after the effective date counts under USERRA rules. Thus, if a technician was on a 32 U.S.C. 502(f) AGR tour on October 13, 1994, (the date USERRA was signed into law), but exercised restoration rights after December 11, 1994, (the date USERRA became fully effective), AGR service
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prior to December 12 would not count in computing the 5-year total, but all service beginning with that date would count.

(c) Nature of Reserve service and resolving conflicts. An employee who is a member of the Reserve or National Guard has a dual obligation to the military and to his or her employer. Given the nature of the employee’s service obligation, some conflict with job demands is often unavoidable and a good-faith effort on the part of both the employee and the agency is needed to minimize conflict and resolve differences. Some accommodation may be necessary by both parties. Most Reserve component members are required, as a minimum, to participate in drills for 2 days each month and in 2 weeks of active duty for training per year. But some members are required to participate in longer or more frequent training tours. USERRA makes it clear that the timing, frequency, duration, and nature of the duty performed is not an issue so long as the employee gave proper notice, and did not exceed the time limits specified. However, to the extent that the employee has influence upon the timing, frequency, or duration of such training or duty, he or she is expected to use that influence to minimize the burden upon the agency. The employee is expected to provide the agency with as much advance notice as possible whenever military duty or training will interfere with civilian work. When a conflict arises between the Reserve duty and the legitimate needs of the employer, the agency may contact appropriate military authorities to express concern. Where the request would require the employee to be absent from work for an extended period, during times of acute need, or when, in light of previous leaves, the requested leave is cumulatively burdensome, the agency may contact the military commander of the employee’s military unit to determine if the military duty could be rescheduled or performed by another member. If the military authorities determine that the military duty cannot be rescheduled or cancelled, the agency is required to permit the employee to perform his or her military duty.

(d) Mobilization authority. By law, members of the Selected Reserve (a component of the Ready Reserve), can be called up under a presidential order for purposes other than training for as long as 270 days. If the President declares a national emergency, the remainder of the Ready Reserve—the Individual Ready Reserve and the Inactive National Guard—may be called up. The Ready Reserve as a whole is subject to as much as 24 consecutive months of active duty in a national emergency declared by the President.

[60 FR 45652, Sept. 1, 1995, as amended at 64 FR 31487, June 11, 1999]

§ 353.204 Notice to employer.

To be entitled to restoration rights under this part, an employee (or an appropriate officer of the uniformed service in which service is to be performed) must give the employer advance written or verbal notice of the service except that no notice is required if it is precluded by military necessity or, under all relevant circumstances, the giving of notice is otherwise impossible or unreasonable.

§ 353.205 Return to duty and application for reemployment.

Periods allowed for return to duty are based on the length of time the person was performing service in the uniformed services, as follows:

(a) An employee whose uniformed service was for less than 31 days, or who was absent for the purpose of an examination to determine fitness for the uniformed services, is required to report back to work not later than the beginning of the first regularly scheduled work day on the first full calendar day following completion of the period of service and the expiration of 8 hours after a period allowing for the safe transportation of the employee from the place of service to the employee’s residence, or as soon as possible after the expiration of the 8-hour period if reporting within the above period is impossible or unreasonable through no fault of the employee.

(b) If the service was for more than 30 but less than 181 days, the employee must submit an application for reemployment with the agency not later
than 14 days after completing the period of service. (If submitting the application is impossible or unreasonable through no fault of the individual, it must be submitted the next full calendar day when it becomes possible to do so.)

(c) If the period of service was for more than 180 days, the employee must submit an application for reemployment not later than 90 days after completing the period of service.

d) An employee who is hospitalized or convalescing from an injury or illness incurred in, or aggravated during uniformed service is required to report for duty at the end of the period that is necessary for the person to recover, based on the length of service as discussed in paragraphs (a), (b), and (c) of this section, except that the period of recovery may not exceed 2 years (extended by the minimum time required to accommodate circumstances beyond the employee’s control which make reporting within the period specified impossible or unreasonable).

e) A person who does not report within the time limits specified does not automatically forfeit restoration rights, but, rather, is subject to whatever policy and disciplinary action the agency would normally apply for a similar absence without authorization.

§ 353.206 Documentation upon return.

Upon request, a returning employee who was absent for more than 30 days, or was hospitalized or convalescing from an injury or illness incurred in or aggravated during the performance of service in the uniformed services, must provide the agency with documentation that establishes the timeliness of the application for reemployment, and length and character of service. If documentation is unavailable, the agency must restore the employee until documentation becomes available.

§ 353.207 Position to which restored.

(a) Timing. An employee returning from the uniformed services following an absence of more than 30 days is entitled to be restored as soon as possible after making application, but in no event later than 30 days after receipt of the application by the agency.

(b) Nondisabled. If the employee’s uniformed service was for less than 91 days, he or she must be employed in the position for which qualified that he or she would have attained if continuously employed. If not qualified for this position after reasonable efforts by the agency to qualify the employee, he or she is entitled to be placed in the position he or she left. For service of 91 days or more, the agency has the option of placing the employee in a position of like seniority, status, and pay. (Note: Upon reemployment, a term employee completes the unexpired portion of his or her original appointment.) If unqualified (for any reason other than disability incurred in or aggravated during service in the uniformed services) after reasonable efforts by the agency to qualify the employee for such position or the position the employee left, he or she must be restored to any other position of lesser status and pay for which qualified, with full seniority.

(c) Disabled. An employee with a disability incurred in or aggravated during uniformed service and who, after reasonable efforts by the agency to accommodate the disability, is entitled to be placed in another position for which qualified that will provide the employee with the same seniority, status, and pay, or the nearest approximation consistent with the circumstances in each case. The agency is not required to reemploy a disabled employee if, after making due efforts to accommodate the disability, such reemployment would impose an undue hardship on the agency.

d) Two or more persons entitled to restoration in the same position. If two or more persons are entitled to restoration in the same position, the one who left the position first has the prior right to restoration in that position. The other employee(s) is entitled to be placed in a position as described in paragraphs (b) and (c) of this section.

(e) Relationship to an entitlement based on veterans’ preference. An employee’s right to restoration under this part does not entitle the person to retention, preference, or displacement rights over any person with a superior claim based on veterans’ preference.
§ 353.208 Use of paid time off during uniformed service.

An employee performing service with the uniformed services must be permitted, upon request, to use any accrued annual leave under 5 U.S.C. 6304, military leave under 5 U.S.C. 6323, earned compensatory time off for travel under 5 U.S.C. 5550h, or sick leave under 5 U.S.C. 6307, if appropriate, during such service.

[72 FR 62767, Nov. 7, 2007]

§ 353.209 Retention protections.

(a) During uniformed service. An employee may not be demoted or separated (other than military separation) while performing duty with the uniformed services except for cause. (Reduction in force is not considered “for cause” under this subpart.) He or she is not a “competing employee” under §351.404 of this chapter. If the employee’s position is abolished during such absence, the agency must reassign the employee to another position of like status, and pay.

(b) Upon reemployment. Except in the case of an employee under time-limited appointment who finishes out the unexpired portion of his or her appointment upon reemployment, an employee reemployed under this subpart may not be discharged, except for cause—

(1) If the period of uniformed service was more than 180 days, within 1 year; and

(2) If the period of uniformed service was more than 30 days, but less than 181 days, within 6 months.

§ 353.210 Department of Labor assistance to applicants and employees.

USERRA requires the Department of Labor’s Veterans’ Employment and Training Service [VETS] to provide employment and reemployment assistance to any Federal employee or applicant who requests it. VETS staff will attempt to resolve employment disputes brought to investigate. If dispute resolution proves unsuccessful, VETS will, at the request of the employee, refer the matter to the Office of the Special Counsel for representation before the Merit Systems Protection Board (MSPB).

[64 FR 31487, June 11, 1999]

§ 353.211 Appeal rights.

An individual who believes an agency has not complied with the provisions of law and this part relating to the employment or reemployment of the person by the agency may—

(a) File a complaint with the Department of Labor, as noted in §353.210, or

(b) Appeal directly to MSPB if the individual chooses not to file a complaint with the Department of Labor, or is informed by either Labor or the Office of the Special Counsel that they will not pursue to the case. However, National Guard technicians do not have the right to appeal to MSPB a denial of reemployment rights by the Adjutant General. Technicians may file complaints with the appropriate district court in accordance with 38 U.S.C. 4323 (USERRA).

[60 FR 45652, Sept. 1, 1995, as amended at 64 FR 31487, June 11, 1999]

Subpart C—Compensable Injury

§ 353.301 Restoration rights.

(a) Fully recovered within 1 year. An employee who fully recovers from a compensable injury within 1 year from the date eligibility for compensation began (or from the time compensable disability recurs if the recurrence begins after the employee resumes regular full-time employment with the United States), is entitled to be restored immediately and unconditionally to his or her former position or an equivalent one. Although these restoration rights are agencywide, the employee’s basic entitlement is to the former position or equivalent in the local commuting area the employee left. If a suitable vacancy does not exist, the employee is entitled to displace an employee occupying a continuing position under temporary appointment or tenure group III. If there is no such position in the local commuting area, the agency must offer the employee a position (as described above) in another location. This paragraph also applies when an injured employee accepts a lower-grade position in lieu of separation and subsequently fully recovers. A fully recovered employee is expected to return to work...
§ 353.302 Retention protections.

An injured employee enjoys no special protection in a reduction in force. Separation by reduction in force or for cause while on compensation means the individual has no restoration rights.

§ 353.303 Restoration rights of TAPER employees.

An employee serving in the competitive service under a temporary appointment pending establishment of a register (TAPER) under §316.201 of this chapter (other than an employee serving in a position classified above GS–15), is entitled to be restored to the position he or she left or an equivalent one in the same commuting area.

§ 353.304 Appeals to the Merit Systems Protection Board.

(a) Except as provided in paragraphs (b) and (c) of this section, an injured employee or former employee of an agency in the executive branch (including the U.S. Postal Service and the Postal Rate Commission) may appeal to the MSPB an agency’s failure to restore, improper restoration, or failure to return an employee following a leave of absence. All appeals must be submitted in accordance with MSPB’s regulations.

(b) An individual who fully recovers from a compensable injury more than 1 year after compensation begins may appeal to MSPB as provided for in parts 302 and 330 of this chapter for excepted and competitive service employees, respectively.

(c) An individual who is partially recovered from a compensable injury may appeal to MSPB for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration. Upon reemployment, a partially recovered employee may also
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appeal the agency’s failure to credit time spent on compensation for purposes of rights and benefits based upon length of service.

PART 359—REMOVAL FROM THE SENIOR EXECUTIVE SERVICE; GUARANTEED PLACEMENT IN OTHER PERSONNEL SYSTEMS

Subpart A [Reserved]

Subpart B—General Provisions

§ 359.201 Regulatory requirements.
This part contains the regulations of the Office of Personnel Management (OPM) that implement subchapter V of chapter 35 of title 5, United States Code, on the Senior Executive Service (SES).

§ 359.202 Definitions.
Agency, Senior Executive Service position, senior executive, career appointee, limited emergency appointee, limited term appointee, and noncareer appointee, are defined in 5 U.S.C. 3132(a).

Subpart C [Reserved]

Subpart D—Removal of Career Appointees During Probation

§ 359.401 General exclusions.
§ 359.403 Removal: Conduct.
§ 359.404 Removal: Conditions arising before appointment.
§ 359.405 Removal: Reduction in force.
§ 359.406 Restrictions.
§ 359.407 Appeals.

Subpart E—Removal of Career Appointees for Less Than Fully Successful Executive Performance

§ 359.501 General.
§ 359.502 Procedures.
§ 359.503 Restrictions.
§ 359.504 Appeals.

Subpart F—Removal of Career Appointees as a Result of Reduction in Force

§ 359.601 General.
§ 359.602 Agency reductions in force.
§ 359.603 OPM priority placement.
§ 359.604 Removal from the SES and placement rights outside the SES.
§ 359.605 Notice requirements.
§ 359.606 Appeals.
§ 359.607 Records.
§ 359.608 Transfer of function.

Subpart G—Guaranteed Placement

§ 359.701 Coverage.
§ 359.702 Placement rights.
§ 359.703 Responsibility for placement.
§ 359.704 Restrictions.
§ 359.705 Pay.

Subpart H—Furloughs in the Senior Executive Service

§ 359.801 Agency authority.
§ 359.802 Definitions.
§ 359.803 Competition.
§ 359.804 Length of furlough.
§ 359.805 Appeals.
§ 359.806 Notice.
§ 359.807 Records.

Subpart I—Removal of Noncareer and Limited Appointees and Reemployed Annuitants

§ 359.901 Coverage.
§ 359.902 Conditions of removal.

Authority: 5 U.S.C. 1302, 3302, and 3596, unless otherwise noted.

Source: 54 FR 18876, May 3, 1989, unless otherwise noted.

Subpart A [Reserved]

Subpart B—General Provisions

§ 359.201 Regulatory requirements.

This part contains the regulations of the Office of Personnel Management (OPM) that implement subchapter V of chapter 35 of title 5, United States Code, on the Senior Executive Service (SES).

§ 359.202 Definitions.

Agency, Senior Executive Service position, senior executive, career appointee, limited emergency appointee, limited term appointee, and noncareer appointee, are defined in 5 U.S.C. 3132(a).

Probation and probationary period mean the 1-year probation required by 5 U.S.C. 3333(d) upon initial career appointment to the SES.

Reemployed annuitant means an individual who is receiving an annuity under the Civil Service Retirement System or the Federal Employees’ Retirement System on the basis of his or her former Federal service. A reemployed annuitant serves at the pleasure of the appointing authority.

Subpart C [Reserved]
VETS USERRA FACT SHEET #1:  Frequently Asked Questions - Employers’ Pension Obligations to Reemployed Service Members under USERRA

The following frequently asked questions provide general information concerning the application of USERRA to employers that pay pension benefits as a percentage of total earnings of employees.

1. Is the pension plan I maintain for my employees covered by USERRA?
   • USERRA covers any plan, other than the federal government's Thrift Savings Plan, that provides retirement income to employees or that defers payment of income to employees until after employment has ended. 38 U.S.C. § 4318(a)(1)(A); 20 C.F.R. § 1002.260.
   • The rights of reemployed service members with respect to the Thrift Savings Plan are governed by 5 U.S.C. § 8432b and 5 C.F.R. §§ 1620.40 to 1620.46.

2. My employee was absent from work due to military service and has now returned to work. What are my pension obligations to this employee under USERRA?
   • USERRA requires employers to reemploy an eligible returning service member into the position and benefits the service member would have had, with reasonable certainty, if not for the military service. In other words, a returning service member is entitled to the seniority, rights, and benefits they would have attained had they remained continuously employed. 38 U.S.C. §§ 4312, 4316(a), 4318; 20 C.F.R. § 1002.191.
   • Therefore, employers are required to determine a reemployed service member's eligibility for participation in a pension plan and the vesting and accrual of the service member's pension benefits as if the service member had not left for military service. 38 U.S.C. § 4318; 20 C.F.R. § 1002.191.

3. What period of an employee's military-related absence must I treat as continuous employment for purposes of determining pension benefits?
   • The reemployed service member's entire "period of absence from employment due to or necessitated by" military service must be treated as continuous employment. 20 C.F.R. § 1002.259; see also 38 U.S.C. § 4318(a)(2).
   • Additionally, (1) time spent in preparation for military service, and (2) post-service time "within which a person may apply for reemployment and/or recover from an illness or injury incurred or
aggravated by the military service" must be treated as continuous employment. 70 Fed. Reg. 75,246, 75,280 (Dec. 19, 2005); see also 20 C.F.R. § 1002.259.

4. My employee is currently absent from work for military service. Must I make contributions to the employee’s pension while the employee is away?

• No. Employers are not required to make pension contributions until the service member-employee returns to work. 20 C.F.R. § 1002.262.

5. When must I make pension contributions attributable to the employee’s military-related absence?

• For employer contributions to a plan in which employees are not required or permitted to contribute, the employer must make the contribution attributable to the reemployed service member’s military-related absence no later than ninety days after the date of reemployment, or when plan contributions are normally due for the year in which the military service was performed, whichever is later. 20 C.F.R. § 1002.262(a).

• If it is impossible or unreasonable for the employer to make the contribution within this time period, the employer must make the contribution as soon as practicable. 20 C.F.R. § 1002.262(a).

• For employer contributions to a plan that provides for both employer and employee contributions, please see the next question.

6. I maintain a contributory pension plan for my employees. What are my obligations to make pension contributions for an employee who has missed contributions during military-related absence?

• If a pension plan is contributory, the employer is required to make contributions that are contingent on a reemployed service member’s contributions or elective deferrals only to the extent that the service member makes up those payments to the plan. 20 C.F.R. § 1002.262(c).

• Any employer contributions that are contingent on or attributable to the service member’s make-up contributions or elective deferrals must be made according to the plan’s requirements for employer matching contributions. 20 C.F.R. § 1002.262(c).

7. Are there any limitations on a service member’s ability to make up payments to a pension plan that were missed during military-related absence?

• A reemployed service member may make up all or part of their missed contributions or elective deferrals. However, they are not required to do so. 20 C.F.R. § 1002.262(d).

• No makeup payment may exceed the amount the service member would have been permitted or required to contribute had they remained continuously employed. 38 U.S.C. § 4318(b)(2).
A reemployed service member's makeup payments may be made starting on the date of reemployment for a period that is three times the duration of the service member's military service, but not to exceed five years. 38 U.S.C. § 4318(b)(2).

8. I maintain a pension plan in which employee compensation determines the amount of the employee's contribution or the retirement benefit to which the employee is entitled. How do I determine a reemployed service member's pension entitlement?

A determination of a reemployed service member's pension entitlement requires an analysis of what pension benefits a service member would have received had the service member not left for military service. To make this calculation, the employer must determine the rate or rates of compensation the service member would have received but for the military-related absence. 38 U.S.C. § 4318(b)(3)(A). The methodology differs depending on whether the rate of pay the service member would have received if not for the military-related absence is reasonably certain.

In order to determine the rate of compensation a service member would have received, an employer must analyze how many hours the service member likely would have worked and how much the service member would have earned based on the service member's work history leading up to the military-related absence. 38 U.S.C. § 4318(b)(3)(A).

If the service member's rate of compensation cannot be determined with reasonable certainty because, for example, the service member consistently works variable hours or earns variable rates of pay under a commission scheme, the employer is required to look at the average rate of compensation the service member received during the preceding twelve months (referred to as the "12-month look-back"). If the service member was employed less than 12 months prior to leaving for military service, the employer is required to determine the average rate of compensation during the period of employment immediately preceding the military service. 38 U.S.C. § 4318(b)(3)(B).

9. I maintain a contributory pension plan. How do I determine the amount a reemployed service member is permitted or required to contribute?

Follow the same procedures as outlined in response to question 8.

10. My employees are always scheduled to work 40 hours per week at a consistent rate of compensation. Therefore, for pension purposes, a reemployed service member's rate of compensation for a period of military-related absence should be based on 40 hours per week, right?

Not necessarily. Pension benefits should be determined based on the rate the reemployed service member would have earned but for the period of military service, if that rate can be determined with reasonable certainty. If the service member consistently worked 40 hours per week prior to the military-related absence, it is reasonably certain that the service member would have worked 40 hours per week if not for the period of service.

However, if the service member was scheduled to work 40 hours per week, but consistently worked 50 hours per week prior to the military-related absence, it is reasonably certain that the service
member would have worked 50 hours per week if not for the period of service. It is the number of hours worked, not the number of hours scheduled, that determines the rate of compensation the service member would have earned if not for the period of service.

• Additionally, if the service member was scheduled to work 40 hours per week, but the number of hours worked varied each week, then the rate of pay the service member would have received if not for the period of service is not reasonably certain. In this case, the rate of pay must be calculated based on the average rate of compensation the service member earned during the 12-month period preceding the military-related absence.

• See the examples below for further explanation:

**Example A.** The service member, who receives pension contributions based on a percentage of compensation earned, is scheduled to work 40 hours a week. However, for the nine weeks prior to her military-related absence, the service member worked 50 hours a week and earned overtime pay for the additional hours above 40 hours. The service member receives orders for a two-week deployment. How should pension contributions be calculated for the two-week absence?

• Had the service member been continuously employed, it appears reasonably certain that she would have continued to work the same number of hours during her two-week absence as she had done in the previous nine weeks.

• Therefore, after reemployment, the service member's pension contributions should be calculated based on the 50 hours of work per week (and applicable overtime pay) she would have worked if not for the two-week absence.

**Example B.** The service member, who receives pension contributions based on a percentage of compensation earned, is guaranteed to be paid for 75 hours per month. For the previous eight months, the service member has worked for 80 hours per month. The service member is absent from work for one month due to military service. How should pension contributions be calculated for the one-month absence?

• Had the service member been continuously employed, it appears reasonably certain that he would have worked 80 hours per month, as he has done the previous eight months.

• Therefore, after reemployment, the service member's pension contributions should be calculated based on working 80 hours per month.

• The service member's pension contributions should not be calculated based on the number of hours per month he is guaranteed to be paid, as this does not represent the actual number of hours he worked prior to his military-related absence.

**Example C.** The service member, who receives pension contributions based on a percentage of compensation earned, is guaranteed to be paid for 75 hours per month. For the previous eight months, the service member has worked 80 hours per month. The service member goes out on orders
for three years. The service member’s reemployment escalator position is a promoted position earning a higher rate of pay than the service member previously received before deployment. How should pension contributions be calculated for the three-year absence?

- The service member’s pension contributions should be calculated taking into account the point in time there’s reasonable certainty that the promotion occurred. If the promotion would have occurred after the service member was deployed for one year, then there should be pension contributions at the pre-service rate for 80 hours a month for the first year and contributions at the promoted rate for 80 hours a month for years two and three.

Example D. The service member, who receives pension contributions based on a percentage of compensation earned, is scheduled to work 40 hours a week. After only six weeks at the place of employment, the service member is absent for one week as a result of military service. For the first six weeks of employment, the service member worked for 30 hours, 44 hours, 20 hours, 24 hours, 50 hours, and 40 hours, respectively. How should pension contributions be calculated for the one-week absence?

- The service member’s hours during the six weeks of employment prior to military-related absence have been variable, therefore, her rate of pay has been variable. To determine her pension contributions, the amount of hours should be averaged, as the hours she would have worked, and thus the amount of compensation she would have earned if not for her military-related absence, are not reasonably certain.

- After reemployment, the pension contributions should be calculated based upon 34.7 hours—the average number of hours worked prior to the one-week absence.

Example E. The service member, who receives pension contributions based on a percentage of compensation earned, works 40 hours per week and earns base pay plus commission based on sales. Each week, the service member’s commission is different. The service member has been working at the place of employment for two years. The service member goes out on orders for one month. How should pension contributions be calculated for the one-month absence?

- The service member consistently works 40 hours per week but earns commission based on sales. The commission earned each week varies, therefore, the service member’s rate of compensation she would have earned if not for her military-related absence is not reasonably certain.

- After reemployment, pension contributions for the two-year absence should be calculated based on the average of the service member's compensation earned in the previous 12-month period.

Example F. The service member, who receives pension contributions based on a percentage of compensation earned, works 40 hours per week and earns commission based on sales. Each week, the service member's commission is different. The service member has been working at the place of employment for six years but returned from a one-year deployment six months ago. The service
member goes out on orders for two weeks. How should pension contributions be calculated for the two-week absence?

- The service member consistently works 40 hours per week but earns commission based on sales, and the commission earned each week varies. Therefore, the amount of compensation the service member would have received if not for his military-related absence is not reasonably certain.

- After reemployment, pension contributions should be calculated based on the average rate of compensation earned during the previous 12 months. Since the service member returned from a one-year deployment six months ago, the first six months of the previous 12-month period should not be considered, and the subsequent six months should be averaged to determine the average rate of compensation for the two-week absence.

Example G. The service member, who receives pension contributions based on a percentage of compensation earned, is always scheduled to work 40 hours a week. However, the number of hours the service member works each week is variable. The service member has been working at the place of employment for ten years. Three months ago, the service member returned from a one-week military-related absence. The service member goes out on orders for one month. How should pension contributions be calculated for the one-month absence?

- The number of hours the service member works each week is variable, therefore, the service member’s rate of pay is variable, and the amount of compensation the service member would have received if not for her military-related absence is not reasonably certain.

- After reemployment, the service member’s rate of compensation during the previous twelve months, excluding the one-week military-related absence, should be averaged to calculate the average rate of compensation for the one-month absence.

Where to Obtain Additional Information:

For additional information, visit our Veterans’ Employment & Training Service USERRA Website: http://www.dol.gov/vets/programs/userra and/or call our toll-free information and helpline, available 8:00am to 8:00pm (Eastern Time), at 1-866-4-USA-DOL (1-866-487-2365).

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Declined to Extend by Smyth-Riding v. Sciences and Engineering Services, LLC, 4th Cir.(Md.), August 17, 2017

131 S.Ct. 1186
Supreme Court of the United States

Vincent E. STAUB, Petitioner,
v.
PROCTOR HOSPITAL.

No. 09–400.


Decided March 1, 2011.

Synopsis

Background: Angiography technologist sued his former employer, alleging that he was discharged because of his membership in United States Army Reserve, in violation of Uniformed Services Employment and Reemployment Rights Act (USERRA). Following jury verdict for employee, the United States District Court for the Central District of Illinois, John A. Gorman, United States Magistrate Judge, 2008 WL 2001935, denied employer's renewed motion for judgment as matter of law or for new trial. Employer appealed. The United States Court of Appeals for the Seventh Circuit, 560 F.3d 647, reversed, holding that employer was entitled to judgment as a matter of law. Certiorari was granted.

Holdings: The Supreme Court, Justice Scalia, held that:

[1] if supervisor performs act motivated by antimilitary animus that is intended by supervisor to cause adverse employment action, and if that act is proximate cause of ultimate employment action, then employer is liable under USERRA, and


Reversed and remanded.

Justice Kagan did not participate.

Procedural Posture(s): On Appeal; Motion for Judgment as a Matter of Law (JMOL)/Directed Verdict.

West Headnotes (7)

[1] Torts

When Congress creates a federal tort it adopts background of general tort law.

15 Cases that cite this headnote

[2] Negligence

Distinction or relationship between negligence and intentional conduct

Negligence

Reckless conduct

Torts

Intent or malice

Intentional torts, as distinguished from negligent or reckless torts, generally require that actor intend consequences of an act, not simply the act itself.

7 Cases that cite this headnote

[3] Armed Services

Adverse Employment Actions

If supervisor performs act motivated by antimilitary animus that is intended by supervisor to cause adverse employment action, and if that act is proximate cause of ultimate employment action, then employer is liable under Uniformed Services Employment and Reemployment Rights Act (USERRA), notwithstanding that that supervisor did not make ultimate employment decision. 38 U.S.C.A. § 4311(c).

803 Cases that cite this headnote


Proximate cause

Justice Alito filed opinion concurring in the judgment, in which Justice Thomas joined.
Proximate cause requires only some direct relation between injury asserted and injurious conduct alleged, and excludes only those links that are too remote, purely contingent, or indirect.

107 Cases that cite this headnote

[5] Torts
   ➡ Proximate cause
   Cause can be thought “superseding cause” only if it is cause of independent origin that was not foreseeable.

23 Cases that cite this headnote

[6] Armed Services
   ➡ Adverse Employment Actions
   Decisionmaker's independent investigation and rejection of employee's allegations of antimilitary animus by supervisor does not negate effect of prior discrimination, under Uniformed Services Employment and Reemployment Rights Act (USERRA). 38 U.S.C.A. § 4311(c).

404 Cases that cite this headnote

[7] Armed Services
   ➡ Discharge
   Armed Services
   ➡ Actions or Proceedings for Enforcement
   Whether actions of employee's supervisors, in issuing “corrective action” and informing vice president of human resources of employee's violation, were motivated by hostility toward employee's obligations as member of United States Army Reserve, whether supervisors intended to cause employee to be terminated, and whether those actions were causal factors underlying vice president's decision to fire employee were questions for jury in his suit under Uniformed Services Employment and Reemployment Rights Act (USERRA). 38 U.S.C.A. § 4311(c).

136 Cases that cite this headnote

While employed as an angiography technician by respondent Proctor Hospital, petitioner Staub was a member of the United States Army Reserve. Both his immediate supervisor (Mulally) and Mulally's supervisor (Korenchuk) were hostile to his military obligations. Mulally gave Staub a disciplinary warning which included a directive requiring Staub to report to her or Korenchuk when his cases were completed. After receiving a report from Korenchuk that Staub had violated the Corrective Action, Proctor's vice president of human resources (Buck) reviewed Staub's personnel file and decided to fire him. Staub filed a grievance, claiming that Mulally had fabricated the allegation underlying the warning out of hostility toward his military obligations, but Buck adhered to her decision. Staub sued Proctor under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), which forbids an employer to deny “employment, reemployment, retention in employment, promotion, or any benefit of employment” based on a person's “membership” in or “obligation to perform service in a uniformed service,” 38 U.S.C. § 4311(a), and provides that liability is established “if the person's membership ... is a motivating factor in the employer's action,” § 4311(c).

He contended not that Buck was motivated by hostility to his military obligations, but that Mulally and Korenchuk were, and that their actions influenced Buck's decision. A jury found Proctor liable and awarded Staub damages, but the Seventh Circuit reversed, holding that Proctor was entitled to judgment as a matter of law because the decisionmaker had relied on more than Mulally's and Korenchuk's advice in making her decision.

Held:

1. If a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA. In construing the phrase “motivating factor in the employer's action,” this Court starts from the premise that when Congress creates a federal tort it adopts the background of general tort law. See, e.g., Burlington N. & S.F.R. Co. v. United States, 556 U.S. 599, 613 – 614, 129 S.Ct. 1870, 173 L.Ed.2d 812. Intentional torts such as the one here “generally
require that the actor intend **1188 ‘the consequences of an act,’ not simply ‘the act itself.’ “ Kawaihau v. Geiger, 523 U.S. 57, 61–62, 118 S.Ct. 974, 140 L.Ed.2d 90. However, Proctor errs in contending that an employer is not liable unless the de facto decisionmaker is motivated by discriminatory animus. So long as the earlier agent intended, for discriminatory reasons, that the adverse action occur, he has the scienter required for USERRA liability. Moreover, it is axiomatic under tort law that the decisionmaker's exercise of judgment does not prevent the earlier agent's action from being the proximate cause of the harm. See Hemi Group, LLC v. City of New York, 559 U.S. 1, ———, 130 S.Ct. 983, 175 L.Ed.2d 943. Nor can the ultimate decisionmaker's judgment be deemed a superseding cause of the harm. See Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 837, 116 S.Ct. 1813, 135 L.Ed.2d 113. Proctor's approach would have an improbable consequence: If an employer isolates a personnel official from its supervisors, vests the decision to take adverse employment actions in that official, and asks that official to review the employee's personnel file before taking the adverse action, then the employer will be effectively shielded from discriminatory acts and recommendations of supervisors that were designed and intended to produce the adverse action. Proctor also errs in arguing that a decisionmaker's independent investigation, and rejection, of an employee's discriminatory animus allegations should negate the effect of the prior discrimination. Pp. 1190 – 1194.

2. Applying this analysis here, the Seventh Circuit erred in holding that Proctor was entitled to judgment as a matter of law. Both Mulally and Korenchuk acted within the scope of their employment when they took the actions that allegedly caused Buck to fire Staub. There was also evidence that their actions were motivated by hostility toward Staub's military obligations, and that those actions were causal factors underlying Buck's decision. Finally, there was evidence that both Mulally and Korenchuk had the specific intent to cause Staub's termination. The Seventh Circuit is to consider in the first instance whether the variance between the jury instruction given at trial and the rule adopted here was harmless error or should mandate a new trial. Pp. 1194 – 1195.

560 F.3d 647, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. ALITO, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, post, pp. 1195 – 1196. KAGAN, J., took no part in the consideration or decision of the case.

Attorneys and Law Firms

Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument granted.

Motion of Chamber of Commerce of the United States of America for leave to file a brief as amicus curiae out of time granted.

Justice Kagan took no part in the consideration or decision of these motions.

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Opinion

Justice SCALIA, delivered the opinion of the Court.

*413 We consider the circumstances under which an employer may be held liable for employment discrimination based on the discriminatory animus of an employee who influenced, but did not make, the ultimate employment decision.

Petitioner Vincent Staub worked as an angiography technician for respondent Proctor Hospital until 2004, when he was fired. Staub and Proctor hotly dispute the facts surrounding the firing, but because a jury found for Staub in his claim of employment discrimination against Proctor, we describe the facts viewed in the light most favorable to him.
While employed by Proctor, Staub was a member of the United States Army Reserve, which required him to attend drill one weekend per month and to train full time for two to three weeks a year. Both Janice Mulally, Staub's immediate supervisor, and Michael Korenchuk, Mulally's supervisor, were hostile to Staub's military obligations. Mulally scheduled Staub for additional shifts without notice so that he would "...back the department for everyone else having to bend over backwards to cover [his] schedule for the Reserves." 560 F.3d 647, 652 (C.A.7 2009). She also informed Staub's co-worker, Leslie Sweborg, that Staub's "...military duty had been a strain on the [ ] department," and asked Sweborg to help her "...get rid of him." Ibid. Korenchuk referred to Staub's military obligations as "...a bunch of smoking and joking and [a] waste of taxpayers'[ ] money." Ibid. He was also aware that Mulally was "...out to get" Staub. Ibid.

In January 2004, Mulally issued Staub a "Corrective Action" disciplinary warning for purportedly violating a company rule requiring him to stay in his work area whenever he was not working with a patient. The Corrective Action included a directive requiring Staub to report to Mulally or Korenchuk "...when [he] had[d] no patients and [the angio] cases [we]re complete[d]." Ibid., at 653. According to Staub, Mulally's justification for the Corrective Action was false for two reasons: First, the company rule invoked by Mulally did not exist; and second, even if it did, Staub did not violate it.

On April 2, 2004, Angie Day, Staub's co-worker, complained to Linda Buck, Proctor's vice president of human resources, and Garrett McGowan, Proctor's chief operating officer, about Staub's frequent unavailability and abruptness. McGowan directed Korenchuk and Buck to create a plan that would solve Staub's "...availability' problems." Ibid., at 654. But three weeks later, before they had time to do so, Korenchuk informed Buck that Staub had left his desk without informing a supervisor, in violation of the January Corrective Action. Staub now contends this accusation was false: He had left Korenchuk a voice-mail notification that he was leaving his desk. Buck relied on Korenchuk's accusation, however, and after reviewing Staub's personnel file, she decided to fire him. The termination notice stated that Staub had ignored the directive issued in the January 2004 Corrective Action.

Staub challenged his firing through Proctor's grievance process, claiming that "...Mulally had fabricated the allegation underlying the Corrective Action out of hostility toward his military obligations. Buck did not follow up with Mulally about this claim. After discussing the matter with another personnel officer, Buck adhered to her decision.

Staub sued Proctor under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301 et seq., claiming that his discharge was motivated by hostility to his obligations as a military reservist. His contention was not that Buck had any such hostility but that Mulally and Korenchuk did, and that their actions influenced Buck's ultimate employment decision. A jury found that Staub's "...military status was a motivating factor in [Proctor's] decision to discharge him," App. 68a, and awarded $57,640 in damages.

The Seventh Circuit reversed, holding that Proctor was entitled to judgment as a matter of law. 560 F.3d 647. The court observed that Staub had brought a "...cat's paw" case," meaning that he sought to hold his employer liable for the animus of a supervisor who was not charged with making the ultimate employment decision. Id., at 655–656. It explained *416 that under Seventh Circuit precedent, a "...cat's paw" case could not succeed unless the nondecisionmaker exercised such "...singular influence" over the decisionmaker that the decision to terminate was the product of "blind reliance." Id., at 659. It then noted that "...Buck looked beyond what Mulally and Korenchuk said," relying in part on her conversation with Day and her review of Staub's personnel file. Ibid. The court "...admit[ted] that Buck's investigation could have been more robust," since it "...failed to pursue Staub's theory that Mulally fabricated the write-up." Ibid.

The court said that the "...singular influence" rule "...does not require the decisionmaker to be a paragon of independence": "...It is enough that the decisionmaker is not wholly dependent on a single source of information and conducts her own investigation into the facts relevant to the decision." Ibid. (internal quotation marks omitted). Because the undisputed evidence established that Buck was not wholly dependent on the advice of Korenchuk and Mulally, the court held that Proctor was entitled to judgment. Ibid.

We granted certiorari. 559 U.S. 1066, 130 S.Ct. 2089, 176 L.Ed.2d 720 (2010).
II

The Uniformed Services Employment and Reemployment Rights Act (USERRA) provides in relevant part as follows:

“A person who is a member of ... 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, ... or obligation.” 38 U.S.C. § 4311(a).

It elaborates further:

“An employer shall be considered to have engaged in actions prohibited ... under subsection (a), if the person's membership ... is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership.” § 4311(c).

The statute is very similar to Title VII, which prohibits employment discrimination “because of ... race, color, religion, sex, or national origin” and states that such discrimination is established when one of those factors “was a motivating factor for any employment practice, even though other factors also motivated the practice.” 42 U.S.C. § 2000e–2(a), (m).

The central difficulty in this case is construing the phrase “motivating factor in the employer's action.” When the company official who makes the decision to take an adverse employment action is personally acting out of hostility to the employee's membership in or obligation to a uniformed service, a motivating factor obviously exists. The problem we confront arises when that official has no discriminatory animus but is influenced by previous company action that is the product of a like animus in someone else.

[1] [2] In approaching this question, we start from the premise that when Congress creates a federal tort it adopts the background of general tort law. See Burlington N. & S.F.R. Co. v. United States, 556 U.S. 599, 613 – 614, 123 S.Ct. 824, 154 L.Ed.2d 753 (2003); Burlington Industries, supra, at 754–755, 118 S.Ct. 2257. Here, however, the answer is not so clear. The Restatement of Agency suggests that the malicious mental state of one agent cannot generally be combined with the harmful action of another agent to hold the principal liable for a tort that requires both. See Restatement (Second) of Agency § 275, Illustration 4 (1957). Some of the cases involving federal torts apply that rule. See United States v. Science Applications Int'l Corp., 626 F.3d 1257, 1273–1276 (C.A.D.C.2010); Chaney v. Dreyfus Service Corp., 595 F.3d 219, 241 (C.A.5 2010); United States v. Philip Morris USA Inc., 566 F.3d 1095, 1122 (C.A.D.C.2009). But another case involving a federal tort, and one involving a federal crime, hold to the contrary. See United States ex rel. Harrison v. Westinghouse Savannah River Co., 352 F.3d 908, 918–919 (C.A.4 2003); United States v. Bank...

Ultimately, we think it unnecessary in this case to decide what the background rule of agency law may be, since the former line of authority is suggested by the governing text, which requires that discrimination be “a motivating factor” in the adverse action. When a decision to fire is made with no unlawful animus on the part of the firing agent, but partly on the basis of a report prompted (unbeknownst to that agent) by discrimination, discrimination might perhaps be called a “factor” or a “causal factor” in the decision; but it seems to us a considerable stretch to call it “a motivating factor.”

Proctor, on the other hand, contends that the employer is not liable unless the de facto decisionmaker (the technical decisionmaker or the agent for whom he is the “cat's paw”) is motivated by discriminatory animus. This avoids the aggregation of animus and adverse action, but it seems to us not the only application of general tort law that can do so. Animus and responsibility for the adverse action can both be attributed to the earlier agent (here, Staub's supervisors) if the adverse action is the intended consequence of that agent's discriminatory conduct. So long as the agent intends, for discriminatory reasons, that the adverse action occur, he has the scienter required to be liable under USERRA. And it is axiomatic under tort law that the exercise of judgment by the decisionmaker does not prevent the earlier agent's action (and hence the earlier agent's discriminatory animus) from being the proximate cause of the harm. Proximate cause requires only “some direct relation between the injury asserted and the injurious conduct alleged,” and excludes only those “link[s] that [are] too remote, purely contingent, or indirect.”

Hemi Group, LLC v. City of New York, 559 U.S. 1, 9, 130 S.Ct. 983, 989, 175 L.Ed.2d 943 (2010) (internal quotation marks and brackets omitted). We do not think that the ultimate decisionmaker's exercise of judgment automatically renders the link to the supervisor's bias “remote” or “purely contingent.”

The decisionmaker's exercise of judgment is also a proximate cause of the employment decision, but it is common for injuries to have multiple proximate causes. See Sosa v. Alvarez–Machain, 542 U.S. 692, 704, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004). Nor can the ultimate decisionmaker's judgment be deemed a superseding cause of the harm. A cause can be thought “superseding” only if it is a “cause of independent origin that was not foreseeable.”


Moreover, the approach urged upon us by Proctor gives an unlikely meaning to a provision designed to prevent employer discrimination. An employer's authority to reward, punish, or dismiss is often allocated among multiple agents. The one who makes the ultimate decision does so on the basis of performance assessments by other supervisors. Proctor's view would have the improbable consequence that if an employer isolates a personnel official from an employee's supervisors, vests the decision to take adverse employment actions in that official, and asks that official to review the employee's personnel file before taking the adverse action, then the employer will be effectively shielded from discriminatory acts and recommendations of supervisors that were designed and intended to produce the adverse action. That seems to us an implausible meaning of the text, and one that is not compelled by its words.

Proctor suggests that even if the decisionmaker's mere exercise of independent judgment does not suffice to negate the effect of the prior discrimination, at least the decisionmaker's independent investigation (and rejection) of the employee's allegations of discriminatory animus ought to do so. We decline to adopt such a hard-and-fast rule. As we have already acknowledged, the requirement that the biased supervisor's action be a causal factor of the ultimate employment action incorporates the traditional tort-law concept of proximate cause. See, e.g., Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 457–458, 126 S.Ct. 1991, 164 L.Ed.2d 720 (2006); Sosa, supra, at 703, 124 S.Ct. 2739. Thus, if the employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action (by the terms of USERRA it is the employer's burden to establish that), then the employer will not be liable. But the supervisor's biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified. We are aware of no principle in tort or agency law under which an employer's mere conduct of an independent investigation has a claim-preclusive effect. Nor do we think the independent investigation somehow relieves the employer of “fault.” The employer is at fault because one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision.
Justice ALITO claims that our failure to adopt a rule immunizing an employer who performs an independent investigation reflects a “stray[ing] from the statutory text.” Faragher v. Boca Raton, 524 U.S. 775, 798–799, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). As the Seventh Circuit recognized, there was evidence that Mulally's and Korenchuk's actions were motivated by hostility toward Staub's military obligations. There was also evidence that Mulally's and Korenchuk's actions were causal factors underlying Buck's decision to fire Staub. Buck's termination notice expressly stated that Staub was terminated because he had “ignored” the directive in the Corrective Action. Finally, there was evidence that both Mulally and Korenchuk had the specific intent to cause Staub to be terminated. Mulally stated she was trying to “'get rid of' ” Staub, and Korenchuk was aware that Mulally was “‘out to get’ ” Staub. Moreover, Korenchuk informed Buck, Proctor's personnel officer responsible for terminating employees, of Staub's alleged noncompliance with Mulally's Corrective Action, and Buck fired Staub immediately thereafter; a reasonable jury could infer that Korenchuk intended that Staub be fired. The Seventh Circuit therefore erred in holding that Proctor was entitled to judgment as a matter of law.

It is less clear whether the jury's verdict should be reinstated or whether Proctor is entitled to a new trial. The jury instruction did not hew precisely to the rule we adopt today; it required only that the jury find that “military status was a motivating factor in [Proctor's] decision to discharge him.” App. 68a. Whether the variance between the instruction and our rule was harmless error or should mandate a new trial is a matter the Seventh Circuit may consider in the first instance.

The judgment of the Seventh Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice KAGAN took no part in the consideration or decision of this case.

Justice ALITO, with whom Justice THOMAS joins, concurring in the judgment.

I agree with the Court that the decision of the Court of Appeals must be reversed, but I would do so based on the statutory text, rather than principles of agency and tort law that do not speak directly to the question presented here.
The relevant statutory provision states:

“An employer shall be considered to have engaged in [prohibited discrimination against a member of one of the uniformed services] if the person's membership ... is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership ... .” 38 U.S.C. § 4311(c)(1) (emphasis added).

For present purposes, the key phrase is “a motivating factor in the employer's action.” A “motivating factor” is a factor that “provide[s] ... a motive.” See Webster's Third New International Dictionary 1475 (1971) (defining “motivate”). A “motive,” in turn, is “something within a person ... that incites him to action.” Ibid. Thus, in order for discrimination to be “a motivating factor in [an] employer's action,” discrimination must be present “within,” i.e., in the mind of, the person who makes the decision to take that action. And “the employer's action” here is the decision to fire petitioner. Thus, petitioner, in order to recover, was required to show that discrimination motivated that action.

The Court, however, strays from the statutory text by holding that it is enough for an employee to show that discrimination motivated some other action and that this latter action, in turn, caused the termination decision. That is simply not what the statute says.

*425 The Court fears this interpretation of the statute would allow an employer to escape liability by assigning formal decisionmaking authority to an officer who may merely rubberstamp the recommendation of others who are motivated by antimilitary animus. See ante, at 1192 – 1193. But fidelity to the statutory text does not lead to this result. Where the officer with formal decisionmaking authority merely rubberstamps the recommendation of others, the employer, I would hold, has actually delegated the decisionmaking responsibility to those whose recommendation is rubberstamped. I would reach a similar conclusion where the officer with the formal decisionmaking authority is put on notice that adverse information about an employee may be based on antimilitary animus but does not undertake an independent investigation of the matter. In that situation, too, the employer should be regarded as having delegated part of the decisionmaking power to those who are responsible for memorializing and transmitting the adverse information that is accepted without examination. The same cannot be said, however, where the officer with formal decisionmaking responsibility, having been alerted to the possibility that adverse information may be tainted, undertakes a reasonable investigation and finds insufficient evidence to dispute the accuracy of that information.

Nor can the employer be said to have “effectively delegated” decisionmaking authority any time a decisionmaker “relies on facts provided by [a] biased supervisor.” Ante, at 1193. A decisionmaker who credits information provided by another person—for example, a judge who credits the testimony of a witness in a bench trial—does not thereby delegate a portion of the decisionmaking authority to the person who provides the information.

This interpretation of § 4311(c)(1) heeds the statutory text and would provide fair treatment for both employers and employees who are members of the uniformed services. It would also encourage employers to establish internal grievance procedures similar to those that have been adopted following our decisions in Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), and Faragher v. Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). Such procedures would often provide relief for employees without the need for litigation, and they would provide protection for employers who proceed in good faith.

The Court's contrary approach, by contrast, is almost certain to lead to confusion and is likely to produce results that will not serve the interests of either employers or employees who are members of the uniformed services. The Court's holding will impose liability unfairly on employers who make every effort to comply with the law, and it may have the perverse effect of discouraging employers from hiring applicants who are members of the Reserves or the National Guard. In addition, by leaving open the possibility that an employer may be held liable if it innocently takes into account adverse information provided, not by a supervisor, but by a low-level employee, see ante, at 1194, n. 4, the Court increases the confusion that its decision is likely to produce.

For these reasons, I cannot accept the Court's interpretation of § 4311(c)(1), but I nevertheless agree that the decision below must be reversed. There was sufficient evidence to support a finding that at least Korenchuk was actually delegated part of the decisionmaking authority in this case.
Korenchuk was the head of the unit in which Staub worked, and it was Korenchuk who told Buck that Staub left his work area without informing his supervisors. There was evidence that Korenchuk's accusation formed the basis of Buck's decision to fire Staub, and that Buck simply accepted the accusation at face value. According to one version of events, Buck fired Staub immediately after Korenchuk informed her of Staub's alleged misconduct, and she cited only that misconduct in the termination notice provided to Staub. See 5 Record 128–129, 267–268, 380–386; App. 74a. All of this is *427 enough to show that Korenchuk was in effect delegated some of Buck's termination authority. There was also evidence from which it may be inferred that displeasure with Staub's Reserve responsibilities was a motivating factor in Korenchuk's actions. *

All Citations


Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 The term “cat's paw” derives from a fable conceived by Aesop, put into verse by La Fontaine in 1679, and injected into United States employment discrimination law by Judge Posner in 1990. See Shager v. Upjohn Co., 913 F.2d 398, 405(CA7). In the fable, a monkey induces a cat by flattery to extract roasting chestnuts from the fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing. A coda to the fable (relevant only marginally, if at all, to employment law) observes that the cat is similar to princes who, flattered by the king, perform services on the king’s behalf and receive no reward.

2 Under the traditional doctrine of proximate cause, a tortfeasor is sometimes, but not always, liable when he intends to cause an adverse action and a different adverse action results. See Restatement (Second) of Torts §§ 435, 435B and Comment a (1963 and 1964). That issue is not presented in this case since the record contains no evidence that Mulally or Korenchuk intended any particular adverse action other than Staub’s termination.

3 Under traditional tort law, “‘intent’ ... denote[s] that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.” Id., § 8A.

4 Needless to say, the employer would be liable only when the supervisor acts within the scope of his employment, or when the supervisor acts outside the scope of his employment and liability would be imputed to the employer under traditional agency principles. See Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 758, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). We express no view as to whether the employer would be liable if a co-worker, rather than a supervisor, committed a discriminatory act that influenced the ultimate employment decision. We also observe that Staub took advantage of Proctor's grievance process, and we express no view as to whether Proctor would have an affirmative defense if he did not. Cf. Pennsylvania State Police v. Suders, 542 U.S. 129, 148–149, 124 S.Ct. 2342, 159 L.Ed.2d 204 (2004).

* See 5 Record 343–344 (testimony that Korenchuk made negative remarks about Staub’s Reserve duties before firing him in 1998); id., at 124–126, 352 (testimony that Korenchuk informed Staub of the revenue lost while he was on Active Duty in 2003, that Korenchuk was aware in January 2004 that Staub might be called to Active Duty again, and that “[b]udget was a big issue with [Korenchuk]”).
Sheehan v. Department of Navy, 240 F.3d 1009 (2001)

166 L.R.R.M. (BNA) 2526, 175 A.L.R. Fed. 763

KeyCite Yellow Flag - Negative Treatment

240 F.3d 1009
United States Court of Appeals,
Federal Circuit.

Patrick J. SHEEHAN, Petitioner,
and
Ronald J. Fahrenbacher, Petitioner,
v.
DEPARTMENT OF the NAVY, Respondent.

Nos. 00–3271, 00–3272.

Synopsis
Former career officers in the Navy Judge Advocate General (JAG) Corps separately appealed their nonselection for civilian GS-14 Counsel to the Commander position, claiming that the agency discriminated against them on the basis of their prior military service in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA). One appellant's request for corrective action was denied, and appellant petitioned for review. Second appellant's request was granted, and agency petitioned for review. After consolidating the petitions, the Merit Systems Protection Board, 85 M.S.P.R. 500, ruled that neither appellant was entitled to relief under the USERRA, and appellants appealed. The Court of Appeals, Pauline Newman, Circuit Judge, held that: (1) MSPB did not err in not applying the McDonnell Douglas procedural framework to this USERRA matter, and (2) appellants failed to prove that their prior military status was a motivating factor in agency's decision not to select them.

Affirmed.

West Headnotes (14)

[1] Armed Services ⇐ Adverse Employment Actions

17 Cases that cite this headnote

Even if prohibited discrimination was a factor, employer does not violate the Uniformed Services Employment and Reemployment Rights Act (USERRA) if employer can prove that the action would have been taken in the absence of military status. 38 U.S.C.A. § 4311(c)(1).

14 Cases that cite this headnote

[3] Armed Services ⇐ Evidence in general
Armed Services ⇐ Weight and sufficiency of evidence
Employee making a claim of discrimination under the Uniformed Services Employment and Reemployment Rights Act (USERRA) must bear the initial burden of showing, by a preponderance of the evidence, that employee's military service was “a substantial or motivating factor” in the adverse employment action. 38 U.S.C.A. §§ 4301–4333.

126 Cases that cite this headnote

[4] Armed Services ⇐ Evidence in general

Armed Services ⇐ Weight and sufficiency of evidence

If employee making a claim of discrimination under the Uniformed Services Employment and Reemployment Rights Act (USERRA) shows that his or her military service was “a substantial or motivating factor” in the adverse employment action, employer then has the opportunity to come forward with evidence to show, by a preponderance of the evidence, that employer would have taken the adverse action anyway, for a valid reason. 38 U.S.C.A. §§ 4301–4333.

115 Cases that cite this headnote


When employee makes claim of discrimination on the basis of military service in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA), factual question of employer's discriminatory motivation or intent may be proven by either direct or circumstantial evidence. 38 U.S.C.A. §§ 4301–4333.

28 Cases that cite this headnote


Discriminatory motivation under the Uniformed Services Employment and Reemployment Rights Act (USERRA) may be reasonably inferred from a variety of factors, including proximity in time between employee's military activity and the adverse employment action, inconsistencies between the proffered reason and other actions of employer, employer's expressed hostility towards members protected by the statute together with knowledge of employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses. 38 U.S.C.A. §§ 4301–4333.

125 Cases that cite this headnote


In determining whether employee has proven that his protected status was part of the motivation for agency's adverse conduct, as required to show violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA), all record evidence may be considered, including agency's explanation for the actions taken. 38 U.S.C.A. §§ 4301–4333.

18 Cases that cite this headnote

[8] Armed Services ⇐ Evidence in general

When employee asserting a discrimination claim under the Uniformed Services Employment and Reemployment Rights Act (USERRA) has met his or her burden, burden shifts to employer to prove the affirmative defense that legitimate reasons, standing alone, would have induced employer to take the same adverse action. 38 U.S.C.A. §§ 4301–4333.
Shifting of burden, from employee asserting a discrimination claim under the Uniformed Services Employment and Reemployment Rights Act (USERRA) to agency, applies to both so-called “dual motive” cases in which agency defends on the ground that, even if an invalid reason played a part in the adverse action, the same action would have been taken in the absence of the invalid reason, and so-called “pretext” cases in which agency defends on the ground that it acted only for a valid reason. 38 U.S.C.A. §§ 4301–4333.

Procedural framework and evidentiary burdens set forth for discrimination claims brought under the Uniformed Services Employment and Reemployment Rights Act (USERRA), as explained in the Supreme Court's Transportation Management decision for National Labor Relations Board (NLRB) rulings, are different from those in Title VII discrimination cases, as described in McDonnell Douglas; McDonnell Douglas, while allocating the burden of production of evidence, does not shift the burden of persuasion to the employer. 38 U.S.C.A. §§ 4301–4333.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

In Uniformed Services Employment and Reemployment Rights Act (USERRA) actions, there must be an initial showing by employee that military status was at least a motivating or substantial factor in the agency action, upon which the agency must prove, by a preponderance of evidence, that the action would have been taken despite the protected status. 38 U.S.C.A. §§ 4301–4333.

Merit Systems Protection Board (MSPB) did not err in not applying the McDonnell Douglas criteria to veterans-status discrimination claims brought by retired military officers under the Uniformed Services Employment and Reemployment Rights Act (USERRA); although there may be some overlap in proof of discrimination claims under either framework, McDonnell Douglas criteria differ from the statutory burdens set out in the USERRA, and, although MSPB did not separate its discrimination determination into two discrete parts, for the first of which officers bore the burden of proof, and for the second of which employer bore burden of proof, its decision as a whole followed the strictures of the framework developed for USERRA claims. 38 U.S.C.A. §§ 4301–4333.

To establish their claims of discrimination on the basis of military service in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA), retired military officers were required to show evidence of discrimination other than the fact of non-selection for the position sought and membership in the protected class. 38 U.S.C.A. §§ 4301–4333.
Sheehan v. Department of Navy, 240 F.3d 1009 (2001)
166 L.R.R.M. (BNA) 2526, 175 A.L.R. Fed. 763

8 Cases that cite this headnote

[14] Armed Services  ⇩ Weight and sufficiency of evidence
Retired military officers failed to prove that their prior military status was a motivating factor in agency's decision not to hire them for civilian GS-14 Counsel to the Commander position, as required to establish their discrimination claims under the Uniformed Services Employment and Reemployment Rights Act (USERRA), in light of officers' qualifications, selected employee's qualifications, and fact that two of five finalists for the position, which did not include these officers, had prior military service. 38 U.S.C.A. §§ 4301–4333.

12 Cases that cite this headnote

Attorneys and Law Firms

*1011 Ronald J. Fahrenbacher, of Kansasville, WI, pro se.

Patrick J. Sheehan, of Pleasant Prairie, WI, pro se.

James H. Holl, III, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, for respondent. With him on the brief were David M. Cohen, Director; and Deborah A. Bynum, Assistant Director. Of counsel was Catherine Donovan, Counsel, Office of the Assistant General Counsel, Human Resources Operations Center, Department of the Navy, of Washington, DC.

Before NEWMAN, MICHEL, and GAJARSA, Circuit Judges.

Opinion

PAULINE NEWMAN, Circuit Judge.


BACKGROUND

The appellants are retired military officers, and had served in the Navy Judge Advocate General Corps. Both have distinguished records. In 1996, both of the retired appellants applied for the newly-created civilian position of Attorney Advisor and Counsel to the Commander of the Naval Training Center at Great Lakes, Illinois. Neither of the appellants was selected. They separately appealed their non-selection to the Board, on the ground that the agency discriminated against them on the basis of their prior military service, in violation of the USERRA. The appeals proceeded separately, and were assigned to different administrative judges.

Mr. Fahrenbacher's appeal was denied by the administrative judge, from which Mr. Fahrenbacher petitioned for review by the full Board. Mr. Sheehan's appeal was granted by the administrative judge, from which the agency petitioned for review by the full Board. The Board consolidated the petitions, and ruled that neither Mr. Fahrenbacher nor Mr. Sheehan was entitled to relief under the USERRA.
JURISDICTION

The Board has jurisdiction of the appellants' USERRA claims under 38 U.S.C. § 4324. See 5 C.F.R. § 1201.3(a)(22) (“The Board has jurisdiction over appeals from agency actions when the appeals are authorized by law, rule, or regulation. These include appeals from ... [n]on-compliance by a Federal agency executive agency employer or the Office of Personnel Management with the provisions of [the USERRA] relating to the employment or reemployment rights or benefits to which a person is entitled after service in the uniformed services.”), Williams v. Dep't of Army, 83 M.S.P.R. 109, 113 (1999). The Federal Circuit has jurisdiction of the appeal pursuant to § 4324(d)(1).

THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT


(a) 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.

* * *

(c) An employer shall be considered to have engaged in actions prohibited—

(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service.

While the Board has previously considered the legal structure and operation of this statute, e.g., Williams v. Dep't of Army, 83 M.S.P.R. 109, 112 (1999); Petersen v. Dep't of Interior, 71 M.S.P.R. 227, 239–40 (1996), as have courts in other circuits, e.g., Gummo v. Village of Depew, N.Y., 75 F.3d 98, 105–06 (2d Cir.1996), this court has not done so. On the basis of the statute and the appurtenant legislative history, we adopt a construction of the statute consistent with those decisions.

The USERRA was enacted in congressional response to the Supreme Court's decision in Monroe v. Standard Oil Co., 452 U.S. 549, 101 S.Ct. 2510, 69 L.Ed.2d 226 (1981), wherein the Court held that the USERRA's antecedent, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, “was enacted for the significant but limited purpose of protecting the employee-reservist against discriminations ... motivated solely by reserve status.” Id. at 559, 101 S.Ct. 2510. The Court concluded that liability for violation of the statute *1013 could not be found unless the employee's reserve status was the sole motivation for the discriminatory conduct. The 1994 enactment broadened the statute by providing that a violation occurs when a person's military service is a “motivating factor” in the discriminatory action, even if not the sole factor. See 38 U.S.C. § 4311(c)(1).

[2] The 1994 enactment also confirmed “that the standard of proof in a discrimination or retaliation case is the so-called ‘but-for’ test and that the burden of proof is on the employer, once [the employee's] case is established,” the legislative history citing the procedures and allocation of burdens of proof for actions under the National Labor Relations Act as discussed by the Supreme Court in National Labor Relations Bd. v. Transportation Management Corp., 462 U.S. 393, 401, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983) (modified by Director, Office of Workers' Compensation v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994)). H.R.Rep. No. 65, 103d Cong., 2d Sess. 24 (1994), reprinted in 1994 USCCAN 2449 at 2457;
S.Rep. No. 158, 103d Cong., 2d Sess. 45 (1994); see also Gummo, 75 F.3d at 105–06 (discussing legislative history); Petersen, 71 M.S.P.R. at 239–240 (same). Thus the USERRA provides that even if prohibited discrimination was a factor, the employer does not violate the statute if “the employer can prove that the action would have been taken in the absence of [military status].” 38 U.S.C. § 4311(c)(1).

Precedent interpreting and applying the USERRA is sparse. Those courts that have applied it, as well as the MSPB, have implemented the legislative intent to adopt the Transportation Management evidentiary scheme for cases arising under the National Labor Relations Act. The Court in Transportation Management in turn had adopted and approved the National Labor Relations Board's reasoning in Wright Line, 251 N.L.R.B. 1083, 1089 (1980), enforced, 662 F.2d 899 (1st Cir.1981). We apply this precedent to the appellants' USERRA claims.

The procedures established by precedent require an employee making a USERRA claim of discrimination to bear the initial burden of showing by a preponderance of the evidence that the employee's military service was “a substantial or motivating factor” in the adverse employment action. See Transportation Management, 462 U.S. at 400–01, 103 S.Ct. 2469. If this requirement is met, 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. See id.; Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977); Holo–Krome Co. v. Nat'l Labor Relations Bd., 954 F.2d 108, 110–12 (2d Cir.1992); see also Matson Terminals, Inc. v. Nat'l Labor Relations Bd., 114 F.3d 300, 303 (D.C.Cir.1997); FPC Holdings, Inc. v. Nat'l Labor Relations Bd., 64 F.3d 935, 942 (4th Cir.1995); Mississippi Transport, Inc. v. Nat'l Labor Relations Bd., 1 F.3d 486, 490 (7th Cir.1993).

The factual question of discriminatory motivation or intent may be proven by either direct or circumstantial evidence. See 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). Circumstantial evidence will often be a factor in these cases, for discrimination is seldom open or notorious. 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, an 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. Cf. W.F. Bolin Co. v. Nat'l Labor Relations Bd., 70 F.3d 863, 871 (6th Cir.1995). 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.

When the employee has met this burden, the burden shifts to the employer to prove the affirmative defense that legitimate reasons, standing alone, would have induced the employer to take the same adverse action. Transportation Management, 462 U.S. at 400, 103 S.Ct. 2469; Mt. Healthy, 429 U.S. at 285–86, 97 S.Ct. 568. This applies to both so-called “dual motive” cases (in which the agency defends on the ground that, even if an invalid reason played a part in the adverse action, the same action would have been taken in the absence of the invalid reason) and so-called “pretext” cases (in which the agency defends on the ground that it acted only for a valid reason). See Holo–Krome, 954 F.2d at 110–11.

The procedural framework and evidentiary burdens set out in § 4311, as explained in Transportation Management for NLRB rulings, are different from those in discrimination cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a)(1), as described in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and subsequent decisions. McDonnell Douglas, while allocating the burden of production of evidence, does not shift the burden of persuasion to the employer. See Nat'l Labor Relations Bd. v. Weiss Memorial Hospital, 172 F.3d 432, 442 (7th Cir.1999) (contrasting Wright Line with “the shifting burdens of production under the ubiquitous McDonnell Douglas analysis, which is merely a method for ordering the proof”); Walker v. Mortham, 158 F.3d 1177, 1184–85 n. 10 (11th Cir.1998), cert. denied 528...
U.S. 809, 120 S.Ct. 39, 145 L.Ed.2d 36 (1999) (distinguishing the employer's burden to prove its affirmative defense under the NLRA from the McDonnell Douglas prima facie case, which shifts the burden of production but not the risk of nonpersuasion).

[11] Thus in USERRA actions there must be an initial showing by the employee that military status was at least a motivating or substantial factor in the agency action, upon which the agency must prove, by a preponderance of evidence, that the action would have been taken despite the protected status.

ANALYSIS

[12] The appellants claim that the MSPB erred in not applying the criteria outlined in McDonnell Douglas and recently clarified in Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). We do not agree. As discussed above, the McDonnell Douglas criteria differ from the statutory burdens set out in the USERRA and the National Labor Relations Act. Although there may be some overlap in proof of discrimination claims under either framework, the Court's decision in Reeves expressly deals with the McDonnell Douglas framework, and does not require any change in the standard codified in the USERRA and explained in Transportation Management. See Reeves, 530 U.S. at ———, 120 S.Ct. at 2105 (“Because the parties do not dispute the issue, we shall assume, arguendo, that the McDonnell Douglas framework is fully applicable here.”);

The initial burden on the appellants was to establish that their military service was a motivating factor in their non-selection. In Mr. Sheehan's case the administrative judge, hearing witnesses and making credibility determinations, found that this initial burden was met, and that the agency did not establish that it would have taken the same non-selection action absent Mr. Sheehan's military service. In Mr. Fahrenbacher's case the administrative judge found that this initial burden was not met. Reviewing these two decisions, the full Board held that the appellants “did not carry their ultimate burden of proving that the agency failed to select them on the basis of their prior military service.” The Board thus sustained the administrative judge's decision in Mr. Fahrenbacher's case, and reversed the administrative judge in Mr. Sheehan's case.

The Board stated that its task was to determine “whether the appellants' veterans status was a motivating factor in the agency's decision not to select them.” That is, “whether, in view of their qualifications as set forth in their application, the agency's reasons for not selecting them are pretextual and the real reason is their prior military service.” Although the MSPB did not separate the discrimination determination into two discrete parts, for the first of which the complainant bears the burden of proof, and for the second of which the employer bears the burden of proof, its decision as a whole followed the strictures of the framework developed by the NLRB and the Court.

[13] [14] The MSPB, after reviewing the qualifications of both of the appellants as well as the person actually selected for the position, found that “the appellants did not establish that they were not selected for the GS–14 Counsel to the Commander position because of discrimination based on their military service.” In their appellate briefs, both Mr. Fahrenbacher and Mr. Sheehan principally argue that the inferior qualifications of the person selected for the position of itself establishes that they were discriminated against. The Board correctly held that the claimants must show evidence of discrimination other than the fact of non-selection and membership in the protected class. Cf. Nat'l Labor Relations Bd. v. Fluor Daniel, Inc., 161 F.3d 953, 967 (6th Cir.1998) (refusing to incorporate the Title VII prima facie case set forth in McDonnell Douglas into refusal-to-hire discrimination cases arising under the NLRA).

The Board considered the evidence of record including the appellants’ qualifications, the qualifications of the employee actually selected, and other evidence including the fact that two of the five finalists for the position (appellants were not in this group) had prior military service. On the record presented, we agree that the appellants did not meet their burden of proving that their prior military status was a motivating factor in the agency's decision not to select them. On this basis, the decision of the Board is affirmed.
AFFIRMED.

No costs.

All Citations

240 F.3d 1009, 166 L.R.R.M. (BNA) 2526, 175 A.L.R. Fed. 763

Footnotes

1  Ronald Fahrenbacher and Patrick J. Sheehan v. Dep't of Navy, 85 M.S.P.R. 500 (2000).

2  On February 4, 2000, after the initial decision, but before decision of the full Board, 5 C.F.R. § 1201.3 was amended to replace subparagraph (a)(22) with new subparagraph (b)(1) providing that “Appeals filed under [USERRA] ... are governed by part 1208 of this title.” 65 Fed.Reg. 5409 (Feb. 4, 2000). Part 1208.2 provides that “Under 38 U.S.C. § 4324, a person entitled to the rights and benefits provided by [USERRA] may file an appeal with the Board....” 65 Fed.Reg. 5410 (Feb. 4, 2000) (to be codified at 5 C.F.R. § 1208.2).

We assume, without deciding, that USERRA claims fall within the Board's appellate jurisdiction. Compare Bodus v. Dep't of the Air Force, 82 M.S.P.R. 508, 516 (1999) (pure USERRA claims are complaints, not appeals, under 5 U.S.C. § 7701) with 5 C.F.R. § 1208.4 (“‘Appeal’ means a request for review of an agency action (the same meaning as in 5 C.F.R. § 1201.4(f)) and includes a ‘complaint’ or ‘action’ as those terms are used in USERRA....”).

3  This was referred to as a “prima facie” case in Wright Line, 251 NLRB at 1089, meaning that the employee had met the burden of showing, by a preponderance of evidence, that his/her protected status motivated the action. Following the Supreme Court's holding in Greenwich Collieries, 512 U.S. at 277–78, 114 S.Ct. 2251, the use of the term “prima facie” case is inapt. See National Labor Relations Bd. v. Joy Recovery Tech. Corp., 134 F.3d 1307, 1314 (7th Cir.1998) (explaining that Greenwich Collieries makes clear that Wright Line “analysis does not simply require ... a prima facie case. [The employee] must establish that [discriminatory] animus was a motivating factor in the decision.”); Southwest Merchandising Corp. v. Nat'l Labor Relations Bd., 53 F.3d 1334, 1339–40 & n. 8 (D.C.Cir.1995) (“[I]n the wake of Greenwich Collieries, it will no longer be appropriate to term the [employee's] burden that of mounting a prima facie case.”); Holo–Krome Co. v. Nat'l Labor Relations Bd., 954 F.2d 108, 111–12 (2d Cir.1992) (“[T]he Board uses the phrase ‘prima facie case’ to mean evidence that proves that protected conduct was a motivating factor, [though] it would be helpful if the Board would abandon the phrase, in view of its entirely different meaning in other contexts.”).
Plaintiff, Larry Green (Green), by the undersigned attorneys, alleges:


**JURISDICTION AND VENUE**

2. This Court has jurisdiction over the subject matter of this civil action under 28

3. Venue is proper in this judicial district under 38 U.S.C. 4323(c)(2) because Defendant Watermark maintains a place of business in this judicial district and is considered a “private employer.” Venue is also proper under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to this action occurred in this judicial district.

PARTIES

4. Plaintiff Green resided in Gilbert, Arizona, within the jurisdiction of this Court, at the time of the events giving rise to this lawsuit.

5. Watermark Solutions (Watermark) is a private, for-profit company located in Phoenix, Arizona, which is within the jurisdiction of this Court. Watermark manufactures cleaning products and provides commercial cleaning equipment to various business segments including hotels, healthcare companies, major league baseball entities, and industrial entities. Watermark is an “employer” within the meaning of 38 U.S.C. § 4303(4)(A), and is subject to suit under USERRA under 38 U.S.C. § 4323(a).

FACTUAL ALLEGATIONS

6. Green repeats the factual allegations set forth in paragraphs 1-5.

7. Green joined the active duty United State Air Force as an enlisted member in June 2009 as an Airman First Class, and was ultimately promoted to Staff Sergeant. In 2015, Green sought to fulfill the remainder of his military service as a Reserve Staff Sergeant and began looking for full-time civilian employment. His active duty service term ended in July 2015, and his reserve unit did not require his participation until September 2015 when he entered the Air Force Reserves as a Staff Sergeant.

8. In June 2015, Green began interviewing for a service technician position with
Watermark. Watermark Vice President Mark Simmons (Simmons) met Green through a veteran's program designed to facilitate employment and entrepreneurial opportunities for servicemembers.

9. On or around July 13, 2015, Watermark hired Green as a full-time Service Technician where his responsibilities included ensuring that customers were satisfied with Watermark's cleaning agents, and servicing and repairing equipment.

10. When Green began at Watermark, he informed Simmons that he would need four months of leave from the office to fulfill his military training requirements in the coming months. Green required four months of military leave due to his transition from active duty to the Reserves. In this transition, Green changed his specialty from aircraft maintenance to vehicle maintenance. This specialty change required that Green undergo 3-1/2 months of vehicle maintenance training, in addition to the two weeks of annual reserve training. Simmons was fully aware of that obligation.

11. At the time of his hiring, Green was the sole Service Technician for Watermark, and responsible for ensuring customer satisfaction with the company's cleaning agents and providing service maintenance and repairs on equipment. Simmons introduced Green to the company's clients and trained him on servicing equipment. Green was on call 24 hours daily, during the week and on weekends, and serviced about 40 customers, some of whom were located as far as two hours away from Watermark's Phoenix Office. After being trained by Simmons, Green worked most jobs independently, was given significant responsibility servicing the company's customer base, and assisted Simmons on certain jobs that required more than one person. Customers called Green directly and Green managed his own schedule based on responding to direct-customer calls and managing monthly maintenance requirements. Green was never made aware of any customer complaints, and was never counseled by the company for poor
performance. Between January and March 2016, Simmons texted Green to thank him for his work and informed Green that he was doing a “good job.”

12. During the course of his employment with Watermark, Green received updates from his commanding officer in the Reserves as to when his military training would need to begin. Green kept Simmons informed of those updates.

13. Around May 9, 2016, Green informed Simmons that his military training would begin in June 2016. On June 6, 2016, Green told Simmons that his military training would begin on June 24, 2016, and end about four months later at the end of October 2016.

14. Simmons responded to Green that a temporary replacement could not be hired and that he would be terminated. Green told Simmons that his termination was prohibited under USERRA.


16. On or around June 13, 2016, Green notified Simmons of his refusal to sign the Separation and Release of Claims Agreement. On June 16, 2016, Green again notified Watermark by email that his military service obligation would begin on June 24, and that he would return to work by around November 7, 2016.

17. By around October 31, 2016, after Green fulfilled his military obligations, he notified Watermark that he was prepared to resume work by as early as November 1, 2016. Watermark informed Green that his position had been filled with someone else and that the company was not hiring.

18. At the time of his termination, Green’s annual salary with Watermark was $48,000.
19. On October 28, 2016, Green filed a complaint with the United States Department of Labor, Veterans Employment and Training Service (VETS) alleging Watermark violated USERRA by terminating his employment due to his military service.

COUNT I

USERRA, 38 U.S.C. § 4311
Termination in Violation of USERRA

20. Green re-alleges and incorporates by reference all of the foregoing allegations.

21. Section 4311 of USERRA prohibits the denial of “reemployment [or] retention in employment” by an employer against a person who is a servicemember or has an “obligation to perform service in the uniformed services” on the basis of that person’s military status. 34 U.S.C. § 4311(a) & (c). USERRA defines “service in the uniformed services” as “the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes * * * active duty for training, initial active duty for training, [and] inactive duty training.” 38 U.S.C. § 4303(13). An employer violates this prohibition when military status “is a motivating factor in the employer’s action.” 34 U.S.C. § 4311(c).

22. As described in paragraphs 6 through 19, Green is a member of the U.S. Air Force Reserves who was employed by Watermark from July 13, 2015 to June 15, 2016.

23. Watermark violated Section 4311 of USERRA by terminating Green on the basis of his membership in the U.S. Air Force Reserves, his absence to perform military service, and/or his military service obligations.

24. Green’s military service was a motivating factor in Watermark’s termination decision.

25. Watermark acted with willful disregard to Green’s USERRA rights when it terminated his employment.
26. Because of Watermark’s actions in violation of USERRA, Green has suffered a substantial loss of earnings and other benefits in an amount to be proven at trial.

27. Green requests, to the extent authorized by law, a trial by jury.

PRAYER FOR RELIEF

WHEREFORE, Green prays that this Court grant the following relief:

A. Declare that Watermark’s termination of Green’s employment was unlawful and a violation of USERRA;

B. Order Watermark to comply fully with the provisions of USERRA by compensating Green for his lost wages and other benefits suffered by reason of Watermark’s violations of USERRA;

C. Award prejudgment interest to Green on the amount of lost wages and benefits due;

D. Direct Watermark to re-employ Green at the position he had at the time of his unlawful termination;

E. Enjoin Watermark from taking any action with respect to Green that fails to comply with USERRA;

F. Declare that Watermark’s USERRA violation was willful, and award Green liquidated damages in an amount equal to his lost wages; and
G. Grant such other and further relief as may be just and proper together with the costs and disbursements of this lawsuit.

Date: December 18, 2018

Respectfully submitted,

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Assistant Attorney General
Civil Rights Division

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MARK WOODALL,
MICHAEL P. McMAHON,
PAPUL J. MADSON,
Individually and on behalf of a class of all
similarly situated persons,

Plaintiffs,

V.

AMERICAN AIRLINES, INC.,

Defendant.

COMPLAINT - CLASS ACTION

Plaintiffs, Mark Woodall, Michael P. McMahon, and Paul J. Madson ("Plaintiffs"), on
behalf of themselves and a class of all similarly situated persons, by the undersigned attorneys,
make the following averments:

1. This is a civil action brought pursuant to the Uniformed Services Employment and

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action pursuant to
   38 U.S.C. § 4323(b).

3. Venue is proper in this district under 38 U.S.C. § 4323(c)(2) and 28 U.S.C.
   § 1391(b), because Defendant, American Airlines, Inc. ("American Airlines"), maintains
   a place of business in this judicial district.
PARTIES

4. Plaintiff Mark Woodall ("Woodall") resides in Carrollton, Texas. He is currently employed by American Airlines as a pilot. Woodall is also a Captain in the United States Naval Reserve.

5. Plaintiff Michael McMahon ("McMahon") resides in Arnold, Maryland. He is a former employee of American Airlines where he was employed as a pilot. McMahon is a member of the United States Naval Reserve and served as a Captain between 1998 and 2005. In 2005, McMahon was recalled to active duty and is currently a Commander.

6. Plaintiff Paul Madson ("Madson") resides in Chicago, Illinois. He is currently employed by American Airlines as a pilot. Madson is also a Lieutenant Colonel in the Ready Reserve of the South Dakota Air National Guard.

7. Defendant American Airlines maintains its headquarters at 4333 Amon Carter Blvd, Fort Worth, Texas 76155, within the jurisdiction of this Court.

CLAIMS FOR RELIEF

8. American Airlines is a global air passenger carrier whose passenger division is the largest scheduled passenger airline in the world, employing over 10,000 pilots, of whom approximately 1,000 are members of the United States Armed Forces serving in National Guard and Reserve units.

9. Pursuant to the 1997 and 2003 Collective Bargaining Agreements between American Airlines and the Allied Pilots Association (the "Collective Bargaining Agreements"), American Airlines has calculated earned vacation time for pilots based on their accumulated service time with American Airlines, as well the pilots' service time during the previous calendar year. Pursuant to the Collective Bargaining Agreements,
American Airlines has calculated earned sick leave time based on the pilots' service time during the previous calendar year. The Collective Bargaining Agreements have required that a pilot be "in service" for fifteen (15) days in a calendar month in order for that month to be counted in figuring the pilot's service time.

10. Pursuant to the Collective Bargaining Agreements, American Airlines has allowed pilots who are "in service" to bid on flight schedules for the upcoming month based on their seniority status. Pilots who are considered to be on "leaves of absence" may not bid for flight schedules.

11. Pursuant to the 1997 Collective Bargaining Agreement, American Airlines was required to credit each pilot with 1.33 days of sick leave for each month the pilot was "in service" during the year. Pursuant to the 2003 Collective Bargaining Agreement, American Airlines must credit each pilot with five (5) hours of sick leave for each month the pilot is "in service" during the year.

12. Upon information and belief, in January 2002, American Airlines conducted an audit of the flight records of pilots who took military leave during 2001. Based on that audit, American Airlines reduced the service time for pilots who had taken military leave during 2001, regardless of whether those pilots were scheduled to work on the days they took military leave. This reduction of service time resulted in the reduction of earned vacation time for certain pilots who had taken military leave, including the named plaintiffs Woodall and McMahon. American Airlines did not reduce earned vacation time for pilots who had taken comparable types of non-military leave.

13. Upon information and belief, from 2001 through 2002, American Airlines placed
pilots who took military leave, including the named plaintiffs Woodall, McMahon, and Madson, on “leave of absence” status, which effectively denied them the ability to bid on flight schedules based on their seniority status and to earn other employment benefits, including earned paid vacation time and earned sick leave. American Airlines continues to place pilots who take military leave on “leave of absence” status, thereby denying them the ability to bid on flight schedules based on their seniority status and to earn other employment benefits, including earned paid vacation time and earned sick leave.

14. Upon information and belief, in 2001 and 2002, American Airlines did not deny to pilots who took comparable types of non-military leave, including but not limited to sick leave, union service leave or jury duty leave, the ability to bid on flight schedules based on their seniority and to earn other employment benefits, including earned paid vacation time and earned sick leave. Similarly, American Airlines did not deny to pilots who conducted other non-military activities and/or business on days when they were not scheduled to fly, but were not technically considered to be “on leave,” the ability to bid on flight schedules based on their seniority status and to earn other employment benefits, including earned paid vacation time and earned sick leave.

Mark Woodall

15. American Airlines has employed Woodall as a pilot since 1991. He joined American Airlines directly from active duty as a pilot with the United States Navy.

16. In 2001, pursuant to the 1997 Collective Bargaining Agreement and his seniority, Woodall was entitled to twenty-one (21) paid vacation days based on his ten (10) years of total service with American Airlines and twelve (12) months of service time in 2001.
17. Woodall took sixteen (16) days of military leave for annual reserve training with the United States Naval Reserve, June 9-24, 2001.

18. In February 2002, Woodall learned that he would only accrue nineteen (19) paid vacation days in 2002 because American Airlines considered him on a “leave of absence” in June 2001 during his sixteen (16) days of military leave and thus American Airlines would not credit him with being in service in June.

19. As a result of American Airlines’ denial of two earned days of paid vacation time to Woodall due to his military service, Woodall has suffered a loss of his benefits of employment.

Michael McMahon

20. American Airlines employed McMahon as a pilot from 1998 to 2005. McMahon is a member of the United States Naval Reserve. In June 2005, he was recalled to full-time active duty and is currently a Commander.

21. In 2001, pursuant to the Collective Bargaining Agreement and his seniority, McMahon was entitled to fourteen (14) paid vacation days based on his three (3) years of total service with American Airlines and twelve (12) months of service time in 2001.

22. McMahon took fourteen (14) days of military leave for annual reserve training with the Naval Reserve, February 4 - 17, 2001.

23. In 2002, McMahon learned that American Airlines had audited the flight records of pilots who took military leave and that he would be awarded only thirteen (13) paid vacation days in 2002 because American Airlines considered him on a “leave of absence” in February 2001, covering his fourteen (14) days of military leave, and thus American Airlines would not credit him for being in service for the month of February.
24. As a result of American Airlines’ denial of an earned day of paid vacation time to McMahon due to his military service, McMahon has suffered a loss of his benefits of employment.

Paul Madson

25. American Airlines has employed Madson as a pilot since 1989. He joined American Airlines directly from active duty as a pilot with the United States Air Force.

26. In 2002, pursuant to the 1997 Collective Bargaining Agreement, Madson was entitled to accrue 1.33 days of sick leave for each month he was “in service” with American Airlines. Pursuant to the 1997 Collective Bargaining Agreement and his seniority, he was also entitled to bid on his flight schedule in order of seniority.

27. Madson was on military leave for twenty (20) days, December 1-21, 2002.

While on military leave, Madson served on active duty with the U.S. Air Force deployed to Turkey for Operation Northern Watch.

28. Upon his return from active duty, Madson completed his full-time flying schedule for American Airlines for the month of December, from December 22-31, 2002.

29. American Airlines placed Madson on “leave of absence” status while he was on military duty in Turkey. Due to this status, Madson was not allowed to earn sick leave nor was he permitted to submit a flight schedule request for the month of January 2003.

30. As a result of American Airlines’ placement of Madson on “leave of absence” status, he was denied 1.33 days of accrued sick leave and was placed on “reserve” flight status for the month of January.

31. Madson was further denied twenty-seven (27) hours of paid flight time in January 2003 because he was placed on reserve flight status instead of being awarded his December
2002 bid for a flight schedule based on his thirteen (13) years of seniority at American Airlines.

32. The acts and practices of American Airlines, set forth in paragraphs 12-14, 18-19, 23-24 and 29-31 above, constitute violations of USERRA, with respect to the named plaintiffs Woodall, McMahon, and Madson, and a class of similarly situated present and former pilots who have taken military leave while employed by American Airlines.

CLASS ACTION ALLEGATIONS

33. Plaintiffs bring this action pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure on behalf of a class of all past and present pilots of American Airlines who are or were members of the United States Armed Services and who have taken military leave from January 2001 to the present while employed by American Airlines. Plaintiffs are members of the class they seek to represent.

34. The members of the class are sufficiently numerous that joinder of all members is impracticable. Plaintiffs are informed and believe that the class exceeds 100 present and former pilots of American Airlines.

35. There are questions of law and fact common to the class, and these questions predominate over individual questions. Such questions include, without limitation: whether American Airlines has placed pilots who have taken military leave since 2001 on “leave of absence” status for the periods of their military leave; whether American Airlines has not placed pilots who have taken comparable types of non-military leave since 2001, including sick leave, union service leave or jury duty leave on “leave of absence” status for their periods of such non-military leave; whether American Airlines' acts and practices have violated USERRA by discriminating against American Airlines
pilots who are members of the Armed Forces and have taken military leave; and whether injunctive and other equitable remedies for the class are warranted.

36. The claims alleged by Plaintiffs are typical of the claims of the class.

37. The named Plaintiffs will fairly and adequately represent and protect the interests of the class.

38. Class certification is appropriate pursuant to Fed. R. Civ. Proc. Rule 23(b)(2) because American Airlines has acted on grounds generally applicable to the class, making appropriate declaratory and injunctive relief to Plaintiffs and the class as a whole. The class members are entitled to injunctive relief to end American Airlines’ acts and practices that have treated pilots who have taken military leave differently and less favorably than pilots who have taken comparable types of non-military leave.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and the members of the class, pray for judgment against American Airlines, its officers, agents, employees, successors and all persons in active concert or participation with it as follows:

39. Determine that this action may proceed and be maintained as a class action, designating Plaintiffs as Lead Plaintiffs, and certifying Plaintiffs as class representatives under Rule 23 of the Federal Rules of Civil Procedure and their counsel as lead counsel, and designating Plaintiffs as representatives of the class and their counsel of record as Class Counsel;

40. Declare that the acts and practices complained of herein are unlawful and are in violation of USERRA, 38 U.S.C. § 4301, et seq.;
41. Require that American Airlines fully comply with the provisions of USERRA by providing Plaintiffs and class members all employment benefits denied them as a result of the unlawful acts and practices under USERRA described herein, including, but not limited to, lost earned vacation time and lost earned sick leave (or the monetary equivalent), and pay lost due to the inability to bid on flights commensurate with their levels of seniority;

42. Enjoin American Airlines from taking any action against Plaintiffs and members of the class that fails to comply with the provisions of USERRA;

43. Award Plaintiffs prejudgment interest on the amount of lost wages or employment benefits found due;

44. Grant such other and further relief as may be just and proper.
45. Plaintiffs further pray for their costs and disbursements in this action.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MARK WOODALL,
MICHAEL P. MCMAHON,
PAUL J. MADSON,
Individually and on behalf of a class of
all similarly situated persons,

Plaintiffs,

v.

AMERICAN AIRLINES, INC.

Defendant.

CIVIL ACTION NO. 3-06CV-0072M

(ORAL ARGUMENT REQUESTED)

AMERICAN AIRLINES, INC.'S BRIEF IN SUPPORT OF ITS MOTION FOR
DISMISSAL OF PLAINTIFFS' COMPLAINT, AND, ALTERNATIVELY, TO STRIKE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MARK WOODALL,
MICHAEL P. MCMAHON,
PAUL J. MADSON,
Individually and on behalf of a class of
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(ORAL ARGUMENT REQUESTED)

AMERICAN AIRLINES, INC.'S BRIEF IN SUPPORT OF ITS MOTION FOR
DISMISSAL OF PLAINTIFFS' COMPLAINT, AND, ALTERNATIVELY, TO STRIKE

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Defendant American Airlines, Inc. ("American") respectfully files this brief in
support of its motion for dismissal of Plaintiffs' Complaint (the "Complaint" or "Compl.") and,
alternatively, to strike pursuant to Rules 12(b)(6) and 12(f) of the Federal Rules of Civil
Procedure (the "Rules") (the "Motion"), and respectfully states as follows:

I. PRELIMINARY STATEMENT

Three airline pilots bring this action in an effort to supersede various provisions of
a labor agreement negotiated on their behalf by their union and their employer, American. These
provisions relate to the rules regarding pilots' "bidding" for various flight assignments, accrual
of sick leave, and accrual of vacation leave. Plaintiffs seek this extraordinary result based on
their theory that American's compliance with the labor agreement disadvantaged them because
they took military leaves of absence. Accordingly, they claim that under the Uniformed Services
Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301-4334 ("USERRA"), this Court should rewrite the labor agreement and award them injunctive and monetary relief.

The Court should dismiss Plaintiffs' claims because they are either moot or based upon an erroneous understanding of USERRA's requirements. Plaintiffs' claims based on bidding for flight assignments are moot because they are predicated on the bidding procedure contained in the 1997 labor agreement. Importantly, the provisions about which they complain were completely rewritten in the 2003 labor agreement which superseded the 1997 agreement. Because the injunctive relief sought to remedy this claim cannot benefit Plaintiffs, the claim is moot and must be dismissed.

Plaintiffs' claims regarding how military leave, jury duty, union service, and sick leaves are defined and treated under the labor contract contradict the plain words of the agreement, and do not lead to the comparability conclusion they ask the Court to draw. For example, the labor agreement does not consider a pilot's unavailability due to jury duty to be a "leave of absence." Because jury duty is not a leave of absence, it obviously cannot be viewed as "comparable" to military leave. Further, unlike military leave, a pilot's remuneration received from jury duty is deducted by American from the pilot's wages.

By the terms of the relevant labor contract, union service also is different from military leave in that leaves for union service are limited to a maximum of three employees at any one time. In addition, the union reimburses American for the wages and benefits paid to employees who are absent due to union service. By contrast, military leave is subject to no limitation on contemporaneous absence (nor could it be) and the military wages and benefits earned by employees who are absent on military leave are not offset to American.

Plaintiffs' analogy between military leave and sick leave also is contradicted by the terms of the labor contract. In this regard, Plaintiffs ignore the fact that the labor contract
treats sick leave (as defined by the contract) and military leave in identical fashion with respect to accrual of sick and vacation time. Accordingly, Plaintiffs’ assertion that American treats military leave in a less advantageous fashion than sick leave is wrong on its face.

As more fully set forth below, this Court cannot lightly set aside the terms of a collectively-bargained labor agreement. Longstanding national labor policy, as well as settled law under the Railway Labor Act, 45 U.S.C. § 181 (“RLA”), require that this Court honor and enforce such agreements. See, e.g., McKinney v. Missouri-Kansas-Texas R.R. Co., 357 U.S. 265, 272-73 (1958) (“The statute does not envisage overriding an employer’s discretionary choice by any such mandatory promotion. Nor does it sanction interfering with and disrupting the usual, carefully adjusted relations . . . .”). While USERRA has supremacy, its preemptive force and reach apply to labor agreements on a term-by-term basis, and only in the event of irreconcilable conflict. No clear and direct conflict exists here between the terms of the relevant USERRA provisions and the relevant labor contract. Accordingly, settled law requires that the Court harmonize application of the RLA and USERRA. See Aeronautical Indus. Dist. v. Campbell, 337 U.S. 521, 528 (1949) (“A labor agreement is a code for the government of an industrial enterprise and, like all government, ultimately depends for its effectiveness on the quality of enforcement of its code.”).

When USERRA and the RLA are harmonized, the Court will find that the remedies Plaintiffs seek would place employees returning from military leave in a better position than those returning from other comparable forms of leave. This Court can not penalize

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1 In requesting the Court to harmonize the RLA and USERRA at the pleading stage, American does not argue that the RLA preempts the Court’s jurisdiction. Cf. Fry v. Airline Pilots Ass’n, 88 F.3d 831, 836 (10th Cir. 1996) (preemption of “minor disputes” under RLA extend to any suit that is inextricably intertwined with consideration of the terms of the labor contract); Tice v. Am. Airlines, Inc., 288 F.3d 313, 315 (7th Cir. 2002) (ADEA claim rejected based on interpretation of the CBA benefit); Hogan v. Northwest Airlines, Inc., 880 F. Supp. 685, 691 (D. Minn. 1995) (same as to ADA claim). Rather, American contends that, in pleading their Complaint, Plaintiffs cannot ignore the plain terms of and definitions in the governing collective bargaining agreement.
American under USERRA for failing to accord such preferential treatment. See Monroe v. Standard Oil Co., 452 U.S. 549, 555 (1981). Rather, the policies underlying USERRA and longstanding practice is that employees returning to work following military service should be treated no worse than those returning from other forms of comparable leave. American’s labor agreement meets this USERRA requirement.

II. **STATEMENT OF FACTS**

The contractual rules that govern, inter alia, the pilots’ work periods, passenger aircraft certification, training and requalification, operating experience, required rest periods and medical fitness are largely dictated by the FAA. Other work rules and conditions of employment are subject to bargaining. As such, pilot collective bargaining agreements are the product of lengthy and intense negotiations between the Association and American, and, as set forth below, are intended to be comprehensive.

This case concerns benefits due pilots under the terms of a collective bargaining agreement -- to wit, the Agreement between American Airlines, Inc. and The Airline Pilots in the service of American Airlines, Inc., as represented by the Allied Pilots Association (the “Association”), dated May 5, 1997 (the “1997 CBA”) (App. at 1-308). Purportedly on behalf of a class of pilots, Plaintiffs make two claims for “injunctive” relief: (1) Pilots on active military

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2 Factual allegations in the Complaint must be accepted as true for purposes of this motion, even if discovery later reveals them to be false. See Manguno v. Prudential Prop., & Cas. Ins. Co., 276 F.3d 720, 725 (5th Cir. 2002). By filing this Motion, American does not intend to waive its right to contest the validity of Plaintiffs’ factual allegations. Further, to the extent Plaintiffs’ allegations contradict the terms of the relevant labor contract, the plain contractual terms control. Assoc. Builders, Inc. v. Ala. Power Co., 505 F.2d 97, 99-100 (5th Cir. 1974). Citations to the Appendix (“App.”) are to the page of the consecutively numbered Appendix filed concurrently herewith and incorporated herein by reference as if fully set forth herein.

3 As set forth in below, infra at IIIID, Plaintiffs’ Complaint fails to state a single “fact” allegedly occurring on or after May 1, 2003, the effective date of the Agreement between American and The Airline Pilots in the service of American Airlines, Inc., as represented by the Allied Pilots Association, dated May 1, 2003 (the “2003 CBA”) (App. at 309-733). As such, unless otherwise noted, the terms and conditions cited in the Statement of Facts and forming the basis of this Motion are found in the 1997 CBA.
duty allegedly were unable to bid for a flight schedule, but pilots conducting “other non-military activities and/or business” were (the “Trip Bidding Claim”), and (2) Pilots on active military duty allegedly did not accrue vacation and sick leave under the 1997 CBA, but pilots taking “comparable types of non-military leave” did (collectively, the “Vacation Accrual Claim”).

A. **The Computerized Bid Process Under the 1997 CBA.**

1. **Complex Computerized Bid Process.** Pilots’ monthly work schedules are determined through a complex computerized bid process based upon: (a) entitlement; and (b) preference. The entitlement portion consists of a pilot’s bid status as defined by each of five objective categories: seniority, base (trip origin), equipment (type of aircraft), division (domestic or international), and category (captain or first officer). See 1997 CBA §§ 4, 15, 17-19 (App. at 29-31; 68-78; 81-115); id. § 17.A.1-2 (App. at 81).

2. **Trip Selection Report.** Fifteen days prior to the start of each subsequent month, American forwards its pilots a report of all flying planned for the subsequent month and flown in the preceding month. See 1997 CBA § 17.X.4 (App. at 95). This monthly report also contains “trip selections” available for the coming month, defined to mean “any monthly regular, relief, supernumerary or reserve flying assignment.” Id. § 2.Z (App. at 23). Thereafter, but always on or before the twentieth of each month, pilots bid for a regularly scheduled, supernumerary, or reserve flight assignment to obtain their flight schedule for the subsequent month. Id. §§ 15, 17-19 (App. at 68-78; 81-115).


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4 The 1997 CBA sets forth a formula for calculating the “minimum number of monthly positions in each bid status.” See 1998 CBA § 17.X.1 (App. at 95).
with other regulatory and administrative requirements that are set forth in the 1997 CBA, pilots are able to bid for one or more regularly scheduled trips during the course of a month. 5 Id. § 18.A.1 (App. at 97). Pilots bidding for a regularly scheduled trip assignment may only select trips that are consistent with their individual bid status (or the bid status to which the pilot is temporarily assigned). Id. § 18.A.1 (App. at 97). 6

In addition to the monthly regularly scheduled trip selection assignment, pilots may bid for and hold a “supernumerary” assignment. See 1997 CBA § 18.B.3 (App. at 97-99). These supernumerary trips become available due to unplanned circumstances such as conflicts of schedule, illegality (i.e., scheduled pilot reaching FAA-maximum flight hours), non-scheduled charters, training, vacation, schedule overlaps, trip drops or other miscellaneous reasons. 7 See 1997 CBA § 18.B.3.a-b (App. at 97-98) (“Pilots who bid Supernumerary Trip Selections will be set aside to the extent of the number of Supernumerary Trip Selection awards anticipated by the Company during the bid awarding process and to the extent of the number anticipated by the Company to develop after the month starts.”). When the awarding process is complete, if the Company is unable to award as many supernumerary trip selections as anticipated, those pilots not awarded a supernumerary trip selection will be awarded reserve selections. Id.

A pilot who holds a regularly scheduled or supernumerary assignment is guaranteed minimum compensation equal to the greater of sixty-four hours (the minimum “guarantee”) or the pilot’s actual flying time, not to exceed the monthly seventy-five hour

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5 Individual “trips” are comprised of one or more “trip sequences,” defined in the 1997 CBA to mean “a published pairing of flying and/or deadheading consisting of two or more flight segments, which originates and terminates at a crew base.” Id. § 2.V (App. at 23).

6 For example, a DFW-based B-767 first officer may only bid for trips that have been assigned to B-767 trips.

7 Before supernumerary trips are built, a “schedule enhancement period” takes place. The schedule enhancement period permits pilots holding a regularly scheduled assignment to modify their monthly trip selection awards through a formalized “trip trade” process.
maximum permitted under the 1997 labor agreement. See 1997 CBA § 4.A (App. at 29); cf. id. § 15.A.1 (App. at 68). A pilot holding a regularly scheduled or supernumerary assignment shall receive not less than five separate periods of forty-eight consecutive hours free from all duty with American. Id. § 15.D.1 (App. at 73).

4. **Reserve Trip Selection.** In addition to the monthly regularly scheduled and supernumerary trip selections, pilots may hold a "reserve" assignment. See 1997 CBA § 18B.2 (App. at 97). These reserve assignments generally are held by pilots who voluntarily choose a reserve assignment, decline to bid for a supernumerary assignment, or otherwise cannot successfully bid for a regular trip schedule due to (typically) low seniority relative to the pilot’s colleagues. A pilot who holds a reserve assignment is guaranteed compensation equal to the greater of seventy hours per month (the minimum "guarantee") or the pilot’s actual flying time, but will be compensated the full amount of this guarantee regardless of the pilot’s actual flight time, so long as he is available to fly on each of his scheduled reserve days. See id. § 4.B (App. at 29).

As is the case with regularly scheduled and supernumerary assignments, a pilot holding a reserve assignment is assigned twelve to thirteen “duty free” days, during which the pilot is free from all duty with American. See id. § 15.D.2.b.

**B. Trip Bidding While a Pilot is Active with the Military Under the 1997 and 2003 CBAs.**

5. **1997 CBA.** Supplement R to the 1997 CBA, entitled “Military Leaves of Absence,” states that a pilot returning from military leave “before the close of trip selection” is

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8 Pursuant to Supplement L, there also are so-called “Flexible Months” when the monthly maximum may be increased to seventy-seven or seventy-eight hours. Further, pursuant to Supplement M, there also are pre-planned times when “Overtime Flying” is permitted, and the monthly maximum is increased to seventy-nine or eighty hours.

9 As in the case of a regularly scheduled or supernumerary flight schedule, there are Flexible Months and instances when Overtime Flying is permitted -- both of which may increase this reserve guarantee. See supra n.6.

6. **2003 CBA.** The relevant provision of Supplement R to the 1997 CBA was modified in the 2003 CBA. Under the modified 2003 CBA, pilots taking military leave during the bidding process may still participate in the flight bidding process, even if they have not returned from active duty with the military before the close of the bidding process. See 2003 CBA § 11.E.11.b (App. at 371) (“A current and qualified pilot who will be available on the first day of the next contractual month **will be eligible to bid for a trip selection.**”) (emphasis added)).

C. **Plaintiffs’ Trip Bidding Allegations.**

7. **Plaintiffs’ Trip Bidding Allegations.** In support of their Trip Bidding Claim, Plaintiffs make the following general allegation:

Pursuant to the Collective Bargaining Agreements, American Airlines has allowed pilots who are “in service” to bid on flight schedules for the upcoming month based on their seniority status. Pilots who are considered to be on “leaves of absence” may not bid on flight schedules.

Pls.’ Compl. ¶ 10.

8. **Plaintiff Madson.** Plaintiffs’ Trip Bidding Claim is predicated upon allegations pertaining to Plaintiff Madson only. Specifically, Plaintiffs’ Complaint alleges that:

(1) Madson took a military leave for twenty days in December 2002, during which the bidding process took place as scheduled, Pls.’ Compl. ¶ 27;

(2) While on leave, Madson was not permitted to participate in the trip selection bidding process, id. ¶ 29;

(3) As an alleged result, Madson was required to hold a reserve assignment for January 2003 in lieu of a scheduled line, and therefore be compensated in accordance with the minimum guarantee for pilots holding a reserve assignment, id. ¶ 30; and
If he had been permitted to bid on a flight schedule, Madson would have bid for and been able to hold a regularly scheduled assignment for January 2003 with hours of paid flight time totaling twenty-seven hours more than the minimum guarantee he received under a reserve assignment.\(^\text{10}\) Id. ¶ 31.

D. **Plaintiffs’ Vacation Accrual Allegations.**

9. **Plaintiffs’ Vacation Accrual Claim.** Plaintiffs allege that American permitted pilots taking “comparable leaves” -- namely, jury “leave,” union service “leave” and sick “leave” -- to accrue vacation and sick days while pilots on military leave did not:

> Upon information and belief, in 2001 and 2002, American Airlines did not deny pilots who took comparable types of non-military leave, including but not limited to **sick leave, union service leave or jury duty leave**, the ability to . . . earn other employment benefits, including earned paid vacation time and earned sick leave. Similarly, American Airlines did not deny to pilots who conducted other non-military activities and/or business on days when they were not scheduled to fly, but were not technically considered to be “on leave,” the ability to . . . earn other employment benefits, including earned paid vacation time and earned sick leave.

Pls.’ Compl. ¶ 14 (emphasis added); id. ¶ 35 (same allegation as to “sick leave, union service leave or jury duty leave”); id. ¶ 38 (“The class members are entitled to injunctive relief to end American Airlines’ acts and practices that have treated pilots who have taken military leave differently and less favorably than pilots who have taken comparable types of non-military leave.”).

E. **Jury Duty, Sick Leave Not in Excess of Accrued Sick Leave, and Union Service under the 1997 CBA**

10. **Jury Duty and Sick Leave Not in Excess of Accrued Sick Leave Are Not Considered Leaves of Absence under The 1997 CBA.** The 1997 CBA contains a specific section

\(^{10}\) Under the terms of the 1997 CBA, assuming Madson held a reserve assignment for January 2003, he should have received a minimum guarantee of seventy hours. See 1997 CBA § 4.B (App. at 29). Since the contractual monthly maximum is seventy-five hours, it is unclear (and Plaintiffs’ Complaint does not address) how Plaintiff Madson would have been entitled to earn compensation equal to twenty-two hours more than the contractual maximum.
devoted to the terms and conditions that govern “Leaves of Absence.” See 1997 CBA § 11
(App. at 52-53). Separate and apart from the Leaves of Absence section, the 1997 CBA also
contains a section devoted to four unique circumstances when the Association and American
agree that a pilot is “Relieved of Flying Duties” but may nonetheless be entitled to compensation
(directly or indirectly) from American. See § 5. These four circumstances are not considered to
be Leaves of Absence under the 1997 CBA (App. at 32-33). Rather, they are instances in which
specified and distinct provisions govern the pay, credit, and schedule availability of the
individual pilot:

SECTION 5
PAY AND CREDIT
PILOT RELIEVED OF FLYING DUTIES

... The pay provisions of this Section shall apply to a pilot who is
relieved of regular flying duties for any of the following reasons:
1. **Sick leave not in excess of accrued sick leave**, as is
provided in Section 10 of the Agreement,
2. To engage in a training program other than training on a
regular day off,
3. For vacation and for the duty free forty-eight (48) hour
period preceding the selection portion of such vacation, and
4. **To serve as a juror** in response to official summons.


11. The 1997 CBA Further Differentiates Between Jury Duty and Military
Leave. In addition to treating jury duty as a circumstance when a pilot is Relieved of Flying
Duties (under Section 5) rather than a Leave of Absence (under Section 11), the 1997 CBA
requires any remuneration received by the pilot for performing jury service to be deducted from
the pilot’s monthly compensation from American. See § 5.G (App. at 33) (“A pilot paid for jury
duty ... will have deducted from such pay the amount of remuneration the pilot received for
service as a juror”). There is no similar remuneration provision for pilots on military leave.
12. **The 1997 CBA Differentiates between Union Service and Military Leave.**

Union service or "Duty with the Association" is addressed in the section governing Leaves of Absence. See § 11.E (App. at 53) ("Duty with the Association"). In contrast to the military leave circumstance, the 1997 CBA requires the Association to pay for the pilot’s wages and benefits, including “sick time and vacations,” either directly or through reimbursement to American. The contract also limits the number of pilots who may be absent on such leaves at any given time to three in number:

**Duty with the Association**

A pilot covered by this Agreement, who is providing service for the Association on a full time basis, shall be granted a leave of absence for the duration of such tour of duty *provided that the number of pilots on such leaves shall not at any time exceed three (3) in number*. A pilot, who is granted any such leave of absence, shall continue to accrue seniority and length of service for pay purposes . . . In lieu of a full time leave of absence, such pilot may elect to remain on [American’s] payroll, in which case the Association will reimburse [American] for all items such as salary pensions, insurance, sick time and vacations.

*Id.* (App. at 53) (emphasis added).

F. **Plaintiffs’ Complaint Does Not Distinguish Between Types of Military Leave and is Ambiguous as to Sick Leave**

13. **The 1997 CBA.** The 1997 CBA provides different benefits depending upon, *inter alia*, the duration of a pilot’s military leave, including:

- **Military Leave for Four or Less Consecutive Days, the Weekend Drill:** Under circumstances where a pilot is on military leave for four or less consecutive days, the Association and American have agreed that the pilot’s guarantee will not be reduced unless: (1) the pilot holds a regularly scheduled assignment; and, (2) as a result of the military leave, the pilot misses his scheduled trip(s) and refuses all proffers to make up flying. See 1997 CBA Supp. R.C.1-2 (App. at 231);

- **Military Leave for More than Four Consecutive Days, but Less than Necessary to Go Off-Payroll, the Annual Two Week Drill:** Under circumstances where a pilot is on military leave for more than four consecutive days, but less than necessary to go off payroll, the pilot is required to meet the monthly 15-day “in service” requirement for pay and sick leave accrual. See *id.* §§ 9.A.3, 10.D (App. at 47; 50); and
• **Military Leave for an Extended Duration:** The 1997 CBA permits pilots to remain on active duty with the military for a period not to exceed a cumulative total of five years. See *id.* § 11.D.2 (App. at 53). Under circumstances where a pilot is on military leave for a duration that requires him or her to go off payroll, the Association and American have agreed that vacation will continue to accrue until such leave equals ninety cumulative days in a calendar year. See *id.* § 9.E (App. at 49).

14. **Plaintiffs’ Complaint Ignores these Distinctions.** Plaintiffs’ Complaint makes no distinction whatsoever between the types of military leave available, and appears to contend that *all* military leaves of any duration are themselves comparable *and, in turn,* that all military leaves are comparable to “sick leave, union service leave, and jury duty leave.” See Pls.’ Compl. ¶¶ 13-14, 33, 38.11

15. **Plaintiffs’ Complaint Is Ambiguous as to “Sick Leave”**. As discussed, a pilot on “sick leave not in excess of accrued sick leave” is considered to be Relieved of Flying Duties, rather than on a Leave of Absence. In addition, the 1997 CBA specifically defines the term “sick leave,” in the Leave of Absence section as commencing only “after a pilot has exhausted accrued sick leave credits.” 1997 CBA § 11.C.1 (App. at 52-53). Important for purposes of this Motion, a pilot on sick leave, as defined in the 1997 CBA, is treated the same as a pilot on military leave for purposes of vacation and sick leave accrual. See *id.* §§ 9.A.3, E, 10.A (App. at 47, 49; 50).

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11 Plaintiffs’ Complaint is deficient in that it fails to distinguish between military leaves of varying duration and appears to contend that military leaves of *any* duration are not only comparable to each other, but also comparable to jury duty, sick leave not in excess of earned sick leave, and Duty with the Association. Such a broad brush disregards the 1997 CBA, which memorializes an agreement to afford different benefits to pilots depending upon, *inter alia,* the duration of the military leave. See *id.* Further, as recognized by the Department of Labor in its Final Rules, a leave of short duration is not comparable to one of extended duration. See U.S.S.E.R.A., 70 Fed. Reg. 75246, 75304 (Dec. 19, 2005) (to be codified at 20 C.F.R. § 1002.150(b) (“For instance, a two-day funeral leave will not be ‘comparable’ to an extended leave for service in the uniformed service.”)). This pleading deficiency also fails to appreciate that many pilots on certain categories of military leave do continue to accrue vacation and sick leave.
III. ARGUMENT AND AUTHORITIES

A. The Applicable Standard of Review Pursuant to Rules 12(b)(6) and 12(f) Requires Dismissal of Plaintiffs’ Complaint.

Rule 12(b)(6) permits dismissal at the pleading stage when a plaintiff “fail[s] to state a claim upon which relief can be granted.” In reviewing this Motion, the Court must accept the Complaint’s allegations as true; however, mere “conclusory allegations and unwarranted deductions of fact are not admitted as true.” Assoc. Builders, Inc. v. Ala. Power Co., 505 F.2d 97, 99-100 (5th Cir. 1974); accord; Manguno v. Prudential Prop. & Cas. Ins. Co., 276 F.3d 720, 725 (5th Cir. 2002). Furthermore, when a document “pertinent to the complaint” “contradicts an assertion made in the complaint,” dismissal is warranted. Sheppard v. Tex. Dept. of Transp., 158 F.R.D. 592, 595 (E.D. Tex. 1994); Jones v. Alcoa, Inc., 339 F.3d 359, 363 (5th Cir. 2003).

Pursuant to Rule 12(f) this Court should strike any “matter” in the Complaint that is “redundant, immaterial, impertinent, or scandalous.” Id. (emphasis added).

B. Plaintiffs Lack Standing to Pursue, and would not Benefit from, Their Prospective Trip Bidding Claim.

To demonstrate standing to seek injunctive or declaratory relief, Plaintiffs are required to satisfy the following three elements: (1) the plaintiff must have suffered an injury in fact; (2) there must be a causal connection between the injury suffered and the conduct complained of; and (3) “it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’” Farm Labor Org. Comm. v. Ohio State Highway Patrol, 95 F. Supp. 2d 723, 730 (N.D. Ohio 2000) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). A plaintiff seeking injunctive relief cannot predicate his or her claim for injunctive relief upon allegations of past injury -- he or she must demonstrate a sufficient likelihood that he or she will be injured in the future. See City of Los Angeles v. Lyons, 461 U.S. 95, 105-06 (1983); accord. Whitmore v. Arkansas, 495 U.S. 149, 158 (1990) (“Allegations
of possible future injury do not satisfy the requirements of Art. III.”) (citations omitted). As the Supreme Court has noted, “it is possible to have standing to assert a claim for damages to redress past injury, while, at the same time, not have standing to enjoin the practice that gave rise to those damages. This may be so even if the practice is likely to continue.” Farm Labor, 95 F. Supp. 2d at 730 (citing Lyons, 461 U.S. at 105 (standing to remedy past harm “does nothing to establish a real and immediate threat that he again” would be harmed)).

In support of their Trip Bidding Claim, Plaintiffs allege that pilots on military leave “may not bid on flight schedules” pursuant to the “Collective Bargaining Agreements.” Pls.’ Compl. ¶ 10; accord id. ¶¶ 40, 42. This is flatly contradicted by the plain language of the 2003 CBA, which permit pilots on military leave to participate in the bidding process even if they are not active with American at the time they submit a bid. See 2003 CBA § 11.E.11.b (App. at 371) (“A . . . pilot who will be available . . . on the first day of the next contractual month will be eligible to bid for a trip selection.”) (emphasis added). Plaintiffs have not (and cannot) allege facts demonstrating otherwise, and, as such, their conclusory and contradictory allegation must “not [be] admitted as true.” Assoc. Builders Inc., 505 F.2d at 99-100.

Shorn of this conclusory and contradictory allegation, the gravamen of Plaintiffs’ Trip Bidding Claim is revealed to be, if anything, the 1997 CBA only. But, because the 2003 CBA forestalls Plaintiffs’ ability to establish a “real or immediate threat that [they] will be wronged again,” Plaintiffs do not have standing to litigate, and would not benefit from, their prospective claim for injunctive relief. Lyons, 461 U.S. at 111. Plaintiffs do not make an independent claim on behalf of Plaintiff Madson for money damages as a result of past injury.
Consequently, based upon Plaintiffs’ choice of remedies and this pleading failure, dismissal is proper with respect to Plaintiffs’ injunctive Trip Bidding Claim in its entirety.¹²

C. Plaintiffs’ Vacation Accrual Claim Disregards the Terms of the 1997 CBA.

1. Because no direct conflict exists between the RLA and USERRA, the statutes should be harmonized and the 1997 CBA respected.

The RLA provides an intricate extra-judicial mechanism that circumscribes judicial involvement in disputes arising out of collective bargaining agreements, Congress deliberately intended to foster judicial restraint in the interpretation of benefits provided under a collective bargaining agreement.¹³ See 45 U.S.C. 151. The Supreme Court has repeatedly confirmed the significance of the collective bargaining relationship to a successful work environment. For example, in Elgin v. Burley, 325 U.S. 711, 751 (1945), Justice Frankfurter explained that:

[O]n negotiating collective agreements, the intimacy of relationship between the leaders of the two parties shaped by a long course of national, or at least regional, negotiations, the intricate technical aspects of these agreements and the specialized knowledge for which their interpretation and application call, the practical interdependence of seemingly separate collective agreements--these and similar considerations admonish against mutilating the

¹² As discussed, Plaintiffs have not pleaded their Trip Bidding Claim as one for damages as a result of Plaintiff Madson’s alleged past injury. If Plaintiffs are given the opportunity to replead their Trip Bidding Claim as one for prospective relief, American specifically reserves its right to seek dismissal on the merits. Rather than discriminate against pilots taking military leave, the 2003 CBA provides pilots on military leave greater bidding rights than pilots on other Leaves of Absence, such as sick leave. Compare 2003 CBA § 11.E.11.b (App. at 371) (pilots on military leave may bid) with id. § 11.C.3 (App. at 367) (“Reinstatement rights of any pilot on a leave of absence shall not be exercised while such pilot is on such leave of absence.”), and id. § 11.D.2 (App. at 368) (“A pilot returning from any leave due to sickness or injury shall assume a bid status to which entitled by seniority upon return to active flying duty.”). Section 4312 creates a right to reemployment after a period of military service, and bidding rights apply to periods when a pilot is “in service” only. Accordingly, through their Trip Bidding Claim, Plaintiffs appear improperly to seek “preferential” treatment to those pilots that are not in “service.” See Monroe, 452 U.S. at 555 (Congress did not intend employers to provide “special benefits” or “preferential” treatment to military reservists).

¹³ The RLA was made applicable to disputes between airline carriers and employees in 1936. 45 U.S.C. § 181; see also Trans World Airlines, Inc. v. Sineroppi, 887 F. Supp. 595, 603 n.7 (S.D.N.Y. 1995); accord 1997 CBA Preamble (App. at 4).
comprehensive and complicated system governing railroad
industrial relations by episodic utilization of inapposite judicial
remedies.

Id. (Frankurter, J., dissenting); Campbell, 337 U.S. at 528 ("A labor agreement is a code for the
government of an industrial enterprise and, like all government, ultimately depends for its
effectiveness on the quality of enforcement of its code."); see also Pan Am. World Airways, Inc.
v. Int'l Bhd. of Teamsters, 275 F. Supp. 986, 993 (S.D.N.Y. 1967) ("It is plain . . . that under the
statutory scheme of the [RLA] Congress has circumscribed the role of the courts.").

As discussed, Plaintiffs' Complaint alleges that American improperly permitted
pilots taking "comparable leaves" -- namely, jury "leave," union service "leave" and sick "leave"
-- to accrue vacation and sick days when pilots on military leave did not. Pls.' Compl. ¶¶ 14, 35,
38. Yet in making these claims, Plaintiffs unilaterally have displaced the plain terms of their
labor contract. When applied and enforced, these terms contradict Plaintiffs' claims and defeat
the comparability conclusion Plaintiffs seek to make. For example, as set forth in Section 5 of
the 1997 CBA, pilots on "jury duty" and "sick leave not in excess of accrued sick leave" are not
on Leaves of Absence, but rather are Relieved of Flying Duties under circumstances that trigger
different pay, credit, and schedule availability terms. See discussion, supra at II E-F. In the
same way, the Association and American require that a pilot receiving remuneration for
performing jury duty deduct this amount from monthly wages. Id. Although disregarded by
Plaintiffs' Complaint, the terms of the 1997 CBA expressly distinguish between Duty with the
Association and military leave in that the Association must reimburse American Airlines for a
pilot's monthly wages and benefits -- including accrued vacation and sick leave -- when the pilot
is on such leave and also limit the number of pilots who may be on leave for Duty with the
Association to three in number. See id. Finally, Plaintiffs' Complaint refers to "sick leave"
without recognizing that the labor agreement addresses two categories of sick leave -- "sick leave
not in excess of accrued sick days” under Section 5 and “sick leave” under Section 11 -- or acknowledging that the 1997 CBA treats pilots on “sick leave” as defined by Section 11 identically to pilots on military leave for purposes of vacation and sick accrual. See id.

In addition to the RLA requirement that terms and standards in a collective bargaining agreement should be honored and enforced, courts are instructed not to interpret collective bargaining agreements in such a way as to render terms therein superfluous or meaningless. See Aeronautical Indus. Dist. v. United Techs. Corp., 230 F.3d 569, 576 (2d Cir. 2000) (“[A]s with all contracts, courts should attempt to read CBAs in such a way that no language is rendered superfluous.”). Thus, Plaintiffs’ disregard for the terms of the operative labor contract prompts the Court to resolve a pivotal issue regarding the interaction between USERRA and the RLA and whether the applicable section of USERRA permits Plaintiffs to supplant the specific terms of the labor contract.

Guidance comes from the venerable canon of statutory construction that requires the Court, in the absence of a “direct conflict” between two federal statutes, to read the statutes in a manner that “gives effect to each.” Pittsburgh & Lake Erie R.R. Co. v. Ry. Labor Executives’ Ass’n, 491 U.S. 490, 509-11 (1989); accord Bhd. of R.R. Trainmen v. Chi. River & Ind. R.R. Co., 353 U.S. 30, 40 (1957) (accommodating RLA and Norris-LaGuardia Act so that “obvious purpose in the enactment of each is preserved”); Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 282 (1946) (“A decision on the merits necessarily involved a reconciliation between the [Selective Training and Service Act] and the collective bargaining agreement or, if it appeared that they conflicted, an adjudication that one superseded the other.”) (emphasis added). In explaining this rule, the Supreme Court has advised:

“[C]ourts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed
congressional intention to the contrary, to regard each as effective.”


As discussed below, a review of the plain language of the applicable USERRA provision reveals that there is no direct conflict between the RLA’s goal of labor-management cooperation, and USERRA’s intended protection of civilian employees who perform military service. Thus, the terms and provisions of a collectively bargained labor agreement are entitled to deference in the form of harmonious interpretation. When USERRA and the RLA are harmonized, the Court will no doubt find that not only are the Plaintiffs’ rights in relation to military leave fully vindicated by the CBA, but the remedies Plaintiffs seek would place those returning from military leave in a better position relative to those returning from other comparable forms of leave. USERRA expressly negates the interpretation that employees who take military leave are to be treated preferentially. See Rogers v. City of San Antonio, 392 F.3d 758, 768 (5th Cir. 2004) (the legislative history “necessarily indicated an intent to codify Monroe’s ‘equal, but not preferential’ interpretation”).

2. Section 4316 directs the Court to the 1997 CBA’s definition of “Leave of Absence,” and settled law does not permit Plaintiffs to disregard such definition.

“In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue, judicial inquiry in to the statute’s meaning, in all but the most extraordinary circumstance, is finished.” Perrone v. Gen. Motors Acceptance Corp., 232 F.3d 433, 435 (5th Cir. 2000) (quoting Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992)). The plain language of USERRA evinces a congressional intent that USERRA not supercede the RLA absent a conflict between operation of
the RLA and a specific provision within USERRA.\textsuperscript{14} Section 4302 is clear on this point:

(a) \textbf{Nothing in this chapter shall supersede, nullify or diminish any Federal or State law} . . . that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.

(b) \textbf{This chapter supersedes any State law} . . . that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter. . .

38 U.S.C. § 4302 (emphasis added). The above-quoted does not appear in USERRA’s predecessor statute, and the corresponding omission from Section 4302 of the word “Federal” in subpart (b) of this new provision implies a congressional intent that USERRA not, in fact, supersede federal law (obviously including the RLA).\textsuperscript{15}

Although not referenced in Plaintiffs’ Complaint, for the reasons set forth above, Plaintiffs necessarily bring their Vacation Accrual Claim pursuant to USERRA Section 4316(b)(1)(B), which states, in relevant part, that:

[A] person who is absent from a position of employment by reason of service in the uniformed services shall be . . . 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 . . . .

\textsuperscript{14} There are circumstances involving rights and benefits provided by statute that are wholly independent of and in addition to the collective bargaining agreement. See, e.g., Saridakis v. United Airlines, 166 F.3d 1272 (9th Cir. 1999) (ADA claim); Deneen v. Northwest Airlines, Inc., 132 F.3d 431 (8th Cir. 1998) (Pregnancy Discrimination Act claim); Munford v. CSX Transp., 878 F. Supp. 827 (M.D.N.C. 1994), (Title VII and § 1981). In this case, Plaintiffs’ substantive entitlement to benefits (e.g., vacation and sick leave accrual) exists, if at all, solely by virtue of the terms and conditions of the 1997 CBA. Consequently, Plaintiffs’ Section 4316 claim is not analogous to this line of cases.

\textsuperscript{15} USERRA’s predecessor statutes, such as the Selective Training and Service Act of 1940, 50 U.S.C. 301, et seq., and the Vietnam Era Veterans’ Readjustment Assistance Act of 1974, 38 U.S.C. §§ 2021-2027 (later recodified at 38 U.S.C. §§ 4301-4307 and commonly referred to as the Veterans’ Reemployment Rights Act), do not appear to include this or a similar section governing the relevant statute’s relationship to other federal law, thereby further demonstrating Congress’ intent that USERRA not supersede other federal law.
See 38 U.S.C. § 4316(b)(1)(B) (emphasis added). Neither “furlough” nor “leave of absence” are defined within USERRA, and thus the plain language of Section 4316 directs the Court to an employer’s own definition of non-military “furloughs or leaves of absence.” Id.; accord H.R. Rep. No. 103-65(I), as reprinted in 1994 U.S.C.C.A.N. 2449, 2466-67 (referring to an employer’s “non-military leaves of absence” and whether “the employer policy or practice varies among various types of non-military leaves of absence”). Were the definition of “leave of absence” in Section 4316 meant to have independent meaning and significance apart from the terms of a “relevant contract, agreement, policy, practice or plan,” then plainly Congress would have either included clarifying language in Section 4316 or included “furlough or leave of absence” in USERRA’s definitions section. See 38 U.S.C. § 4303; cf. Graham v. United States, 96 F.3d 446, 450 (9th Cir. 1996) ([I]nterpretation . . . is a process whereby we figure out the meaning of the words that are actually there; interpreting the sounds of silence is a euphemism for rewriting.”) (Kozinski, J., dissenting). Accordingly, where, as is the case with the three relevant pilots, affected employees are members of a collective bargaining unit, the definitions and terms applicable to “furlough” and “leave of absence” are to be found in the relevant labor contract.

Instructively for purposes of construing USERRA, the Supreme Court has previously addressed the interaction between the reemployment provision of the Selective Training and Service Act (the “STSA”) and “seniority” rights as defined by a collective bargaining agreement. See Campbell, 337 U.S. 521.16 In Campbell, a provision in the collective bargaining agreement.

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16 Both the House and Senate Reports stress that, unless otherwise inconsistent with USERRA, the “extensive” body of case law developed under USERRA’s predecessor statutes remains “in full force and effect.” See, e.g., S. Rep. 103-158, 1993 WL 432576, at *40 (Oct. 18, 1993) (“Because the current VRR law has been so successful for so long, the Committee, as did the House Committee in its report, stresses its intention that the extensive body of case law that has evolved over the past five decades, to the extent that it is consistent with the provisions of the Committee bill, would remain in full force and effect.”).
bargaining agreement guaranteed retention in the event of layoffs to employees who served as union chairmen *regardless of their length of service with the company.* See id. at 524. After being laid off within a year of his reemployment after military service, the employee sued his employer, claiming that the company’s retention of union chairmen with lesser “seniority” violated the express statutory grant of reemployment “without loss of seniority.” See id. The district court found for the employee, holding that the STSA’s reemployment provision trumped the labor agreement, and required the employer to abide by seniority, so far as veterans are affected. The court of appeals affirmed. See id. at 525. Reversing, the Supreme Court held that the collective bargaining agreement’s definition of “seniority” and the limitations thereon, were entitled to deference:

In providing that a veteran shall be restored to the position he had before he entered the military service “without loss of seniority,” *Section 8 of the Act uses the term “seniority” without definition. It is thus apparent that Congress was not creating a system of seniority but recognizing its operation as part of the process of collective bargaining.*

... Of course, the Selective Service Act restricts a readjustment of seniority rights during the veteran’s absence to the disadvantage of the veteran. But it would be an undue restriction of the process of collective bargaining (without compensating gain to the veteran) to forbid changes in collective bargaining arrangements which secure a fixed tenure for union chairmen ... .

Id. at 527, 529 (emphasis added); cf. *Fishgold*, 328 U.S. at 287 (“Thus, when Congress desired to cover the contingency of a layoff, it used apt words to describe it.”).

In *Moe v. Eastern Air Lines Inc.*, 246 F.2d 215 (5th Cir. 1957), the Fifth Circuit reached the opposite result, declining to defer to the collective bargaining agreement therein. In contrast with *Campbell*, however, the Fifth Circuit found a “direct conflict” between the relevant collective bargaining agreement’s treatment of a copilot during his first year of employment and the Universal Military Training and Service Act’s treatment of “nontemporary” employees: “[I]n
the case of a conflict between the terms of the Universal Military Training and Service Act and the terms of a private contract, the Act must control.” Id. at 221; cf. McKinney, 357 U.S. at 268 (no direct conflict since statute “accepts that [seniority system] set forth in the collective bargaining agreement”); id. at 272-73 (“The statute does not envisage overriding an employer’s discretionary choice by any such mandatory promotion. Nor does it sanction interfering with and disrupting the usual, carefully adjusted relations . . .”).

The dispute before the Court is materially similar to Campbell, but, given Section 4316’s plain reference to a “leave of absence under a contract,” it is even more apparent that the definition of Leave of Absence in the labor contract controls the application of USERRA with respect to that term.

3. **USERRA does not preclude the Association and American Airlines from assigning different benefits to dissimilar leaves of absence.**

The “comparable form of leave” test does not appear in the statutory text of Section 4316. Rather, the Department of Labor offered regulatory guidance regarding the interpretation of Section 4316:

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.


Consistent with congressional intent that the relevant labor contract’s definition of “leave of absence” be honored, absent a discriminatory purpose, nothing in the text or purpose of Section 4316 precludes a union and employer from circumscribing obligations due and benefits

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17 USERRA authorizes the Department of Labor to prescribe implementing regulations. See 38 U.S.C. § 4331(a).
derived from dissimilar categories of absence from work. In this regard, the Association and American are permitted under the RLA to agree that certain absences from work -- such as Duty with the Association and jury duty -- are not comparable to military leave. Here, the terms of the labor contract plainly differentiate between these absences because, in the case of Duty with the Association, such absence requires the Association to reimburse American Airlines for payment of monthly wages and benefits, and, in the case of jury duty, such absence requires that any remuneration received for performing such duty be deducted from the pilot's monthly wages. Similarly, the Association and American are permitted under the RLA to agree that sick leave, as defined by the labor contract, is comparable to military leave. Harmonizing these statutes in accordance with settled law, the terms of the labor agreement must be respected and permitted to operate in their intended manner. See Campbell, 337 U.S. at 526; Dougherty v. Gen. Motors Corp., 176 F.2d 561, 564 (3d Cir. 1949) (“However desirable and feasible some modification of the provision by the parties themselves might have been, we cannot impose as a legal requirement a vacation provision other than that on which the bargainers agreed, as long as the intent and operation do not place veterans in a position inferior to that of non-veterans on leave of absence.”). In comparing military leave to “union service leave” and “jury duty leave” in their Complaint, Plaintiffs omit key contractual differences between jury duty (which is not a “leave”), Duty with the Association, and military leave that make these “leaves” not comparable as a matter of law. These differences are central to Section 4316’s comparability analysis, and, when respected, render Plaintiffs’ conclusory allegations of comparability hollow.

In deciding a similar dispute under the Selective Training and Service Act, congressional silence regarding a returning serviceman’s “right to work” again compelled the Supreme Court to defer to the terms of the collective bargaining agreement. See Fishgold, 328 U.S. at 289. Upon returning to civilian employment after war, and after being laid off for nine
days soon thereafter, the plaintiff in Fishgold brought suit against his employer, claiming that non-veteran employees were receiving preference because of their “higher shop seniority” in violation of one of USERRA’s statutory predecessors. Id. at 280. Instructively, the Supreme Court framed the issue as “whether there was a conflict between the collective bargaining agreement and the [USERRA predecessor] and if so, which one prevailed.” Id. at 282.

In answering the question, the Supreme Court looked to the plain language and legislative history of the relevant statute in order to discern whether Congress intended that employees returning from military leave be given a right to work. See id. at 289 (“We have searched the legislative history in vain for any statement of purpose that the protection accorded the veteran was the right to work when by operation of the seniority system there was none then available for him.”). Finding none, the Supreme Court deferred to the duly negotiated seniority system contained in the relevant collective bargaining agreement. Id. In so doing, the Court explained:

Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran’s rights under those systems and to protect him against loss under them by reason of his absence. There is indeed no suggestion that Congress sought to sweep aside the seniority system. What it undertook to do was to give the veteran protection within the framework of the seniority system . . . .

Id. at 288 (emphasis added).

As in Fishgold, nothing in Section 4316 evidences an intent by Congress to rewrite a collectively bargained labor agreement, particularly on a topic such as “comparable leave” that it never specifically addressed or codified. Plaintiffs’ utter disregard for clear contractual differences associated with types of absences they claim are “comparable” to military leave is without legal basis.
D. **Allegations Related to the 2003 CBA. Alternatively, Should be Stricken.**

Conclusory allegations and conclusions of fact masquerading as facts themselves are not to be considered by the Court. See *Manguno*, 276 F.3d at 725.

Disregarding this rule, Plaintiffs’ Complaint includes a number of allusions to and tautological statements regarding generalized wrongdoing under the 2003 CBA. See Pls.’ Compl. ¶¶ 9-11, 13, 33. Yet, the Complaint is bereft of “facts” that allegedly occurred after the effective date of the 2003 CBA. Indeed, the allegations supporting the claims brought by Woodall, McMahon and Madson are all purported to have occurred before the effective date of the 2003 CBA. Compare id. ¶ 12-14 (alleged conduct “from 2001 through 2002”), with id. ¶¶ 15-19 (alleged denial of vacation and sick leave accrual “[i]n 2001”), id. ¶¶ 20-24 (alleged denial of vacation and sick leave accrual in February 2001), and ¶¶ 25-32 (alleged denial of sick leave accrual and the opportunity to bid on a trip selection assignment in December 2002).

Accordingly, Plaintiffs’ veiled references to and conclusory statements regarding generalized wrongdoing under the 2003 CBA are immaterial to the Plaintiffs’ claims for relief and, at a minimum, should be stricken from the Complaint.

IV. **CONCLUSION**

American seeks dismissal of both categories of claims brought by Plaintiffs; alternatively, American seeks an order striking as immaterial all references to and conclusory statements regarding purported wrongdoing allegedly occurring since ratification of the 2003 CBA. American seeks any further relief to which it is justly entitled.
Dated: April 12, 2006

Respectfully submitted,

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AMERICAN AIRLINES, INC.
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by
telecopy, and by certified mail, return receipt requested, to all counsel of record this 12th day of
April, 2006.

[Signature]
Michelle Hartmann
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MARK WOODALL,
MICHAEL P. McMAMHON,
PAUL J. MADSON,
Individually and on behalf of a class of all
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Plaintiffs,

v.

AMERICAN AIRLINES, INC.,

Defendant.

Civil Action No. 3:06-CV-0072-M
Judge Barbara M.G. Lynn

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR DISMISSAL OF
PLAINTIFFS' COMPLAINT, AND, ALTERNATIVELY, TO STRIKE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MARK WOODALL,
MICHAEL P. McMAHON,
PAUL J. MADSON,
Individually and on behalf of a class of all
similarly situated persons,

Plaintiffs,

v.

AMERICAN AIRLINES, INC.,

Defendant.

Civil Action No. 3:06-CV-0072-M
Judge Barbara M.G. Lynn

PLAINTIFFS’ OPPOSITION TO DEFENDANT’S MOTION FOR DISMISSAL OF
PLAINTIFFS’ COMPLAINT, AND, ALTERNATIVELY, TO STRIKE

I. INTRODUCTION

Plaintiffs are military pilots who are or were employed by defendant American Airlines,
Inc. (“defendant” or “American”). See Plaintiffs’ Complaint (“Comp.”) ¶¶ 33-38. They bring
this action pursuant to Fed. R. Civ. P. 23 on behalf of themselves and others similarly situated.
Plaintiffs’ complaint alleges that American has violated the Uniformed Services Employment
and Reemployment Rights Act (“USERRA”), 38 U.S.C. § 4301, et seq., by denying them certain
benefits of employment while on military leave that it provides to pilots on comparable forms of
non-military leave. See Comp. ¶¶ 8-14. Specifically, plaintiffs allege that, while on military
leave, they have not been permitted to bid on flights on the same basis as pilots who take
comparable non-military leave. See id. ¶¶ 9-10, 14. In addition, plaintiffs allege that, while on
military leave, they have been denied accrual of sick and vacation time even though pilots on
comparable non-military leave continue to accrue these benefits. *See id.* ¶ 9-14. Both claims are cognizable under USERRA because the law requires that employees on military leave receive “the most favorable treatment accorded to any comparable form of leave . . . .” 20 C.F.R. § 1002.150(b) (emphasis added).

Nonetheless, American asks this Court to dismiss both claims on the pleadings. American contends that plaintiffs’ trip bidding claim must be dismissed because the USERRA violation about which plaintiffs complain was corrected in the 2003 collective bargaining agreement (“CBA”). *See American Airlines, Inc.’s Brief in Support of Its Motion for Dismissal of Plaintiffs’ Complaint, and, Alternatively, to Strike (“Def’s br.”) at 13-15.* Therefore, American argues, plaintiffs cannot recover a prospective injunction. *See id.* However, American conveniently ignores paragraph 41 of plaintiffs’ complaint, which unambiguously seeks monetary compensation for American’s past trip bidding USERRA violations in addition to prospective relief. *See Comp. ¶ 41.* But, more importantly, dismissal at this stage is entirely inappropriate because mere reference to the language of the 2003 CBA does not resolve numerous factual issues such as, for example, how the trip bidding process is being practically implemented and whether the implementation complies with USERRA.

American also argues that plaintiffs’ leave accrual claim must be dismissed because the CBA *deems* military leave a “Leave of Absence,” for which no employee accrues vacation or sick time. *See Def’s br. at 16-25.* American insists that the CBA can define how military leave is treated without regard to USERRA, and without regard to whether the military leave in question is actually more comparable to jury duty, paid sick leave, union duty leave, or other forms of non-military leave with more favorable benefits. *See id.* However, in making this argument,
American overlooks a mountain of authority, directly on point, holding that the parties to a CBA are not free to negotiate those leaves considered comparable to military leave for purposes of USERRA or its predecessor statutes. See, e.g., Waltermyer v. Aluminum Co. of America, 804 F.2d 821, 824-25 (3d Cir. 1986) (collecting cases); see also Rogers v. City of San Antonio, 392 F.3d 758, 764-72 (5th Cir. 2004); 20 C.F.R. § 1002.150(b); 38 U.S.C. § 4302(b).

For example, American fails to distinguish Rogers v. City of San Antonio where, under virtually identical facts, the Fifth Circuit reversed summary judgment for the defendant, holding that comparability for purposes of USERRA presents a genuine dispute of material fact regardless of how the CBA characterizes military leave. See 392 F.3d at 760, 771-72. In other words, the Fifth Circuit has already rejected the very argument that American now makes. In addition, American ignores USERRA’s implementing regulations, which set forth a number of factors that should be considered when comparing leaves under USERRA, including “the duration of the absences . . . the purpose of the leave and the ability of the employee to choose when to take the leave.” 20 C.F.R. § 1002.150(b). American also avoids mentioning USERRA section 4302, which plainly states that USERRA supercedes any “contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by [USERRA] . . . .” 38 U.S.C. § 4302(b).

Apparently seeking to avoid the vast weight of authority adverse to its position, American instead focuses on irrelevant and immaterial case law regarding labor policy, seniority systems, and the Railway Labor Act (“RLA”). See Def’s br. at 15-24. However, as noted above, the principal issue to be decided here is what forms of non-military leave offered by American are comparable to plaintiffs’ military leave. This case is not about whether USERRA preempts the
RLA, or the interplay between two federal laws. Defendant’s exhaustive discussion of this topic is a classic red herring and amounts to nothing more than a “smoke and mirrors” attempt to obfuscate the central issue in dispute.

Finally, American moves to strike references in plaintiffs’ complaint to the 2003 CBA. But again, American fails to cite or even reference the controlling legal standard in this Circuit under Fed. R. Civ. P. 12(f). Within the Fifth Circuit, motions to strike are rarely granted, and only upon a showing that the pleading to be struck (i) “bears no possible relation to the controversy;” or (ii) “may cause the objecting party prejudice.” OKC Corp. v. Williams, 461 F. Supp. 540, 550 (N.D. Tex. 1978). Here, defendant has not made either showing. Accordingly, no basis exists to strike any portion of plaintiffs’ pleading.

For all of these reasons, and as explained in detail below, American’s motion should be denied.

II. STATEMENT OF FACTS

The collective bargaining agreements between American and the Airline Pilots in Service of American Airlines, as represented by the Airline Pilots Association, dated May 5, 1997 (“1997 CBA”) and May 1, 2003 (“2003 CBA”) set forth the terms of employment negotiated between American and its pilots (collectively, the “CBAs”). Pursuant to the CBAs, there are generally two different types of leave available to pilots: (i) leave with pay and benefits; and (ii) “Leaves of Absence,” with no pay or benefits. In both CBAs, American categorizes pilots on military leave

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1See 1997 CBA § 1.A-D; 2003 CBA Preamble-1 (attached to Def’s br. at App. 309-708). The 1997 and 2003 CBAs are attached to defendant’s brief in the Appendix.

as pilots on "Leaves of Absence," with no pay and no benefits. As a result, plaintiffs allege that pilots on military leave are treated less favorably than individuals on comparable forms of non-military leave, particularly with regard to equivalent trip bidding rights and vacation and sick time accrual. See, e.g., Comp. ¶¶ 9-14.

A. Trip Bidding While On Leave

Plaintiffs' complaint alleges that the 1997 and 2003 CBAs place restrictions on a military pilot's ability to bid on flights, and that no similar restrictions are placed on pilots taking comparable non-military leave. See Comp. ¶¶ 9-10, 14. For instance, the 1997 CBA permits a pilot on military leave to place bids for flight schedules only upon his or her return to American from active duty, even where the pilot might know his or her release date days or weeks in advance. Likewise, under the 2003 CBA, a "current and qualified" pilot on military leave is permitted to bid on flights only if he or she is available to fly on the first day of the next contractual month, thereby effectively preventing pilots who are released from duty any time after the first day of the month from bidding on flights for that month. The 2003 CBA does not place similar restrictions on pilots out for jury duty, paid sick leave, and other comparable forms of non-military leave.

B. Vacation And Sick Leave Accrual While On Leave

Both the 1997 and 2003 CBAs provide less favorable leave accrual benefits to pilots on

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6See, e.g. 1997 CBA §§ 5, 9 & 10; 2003 CBA §§ 5, 9 & 10.
military leave than pilots on comparable non-military leave. For example, the CBAs state that pilots whose leave exceeds 60 days during a calendar year are subject to a one tenth reduction in vacation allowance for each 30 days of leave taken.\(^7\) While the CBAs exempt from the vacation deduction procedure workplace injury leave, paid sick leave, and union duty leave, the CBAs do not exempt military leave.\(^8\)

Furthermore, both CBAs grant full employment benefits to pilots on certain forms of leave, which are not granted to pilots on military leave. For example, the pay and credit provisions of the 1997 and 2003 CBAs apply to pilots on paid sick leave, training program leave, vacation leave and leave to serve jury duty.\(^9\) The CBAs do not provide that the pay and credit provisions apply to pilots on military leave.\(^10\) As a result, pilots on jury duty, paid sick leave, vacation leave, and training leave continue to accrue benefits that are denied to pilots on military leave such as, for example, accrual of vacation and sick time.\(^11\)

The CBAs also specifically state that pilots who return from military leave only begin to accrue vacation upon the date of return.\(^12\) When read in conjunction with other provisions of the


\(^8\)See id.

\(^9\)See 1997 CBA §§ 5.A.1-4; 2003 CBA §§ 5.A.1-4. Pilots on military leave may currently reschedule vacation days, with several strict limitations, to cover their military duty leave time, and only then would they be able to continue to receive pay and benefits comparable to individuals on other types of leave, e.g., jury duty. See 1997 CBA Supp. R.B.1-3; 2003 CBA §§ 11.E.7.a-d.

\(^10\)See id.


\(^12\)See 1997 CBA 9.H; 2003 CBA § 9.J.
CBAs, this means that no vacation accrual occurs while pilots are on military leave.\textsuperscript{13} The CBAs contain no similar restriction with regard to other forms of leave, such as jury duty.\textsuperscript{14} Likewise, because pilots on military leave are defined as pilots on “Leaves of Absence,” the CBA operates to deny leave accrual to those military pilots whose service falls between 15 and 30 days.\textsuperscript{15} Pilots on comparable non-military leave for short durations continue to accrue vacation time.\textsuperscript{16}

Finally, these allegations represent an on-going concern. Pilot Madson specifically alleges that the 2003 CBA still limits his ability to accrue sick leave while on military leave. \textit{See} Comp. ¶¶ 29-31. Furthermore, because the 2003 CBA defines all pilots on military leave as on “Leave of Absence,” the contract continues to limit his and all current pilots’ abilities to accrue certain employment benefits, such as paid sick leave and vacation leave, while allowing such accrual for pilots on comparable non-military leave. \textit{See} Comp. ¶¶ 9-14.

III. ARGUMENT

A. Standard Of Review

“[T]he motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted.” \textit{Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.}, 677 F.2d 1045, 1050 (5th Cir. 1982) (quoting Wright & Miller); \textit{see also Barber v. Motor Vessel “Blue Cat,”} 372 F.2d 626, 627 (5th Cir. 1967) (dismissing a claim “on the basis of the barebone pleadings is a


\textsuperscript{14} \textit{See id.}


\textsuperscript{16} \textit{See id.}
precarious one with a high mortality rate.”). When reviewing the sufficiency of a complaint before receiving any evidence, the district court’s task is a limited one. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (overruled on other grounds). The issue is not whether plaintiffs will ultimately prevail on their claims, but rather whether they are entitled simply to offer evidence to support them. *See id.* For this reason, when considering a motion to dismiss under Rule 12(b)(6), all allegations in the complaint must be construed favorably to the pleader, and the Court must accept as true all facts alleged. *See Lowery v. Texas A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997). Dismissal is improper unless the defendant can prove that no set of facts would entitle plaintiffs to relief. *See Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 524 (5th Cir. 1994).

Similar to the 12(b)(6) motion, motions to strike pursuant to Rule 12(f) are disfavored. These motions are granted only upon a showing of prejudice and “when the pleading to be stricken has no possible relation to the controversy.” *Augustus v. B. of Pub. Instruction of Escambia County, Fl.*, 306 F.2d 862, 868 (5th Cir. 1962) (citations omitted); *see also Fed. Deposit Ins. Corp. v. Niblo*, 821 F. Supp. 441, 449 (N.D. Tex. 1993) (“In order to succeed on a motion to strike . . . it must be shown that the allegations being challenged are so unrelated to [the claims] as to be unworthy of any consideration . . . and that their presence in the pleading throughout the proceeding will be prejudicial to the moving party.”).

Under these highly deferential standards, it is clear that defendant’s motion must be denied.

B. ** Plaintiffs Have Stated A Cognizable Claim Under USERRA Challenging Defendants’s Trip Bidding Procedures **

Under USERRA, employees on military leave must receive from their employers the most
favorable treatment accorded any comparable form of leave. *See Rogers*, 392 F.3d at 771-72; 20
C.F.R. § 1002.150(b). Plaintiffs allege in their complaint that the 1997 and 2003 CBAs deny
military pilots the ability to bid on flight schedules on the same basis as pilots on other forms of
American Airlines has allowed pilots who are ‘in service’ [but have otherwise taken non-military
leave] to bid on flight schedules for the upcoming month . . . . Pilots . . . considered . . . on
[military leave] may not bid for flight schedules.”).

American asserts that plaintiffs’ trip bidding claim must be dismissed because, according
to American, the 2003 CBA has eradicated the alleged USERRA violation. As such, the
Company argues, “Plaintiffs do not have standing to litigate, and would not benefit from, their
prospective claim for injunctive relief.” Def’s br. at 14. American’s position is untenable. As an
initial matter, defendant’s assertion that plaintiffs seek only prospective injunctive relief is simply
wrong. The complaint unambiguously asserts that plaintiffs are entitled to *monetary
compensation* for American’s trip bidding USERRA violations, not solely a forward-looking
injunction. *See Comp. ¶ 41*. But, even if plaintiffs had sought only prospective non-monetary
injunctive relief, a plain reading of the 2003 CBA demonstrates that a live controversy still exists
regarding whether American’s current trip bidding process violates USERRA.

1. **Plaintiffs’ Complaint clearly asserts a claim for monetary compensation
resulting from past injury**

In American’s haste to dismiss the *entire* trip bidding claim, the Company either
overlooked or ignored paragraph 41 of plaintiffs’ complaint, which clearly seeks wrongfully
denied monetary compensation resulting from American’s alleged trip-bidding USERRA
violations. See Comp. ¶ 41. Specifically, in the “prayer for relief,” paragraph 41, plaintiffs ask the Court to:

Require that American Airlines fully comply with the provisions of USERRA by providing Plaintiffs and class members all employment benefits denied them as a result of the unlawful acts and practices under USERRA described herein, including, but not limited to . . . pay lost due to the inability to bid on flights commensurate with their levels of seniority.” (emphasis added).

While discovery will be necessary to determine the precise amount of damages plaintiffs seek, under the notice pleading standard applicable to federal court actions, paragraph 41 clearly states a cognizable claim for monetary relief. See Swierkiewicz v. Sorema N. A., 534 U.S. 506, 512 (2002) (“[The] complaint must include only ‘a short and plain statement of the claim showing that the pleader is entitled to relief.’”) (quoting Fed. R. Civ. P. 8(a)(2)).

And, as American concedes, a claim for monetary relief necessarily defeats its motion to dismiss the trip bidding claim. See Def’s br. at 15 n.12 (acknowledging that if plaintiffs’ complaint had alleged entitlement to damages for past injuries, defendant would have to respond to the trip bidding claim on the merits). Accordingly, by American’s own admission, its motion for dismissal must be denied.\footnote{See also Mann v. Adams Realty Co., Inc., 556 F.2d 288, 293 (5th Cir. 1977) (“The plaintiff need not set forth all the facts upon which the claim is based; rather, a short and plain statement of the claim is sufficient . . . .”); Mills v. Injury Benefits Plan of Schepps-Foremost, Inc., 851 F. Supp. 804, 806 (N.D. Tex. 1993) (“A complaint need only recite a short and plain statement of the claim showing that the pleader is entitled to relief.”).}

\footnote{Moreover, even if plaintiffs had sought only an injunction, recovery of back wages in employment cases has long been considered a form of equitable/injunctive relief. For example, under the Fair Labor Standards Act, 29 U.S.C. 201, et seq., it is well settled that courts may issue restitutitory injunctions to enjoin the unlawful withholding of back wages. See, e.g., Reich v. Tiller Helicopter Servs., 8 F.3d 1018, 1030 (5th Cir. 1993); Donovan v. Grantham, 690 F.2d 453, 456-57 (5th Cir. 1982); cf. Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 10}
2. A live controversy exists regarding the 2003 CBA trip bidding process

Even if plaintiffs had no claim for past damages, a live controversy still exists regarding whether the trip bidding process under the 2003 CBA complies with USERRA. Defendant dedicates four full pages of its brief to attempting to explain the pilot trip bidding process. See Def's br. at 5-9. However, far from clarifying the process, defendant’s recitation simply reinforces plaintiffs' position that reference to the 2003 CBA alone is insufficient to determine whether defendant’s current trip bidding process violates USERRA. In other words, before plaintiffs are forced to respond to a dispositive motion, they are entitled to discovery regarding, among other things, how the CBA’s 2003 trip bidding language is being practically interpreted and applied to pilots on military leave, as well as pilots on comparable forms of non-military leave. See, e.g., U.S. ex. rel. Mathews v. Healthsouth Corp., 54 Fed. Appx. 404, 2002 WL 31687686, at *2 (5th Cir. Oct. 22, 2003) (Rule 12(b)(6) dismissal inappropriate where discovery could turn up evidence substantiating allegations); Mills, 851 F. Supp. at 806 (“Rule 8(a) does not require factual pleading; plaintiffs may proffer general pleadings and defendants may discover the precise factual basis for the claims through liberal pretrial discovery procedures.”). 19

341, 390-91 (2nd Cir. 1973) (court may allow ancillary equitable relief, including restitution, where it is necessary to effectuate the statutory purpose). Moreover, the Fifth Circuit has held that back pay relief under Title VII is compatible with an injunctive class action brought pursuant to Fed. R. Civ. P. 23(b)(2). See In re Monumental Life Ins. Co., 365 F.3d 408, 418 (5th Cir. 2004).

19See also Simmang v. Texas Bd. of Law Examiners, 346 F. Supp.2d 874, 885 (W.D. Tex. 2004) (denying Rule 12(b)(6) motion to dismiss because factual issues exist that necessitate discovery); In re Electronic Data Sys. Corp. “ERISA” Litigation, 305 F. Supp.2d 658, 670 (E.D. Tex. 2004) (rejecting 12(b)(6) motion to dismiss at “early juncture” in litigation where discovery would assist in establishing the status, treatment, and interpretation of employee stock option plan).
Moreover, American misleadingly claims that “the plain language of the 2003 CBA [] permits pilots on military leave to participate in the bidding process even if they are not active with American at the time they submit a bid.” Def’s br. at 14. American does not reveal that the 2003 CBA also states pilots on military leave are only eligible to bid on a trip if they are “available on the first day of the next contractual month . . . .” Id. In other words, a veteran who knows he or she will be unavailable to fly on the first day of the next contractual month would be ineligible to bid on flights despite being available to fly for a substantial portion of that month. Again, defendant does not attempt to explain or address this restriction, nor does it discuss whether such a restriction is imposed on pilots who take comparable forms of non-military leave.20

In sum, it is impossible to conclude, as defendant urges, that changes in the 2003 CBA render plaintiffs’ trip bidding claim moot. At a minimum, plaintiffs are entitled to discovery to determine how the trip bidding process is being interpreted and applied under the 2003 CBA, and whether pilots on military leave are subject to the same restrictions as pilots who take comparable forms of non-military leave. These factual issues cannot be resolved on a motion to dismiss. See Swierkiewicz, 534 U.S. at 512-13 (explaining that liberal discovery provisions, rather than motions to dismiss, should be used to define disputed facts and issues); Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (counseling that a complaint should not be dismissed under Rule 12(b)(6) “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim

20 American also obfuscates with ellipses the requirement that pilots on military leave be “current and qualified” in order to bid on trips. Compare Def’s br. at 14 with 2003 CBA § 11.E.11.b. American does not explain what “current and qualified” means, or whether such a bidding requirement is imposed on pilots taking other forms of comparable leave.
which would entitle him to relief “); Mills, 851 F. Supp. at 806.

C. Plaintiffs Have Stated A Cognizable Claim Under USERRA Challenging Defendant’s Leave Accrual Policies

In addition to their trip-bidding claim, plaintiffs have alleged that, while on military leave, American denied them accrued vacation and sick time, which American provides to pilots on comparable forms of leave such as paid sick leave, union duty leave, and jury duty leave. See Comp. ¶¶ 12-14. This allegation states a cognizable claim under USERRA because, for leave accrual purposes, employees on military leave “must be given the most favorable treatment accorded to any comparable form of leave . . . .” 20 C.F.R. § 1002.150(b) (emphasis added).\footnote{This regulation implements Section 4316 of USERRA, which provides in relevant part that “a person who is absent from a position of employment by reason of service in the uniformed service shall be . . . 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.” 38 U.S.C. § 4316(b)(1)(B). Where, as here, Congress grants “an express delegation of authority to [an] agency to elucidate a specific provision of the statute by regulation[,] [the agency’s] legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984).} Whether two types of leave are comparable for purposes of USERRA hinges upon a number of factors, including “the duration of the absences . . . the purpose of the leave and the ability of the employee to chose when to take the leave . . . .” Id. In other words, whether a particular form of leave is “comparable” to military leave for purposes of USERRA raises questions of fact that are not suitable for summary adjudication. See Rogers, 392 F.3d at 771-72.

Nonetheless, American asks this Court to decide, as a matter of law, on an empty record, that only “Leaves of Absence,” as defined in the CBA, are comparable to military leave. See, e.g.,
Def's br. at 2. However, as defendant concedes, “Leaves of Absence” are only one of several categories of leave contained in the CBA. See id. The CBA also provides for paid sick leave; training leave; vacation leave; jury duty leave; and union duty leave, all of which, unlike military leave, allow employees to accrue sick and vacation time. See Def's br. at 9-12. Plaintiffs' complaint asserts that one or more of these other forms of leave are comparable to military leave and, therefore, require that plaintiffs receive the more preferential benefits accorded to the non-military leave. See Comp. at ¶¶ 12-14. While defendant may disagree, this merely creates a genuine dispute that cannot be resolved on a motion to dismiss. See Rogers, 392 F.3d at 771-72.

There is no support for defendant’s position that the CBA alone can dictate which leaves are comparable to military leave under USERRA. In fact, the overwhelming weight of authority holds otherwise. In Rogers v. City of San Antonio, under virtually indistinguishable facts, the Fifth Circuit held that a factual inquiry is necessary to determine comparability under USERRA regardless of how the CBA characterizes military leave. See 392 F.3d at 760, 771-72. The plaintiff firefighters in Rogers asserted that the City’s CBA deprived them of bonus day and perfect attendance leave in violation of USERRA because the CBA deemed them “absent” while on military leave, rather than treating them as “constructively present.” Id. at 760. The Fifth Circuit reversed the district court’s summary judgment ruling, holding that “[t]here are genuinely disputable issues as to the material facts of whether involuntary non-military leaves, not generally for extended durations, for jury duty, bereavement, and line of duty injury leave . . . under which employees may accrue and receive bonus day leave and perfect attendance leave benefits, are comparable to each plaintiff’s military leaves taken for service in the uniformed services.” See id. at 771-72. In other words, the Fifth Circuit has already held that the CBA’s characterization of
military leave does not control for purposes of USERRA.

The same conclusion was reached by the Third Circuit in Waltermyer v. Aluminum Co. of America, 804 F.2d 821, 825-26 (3d Cir. 1986). In Waltermyer, the CBA limited eligibility for holiday pay to individuals who worked during that week, but allowed employees to receive holiday pay if their absence resulted from reasons beyond their control, such as lay-off, jury duty, serving as a witness in court, and bereavement leave. See id. at 822. The Third Circuit ruled that, even though the CBA failed to allow holiday pay for absences occasioned by military leave, plaintiffs were nonetheless entitled to such pay under USERRA's predecessor statute. See id. at 825-26. The court reasoned that the returning veterans' military leave was comparable to jury duty, during which employees were allowed to receive holiday pay. See id. Quoting the Supreme Court, the Third Circuit emphasized that employers and unions are not ""empowered by the use of transparent labels and definitions to deprive a veteran [or reservist] of substantial rights guaranteed by the Act."" Id. at 825 (quoting Accardi v. Pennsylvania R.R. Co., 383 U.S. 225, 229 (1966)); see also Eagar v. Magma Copper Co., 389 U.S. 323 (1967) (reversing per curiam appellate judgment denying holiday pay to veterans despite CBA provision conditioning holiday pay on employees remaining continuously on payroll for the three months preceding the holiday); Carney v. Cummins Engine Co., Inc., 602 F.2d 763, 765-67 (7th Cir. 1979) (refusing to enforce provisions of CBA regarding overtime that were less favorable to reservists than other employees).

22The legislative history of USERRA and the commentary to USERRA's implementing regulations state that Congress intended to codify Waltermyer in section 4316 of USERRA. See Rogers, 392 F.3d at 769; 20 C.F.R. part 1002 (commentary at 70 Fed. Reg 75263).
American ignores this wealth of authority, which unequivocally holds that parties to a CBA are not free to decide which non-military leaves are deemed comparable to military leave for purposes of USERRA. American also fails to explain why no other form of leave contained in the CBA could be viewed as comparable to military leave under the relevant USERRA test, which examines the duration of the leave, the purpose of the absence, and the ability of the employee to chose when to take it. See 20 C.F.R. § 1002.150(b). Instead, American focuses on immaterial distinctions, such as whether the leave is paid or unpaid. See, e.g., Def’s br. at 9-11. However, binding Fifth Circuit precedent rejects paid status as a factor, much less the controlling factor. See Rogers, 392 F.3d at 767-68 (“[T]o 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.”) (emphasis added) (quoting USERRA House Report). When the proper factors are considered, it is easy to conclude that military leave shares several relevant characteristics with other forms of leave in American’s CBA, making dismissal at this stage entirely inappropriate. For example, jury duty is arguably comparable to military leave because both serve a public service purpose and the employee lacks discretion regarding when the leave can be used or how long it will last. As noted above, that was the Third Circuit’s ruling in Waltermyer, despite the CBA’s contrary treatment of military leave.

In sum, American has fallen dismally short of establishing that plaintiffs’ leave accrual claim lacks merit or should be dismissed. Rather, this claim must proceed for an appropriate determination as to which of the many forms of leave utilized by American are comparable to plaintiffs’ military leave and whether American has given its military pilots the most favorable
treatment accorded to other comparable forms of leave. See 20 C.F.R. § 1002.150(b).

D. American’s Collective Bargaining/Railway Labor Act Arguments Are Irrelevant

For the reasons above, there is simply no basis to dismiss any portion of plaintiffs’ complaint. However, American attempts to avoid this truth by distracting the Court with page after page of argument devoted to honoring collectively bargained-for rights and avoiding RLA preemption. See generally Def’s br. at 15-24. That is not what this case is about.

This case is simply about affording employees on military leave the most favorable treatment afforded to employees on comparable forms of leave. Plaintiffs are not asking the Court to preempt the RLA, rewrite the RLA, overrule the RLA, or set aside years of precedent regarding seniority rights or employer/union relations under the RLA. The only issue in this case is whether military leave is being treated in a manner that violates USERRA. In that regard, the terms of a CBA cannot trump USERRA’s statutory requirements. See 38 U.S.C. § 4302 (USERRA “supersedes any . . . contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit” provided by USERRA).

In an attempt to bolster its distractive RLA contention, American cites a number of cases

23Defendant also criticizes plaintiffs’ complaint for failing to (i) note that the CBA provides different benefits depending upon the length of military service; and (ii) distinguish between paid and unpaid sick leave. See Def’s br. at 11. Yet, defendant does not explain how this omission is fatal to plaintiffs’ claims under the controlling legal test. As noted above, plaintiffs have alleged that, regardless of the length of their military service, they have been denied accrual of vacation and sick leave afforded to employees on comparable forms of non-military leave. Defendant does not dispute this. Accordingly, plaintiffs’ leave accrual allegations state a cognizable claim that does not require additional facts at the pleadings stage. See Mann, 556 F.2d at 293 (“The plaintiff need not set forth all the facts upon which the claim is based; rather a short and plain statement of the claim is sufficient if it gives the defendant fair notice of what the claim is and the grounds upon which it rests.”) (emphasis added) (citing Fed. R. Civ. P. 8(a)(2)).

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involving the interpretation of collective bargaining agreements, none of which carries weight in
the present case. For example, defendant targets Aeronautical Indus. Dist. Lodge 727 v.
Campbell, 337 U.S. 521 (1949) as “instructive” for purposes of construing USERRA, based
largely on the fact that the case mentions the reemployment provision of the Selective Training
and Service Act (“STSA”), a predecessor statute to USERRA, in the context of interpreting the
“seniority” provisions of a collective bargaining agreement. See Def.’s br. at 20-21. A careful
review of the fifty-seven year-old case, however, reveals that it is inapposite.

In Campbell, a veteran was restored to his position with Lockheed Aircraft Corporation
upon his return from military service and subsequently laid off while other employees occupying
like positions, who had been granted seniority by virtue of the collective bargaining agreement,
were retained. The critical distinction from the present controversy is that, even had the veteran in
Campbell not served in the armed forces, and instead remained on the job, his status would have
been exactly the same and he would have been laid off anyway. Indeed, the court affirmatively
decided that the layoff was completely unrelated to the employee’s military absence. Campbell,
337 U.S. at 524-26, 528-29.

This same dynamic holds true for the veteran/plaintiff in Fishgold v. Sullivan Drydock &
Repair Corp., 328 U.S. 275 (1946), an even older STSA case. See Def’s br. at 23-24. As with the
plaintiff in Campbell, the veteran in Fishgold would have been laid off regardless of his military
403, 405-06 (S.D. Cal. 1962) (emphasizing that in both Campbell and Fishgold, “even had the
veteran . . . not been in the service but stayed on the job, his status would have been exactly the
same and he would have been laid off. What the [Campbell and Fishgold] courts decided was
that the layoffs were unrelated to the military absence.

By contrast, in this case, plaintiffs contend that, as a direct result of their military service, they received, and continue to receive, less favorable benefits than pilots on comparable forms of non-military leave. Thus, plaintiffs have alleged a straightforward violation of USERRA, which has nothing to do with the RLA or unrelated seniority rights. Should plaintiffs prevail, the only impact on the relevant CBA would be to nullify the provisions mandating less favorable benefits to pilots on military leave, and replace them with provisions providing the same benefits accorded to pilots on comparable non-military leave. Nothing else is at stake.

Finally, the mandate of section 4302 – that USERRA “supersedes” all contracts and other agreements that reduce or limit the rights or benefits provided under the statute – completely undermines American’s CBA/RLA arguments. As the case law makes abundantly clear, neither employers nor unions are permitted, via the use of transparent “labels” or “definitions,” to divest military employees of rights guaranteed by USERRA. E.g., Waltermyer, 804 F.2d at 825 (quoting Accardi, 383 U.S. at 229); see also Rogers, 392 F.3d at 767-68, 771-72. USERRA trumps any “intricate extra-judicial mechanism” that American alleges the RLA provides to influence disputes arising out of CBAs. Def.’s br. at 15. Indeed, legislative intent relating to USERRA bolsters plaintiffs’ position, spotlighting the critical federal policy behind USERRA of protecting

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24 Any such modification is actually consistent with the 1997 and 2003 CBAs, which both state that federal laws providing greater benefits to employees trump less favorable CBA provisions. See 1997 CBA Supp. R, Section F.5 (“Nothing in this supplemental agreement shall supersede, nullify or diminish any federal or state law that establishes a right or benefit which is more beneficial to, or is in addition to, a right or benefit provided for a pilot in this supplemental agreement.”); 2003 CBA Section 11.E.11.e (“Nothing in this Section shall supersede, nullify or diminish any federal or state law that establishes a right or benefit which is more beneficial to, or is in addition to, a right or benefit provided for a pilot in this Section.”).
those who serve the national defense from harm to their employment because of military service. *See, e.g.*, 38 U.S.C. 4301(a)(1) & (3); *see also* Fishgold, 328 U.S. at 284 (“He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job.”).

For all of these reasons, American’s CBA/RLA preemption arguments are without merit.

E. **American’s Motion To Strike Allegations Related To The 2003 CBA Should Be Denied**

Under Rule 12(f) of the Federal Rules of Civil Procedure, a court may strike “redundant, immaterial, impertinent, or scandalous matter” from a pleading. Fed. R. Civ. P. 12(f). Motions to strike are disfavored and rarely granted, particularly because they are often used as a dilatory tactic. *Niblo*, 821 F. Supp. at 449. A motion to strike must be denied unless the portion of the pleading sought to be struck (i) “bears no possible relation to the controversy;” and (ii) “may cause the objecting party prejudice.” *OKC Corp.*, 461 F. Supp. at 550; *see also* Augustus, 306 F.2d at 868 ("The motion to strike should be granted only when the pleading to be stricken has no possible relation to the controversy.") (citations omitted); *Niblo*, 821 F. Supp. at 449 ("In order to succeed on a motion to strike ... it must be shown that the allegations being challenged are so unrelated to ... [the claims] as to be unworthy of consideration ... and that their presence in the pleading throughout the proceeding will be prejudicial to the moving party.").

Measured against this standard, defendant has offered no basis to strike any portion of plaintiffs’ complaint. First, there is no basis to conclude that the 2003 CBA “bears no possible relation to the controversy.” *OKC Corp.*, 461 F. Supp. at 550. Indeed, American undermines its own position on this point by relying on the 2003 CBA throughout its motion to argue that its conduct does not violate USERRA. *See, e.g.*, Def’s br. at 2, 8, 14, 15 n.2. Second, defendant
makes no allegation of prejudice, undoubtedly because no prejudice exists. See Def’s br. at 25. According to the law in this Circuit, “when there is no showing of prejudicial harm to the moving party, the courts generally are not willing to determine disputed and substantial questions of law upon a motion to strike.” Augustus, 306 F.2d at 868.

Apparently ignoring the legal standard governing Rule 12(f) motions, defendant instead argues that plaintiffs’ allegations should be stricken simply because they are “conclusory” and “generalized.” Def’s br. at 25. However, under the well-established principles of notice pleading, plaintiffs need only provide a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a); see also Swierkiewicz, 534 U.S. at 511 (“[U]nder a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case . . .”). Plaintiffs have satisfied this burden by alleging that American’s trip bidding process and leave accrual policies under both the 1997 and 2003 CBAs violate USERRA by providing pilots on military leave less favorable treatment than pilots on comparable forms of non-military leave. See Comp. ¶¶ 9-11. Moreover, under Rule 12(f), absent a showing of prejudice or utter irrelevance, the Fifth Circuit has directed lower courts to “leave the sufficiency of the allegations for determination on the merits.” Augustus, 306 F.2d at 868. As noted above, defendant has neither alleged nor made such a showing. Accordingly, defendant’s motion to strike is baseless.
IV. CONCLUSION

Defendant's motion to dismiss or, in the alternative, to strike, is without merit. Plaintiffs respectfully request that the Court deny American's motion in its entirety.

Dated: June 12, 2006

Respectfully submitted,

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I hereby certify that on this 12th day of June 2006, the foregoing **Opposition to Defendant's Motion for Dismissal of Plaintiffs' Complaint, and, Alternatively, to Strike**, was served, via electronic mail and first class mail, postage prepaid, on the following:

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IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA  

Rebecca Cruz,  
Plaintiff,  
vs.  
City of Glendale, Arizona,  
Defendant.  

Plaintiff, Rebecca Cruz ("Cruz"), through counsel, states:  
1. This civil action is brought pursuant to the Uniformed Services Employment  

JURISDICTION  
2. This Court has jurisdiction over the subject matter of this action pursuant to  
38 U.S.C. § 4323(b).  
3. Venue is proper in this judicial district under 38 U.S.C. § 4323(c)(2) because  
the defendant, the City of Glendale, Arizona ("Glendale"), maintains a place of business  
within this judicial district. Additionally, venue is proper under 28 U.S.C. § 1391(b)  
because the events or omissions giving rise to this action occurred in this judicial district.
THE PARTIES

4. Rebecca Cruz is a citizen of the State of Arizona, and has been a service member in the Arizona Air National Guard (“Guard”) since 2007.

5. Glendale is a municipality located in Maricopa County, Arizona, which had more than 240,000 residents as of 2015. The Glendale city government provides an array of municipal services, employs more than 1,700 fulltime employees to provide these services, and had a total annual budget of $693 million for 2016-17.

6. Glendale is an “employer” within the meaning of 38 U.S.C. § 4303(4)(A), and is subject to suit for violations of USERRA under 38 U.S.C. § 4323(a).

FACTUAL ALLEGATIONS

7. On or about March 28, 2016, Cruz started work for the City of Glendale’s Public Works Department as a Management Analyst.

8. When Cruz interviewed for the Glendale position with Bob Manginell, Public Works Program Administrator (who would become Cruz’s immediate supervisor) and Michelle Woytenko, Deputy Public Works Director, Cruz told them both about her military service in the Guard.

9. Two months after starting with Glendale (on or about May 27-29, 2016), the Guard told Cruz that it was changing her Guard job classification. Because of this change, the Guard would require her to attend a two-month long training program from July 11, 2016 until September 16, 2016.

10. On or around May 31, 2016, Cruz informed Manginell, in person, that she would need to take military leave for Guard duty.

11. At this meeting, Manginell stated that he was concerned as to how she would integrate back into work when she returned from her military service. Cruz told Manginell that, while being away from her family was always stressful, military service members received resiliency training on how to reintegrate. Manginell said “okay,” but told Cruz that he did not want her coming back with “some kind of PTSD or whatever people call it.”
12. At this meeting Manginell also asked Cruz, “How often is this going to occur?” Manginell said that he thought Cruz’s Guard service was only “one weekend a month, like on the commercials.” Cruz observed that Manginell appeared visibly upset that Cruz’s Guard obligations could consistently require her to be away from her position with Glendale. Manginell then told Cruz that one of Cruz’s co-workers would have to “bend over backwards” to accommodate Cruz’s military absence and finish Cruz’s work.

13. On June 7, 2016, after Cruz received the written orders regarding the training, she provided Manginell with her written military orders. She also filled out an on-line personnel form provided by the City of Glendale requesting that Glendale grant her 240 hours of paid military leave per the city’s military leave policy.

14. Manginell then scheduled a meeting with the City of Glendale’s Human Resources Department (“Glendale HR”) for the next day. Manginell told Cruz that he wanted the meeting to confirm that the City of Glendale required the Glendale Public Works Department to pay Cruz anything during her leave, and that he wanted time to verify Cruz’s military orders. Cruz provided him with contact information for her military superior so that Manginell could confirm the orders.

15. On June 8, 2016, Cruz and Manginell met with two representatives from Glendale’s HR Department. The Glendale HR Department informed Manginell that Glendale had recently changed its military leave policy. Under the new policy, employees working for the City of Glendale, including the Glendale Public Works Department, were entitled to a maximum of 320 hours of paid military leave per year. According to Cruz, Manginell’s tone and demeanor at the meeting made it clear that her leaving on military leave “was an issue for him.” There was no discussion of Cruz’s job performance at this Glendale HR meeting.

16. On information and belief, after the June 8, 2016 meeting, Manginell met that same day with Woytenko and Glendale’s Public Works Director Jack Friedline (Manginell’s and Woytenko’s supervisor). At this second meeting, Manginell and Woytenko allegedly expressed concerns to Friedline about Cruz’s job performance and
attitude as a probationary employee. Friedline decided at that time to terminate Cruz. Upon information and belief, Manginell then called HR that same day to inform it that Friedline had decided to terminate Cruz.

17. No one at Glendale had previously counseled Cruz regarding her job performance, or even had discussions with her about performance issues. On information and belief, Glendale had no documentation whatsoever about the existence of any alleged problems with Cruz’s performance prior to Friedline’s June 8, 2016 decision to terminate Cruz.

18. However, following that decision, on June 9, 2016, Manginell created a post hoc rationale for the termination by conducting interviews with Woytenko and three other employees about allegations regarding Cruz’s job performance.

19. On June 16, 2016, Manginell escorted Cruz to what she believed was a regular senior staff meeting with Friedline. When Cruz arrived at Friedline’s office, Friedline informed Cruz of her termination while Manginell waited outside. Manginell then immediately escorted Cruz to her desk to collect her things. Manginell then escorted Cruz from the premises. Cruz had no idea that Glendale might terminate her employment until she was in Friedline’s office on June 16, 2016.

20. Glendale notified Cruz of her termination only seven working days after Cruz submitted her written military duty orders. Cruz’s supervisors decided to terminate her the same day they learned that the City of Glendale’s own employment policies would require Glendale Public Works Department to continue to pay Cruz for up to 320 hours of military leave.

21. Based on the close timing, Manginell’s negative comments about her military leave, and the lack of any prior discussions about her performance, Cruz reasonably believed that Glendale Public Works terminated her because of her military leave obligation. In response, Cruz filed a USERRA complaint with the Veterans’ Employment and Training Service (“VETS”) of the U.S. Department of Labor (“DOL”), which Glendale received on June 24, 2016.
CLAIM FOR RELIEF

22. Glendale violated USERRA (38 U.S.C. § 4311) by terminating Cruz’s employment in response to her request for leave for military service in the Guard.

23. Cruz’s military service was a motivating factor in Glendale’s decision to terminate her employment.

24. Glendale acted with willful disregard to Cruz’s USERRA rights when it terminated her employment.

25. Cruz suffered a substantial loss of earnings and benefits as a result of Glendale’s violations of USERRA, in an amount to be proven at trial.

26. Cruz requests, to the extent authorized by law, a trial by jury.

PRAYER FOR RELIEF

WHEREFORE, Cruz prays that this Court grant the following relief:

A. Declare Glendale’s termination of Rebecca Cruz was in violation of Section 4311 of USERRA;

B. Require Glendale to comply fully with the provisions of USERRA by paying Cruz all amounts due to her for loss of wages caused by Glendale’s violation of USERRA;

C. Require Glendale to comply fully with the provisions of USERRA by paying Cruz all amounts due to her for loss of benefits caused by Glendale’s violation of USERRA, including credit by Glendale of her lost time in Arizona’s defined benefit pension program;

D. Direct Glendale to reinstate Cruz into her prior position with full seniority, pay and benefits to restore her to same status she would have been but for Glendale’s actions against her;

E. Enjoin Glendale from taking any further action against Ms. Cruz that fails to comply with the provisions of USERRA; and

F. Declare that Glendale’s USERRA violation was willful, and award Cruz liquidated damages in an amount equal to her lost wages.
Respectfully submitted this 14th day of August, 2017.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID MUELLER,

Plaintiff,

v.

CITY OF JOLIET; BRIAN BENTON, in his official and individual capacity as the CHIEF OF POLICE; and EDGAR GREGORY, in his individual capacity,

Defendants.

Case No. 17 C 7938

Judge Harry D. Leinenweber

MEMORANDUM OPINION AND ORDER

I. BACKGROUND

The Plaintiff, employed as Sergeant of Operations for the City of Joliet Police Department, is a member of the Illinois National Guard. On March 23, 2016, Plaintiff received deployment orders from the National Guard that required him to report for active full-time duty to the Illinois National Guard Counter Drug Task Force. The orders were executed by Richard J. Hayes, Jr., the State Adjutant General on behalf of the Governor of Illinois. (Although the full-time duty period was designated as from May 9, 2016 to September, 30, 2016, Plaintiff only served until August, 1, 2016, when he resigned and returned to full-time status with the Police Department.) Plaintiff duly
informed his superiors at the Police Department of his orders, but was advised that he only qualified for “unpaid leave of absence” and he would have to use benefit time for his military service and would “not continue to accrue leave time, such as vacation or personal days.” The effect of this “unpaid leave” decision was to reduce Plaintiff’s compensation during the leave to his pay as a member of the National Guard which was less than his pay as Sergeant of Operations.

As a result of the forgoing denial of paid leave, Plaintiff filed a charge of discrimination with the Illinois Department of Human Rights. His charge was subsequently dismissed and he received a notice of right to sue. He thereafter filed this two-count Complaint alleging violations of the Uniformed Service Members Employment and Reemployment Act (the “USERRA”), 38 U.S.C.A. § 4311 (Count I), and the Illinois Military Leave of Absence Act (the “IMLAA”), 5 ILCS 325/1 (Count II). He has named as Defendants, the City of Joliet (the “City”), Brian Benton, Chief of Police in his official and individual capacity, and Edgar Gregory, Deputy Chief of Police in his individual capacity. Federal jurisdiction is based on Count I, while jurisdiction of Count II is based on supplemental jurisdiction.

Defendants have filed a Motion to Dismiss contending that neither of these statutory provisions apply to Plaintiff’s claim.
because his service in the Illinois National Guard’s Counter Drug Task Force was purely a function of state law. They also contend that, should the Court find that the City is obligated for the differential pay as claimed under IMLAA, the City is excused from complying because the increased costs resulting from IMLAA’s required paid leave would run afoul of the Illinois State Mandates Act, 30 ILCS 805/8(a). This act prohibits the imposition of unfunded mandates such as alleged to be the case here because the legislature had not provided funding for IMLAA claims. In response, Plaintiff argues that these two statutes apply to individuals who are called to “full-time national guard duty” and, accordingly, Plaintiff is entitled to their protection. For the reasons stated herein, the Court finds that USERRA does not apply to Plaintiff due to the fact that he was in state service while on active duty and that the Court will not exercise supplemental jurisdiction with respect to Count II, IMLAA.

II. THE NATIONAL GUARD

The Army National Guard, originally referred to as the militia, predates the founding of the nation and has been a standing national military for almost 150 years. Following its key role during the Revolutionary War, the militia was enshrined in the Constitution as a fundamental component of our national
defense. Since the enactment of the Constitution, a variety of statutes have been enacted that define the Militia’s (or Guard’s) role in our nation’s affairs. While federal regulations dictate much of the Guard’s organization and function, the control of Guard personnel and units is divided between the federal government and the states. Most of the provisions governing the Guard’s federal mission are contained in Title 10 U.S.C.A. which authorizes the President to federalize the National Guard. The purposes for federalization include augmenting the active armed forces in time of war, assisting in the handling of national emergencies such as hurricane relief, suppressing insurrections, and elimination of unlawful obstructions which seek to prevent the enforcement of federal law in any state or territory. National Guard Fact Sheet Army National Guard (FY2005)

An important limitation on the federal use of the National Guard is the Posse Comitatus Act, 18 U.S.C.A. § 1385 ("PCA"). This Act prohibits the use of the Army or Air Force in the execution of criminal laws of the United States. The PCA only
applies to the National Guard when it is placed in federal service as part of the Army or Air Force, and does not apply to the National Guard when it is in its militia status, i.e., under state control. Memorandum Opinion of Douglas W. Kmiec, Assistant Attorney General Office of Legal Counsel, April 4, 1989.

When the National Guard units are not under federal control, the Governor is the commander-in-chief of the respective state units and may act through his designee, such as the State Adjutant General in Illinois. The Governor can mobilize National Guard personnel to state active duty for training orders, and for non-combat purposes such as humanitarian missions in response to disasters, counterdrug operations, peacekeeping or peace enforcement missions, maintenance of vital public services, and participation in engineering projects. National Guard Fact Sheet Army National Guard (FY2005), at 4.

III. DISCUSSION

A. Count I - USERRA

Now, turning to Plaintiff’s Complaint, no where does he allege that his National Guard unit had been federalized at the time of his call up. To the contrary, his call to duty came from the State Adjutant General who is the state official given
the authority to mobilize the state national guard in its militia form. The order came from the Department of Military Affairs State of Illinois and was signed by Richard J. Hayes, Jr., Major General, The Adjutant General. The authorization was for “full-time National Guard Duty for Counterdrug (FTNG-CD)” (the latter acronym meaning “Full Time National Guard-Counter Drug”). (See, Exhibit A to Defendants’ Motion to Dismiss.) There is no indication that the President of the United States had anything to do with the issuance of this order and Plaintiff has suggested none. Instead, Plaintiff argues that he was called to “full time status” and the federal government is paying for at least some of the costs associated with this order.

However, if, in fact, Plaintiff had been called in to federal service for enforcement of drug laws, such call up would appear to be in violation of the Posse Comitatus Act and also in violation of the federal funding law, 32 U.S.C.A. § 112 (A)(1), which allow the National Guards to participate in drug interdiction programs only “while not in federal service.” See, United States v. Hutchings, 127 F.3d 1255, 1258 (10th Cir. 1997). Accord, United States v. Benish, 5 F.3d 20, 26 (3rd Cir. 1993). Plaintiff criticizes the citation of these cases as being just “federal criminal law.” However, these cases each
involve evidence obtained by the National Guard while on drug interdiction duty to which motions to suppress were filed by defendants based on the contention that the evidence was seized in violation of the PCA. In each case, the motion to suppress was denied because of the lack of federal involvement, i.e., the drugs were seized by Guard members while in state service. Surely the federal government would not involve itself in a criminal drug investigation in possible violation of the PCA, and risk suppression of any evidence seized.

Next we have to determine whether the provisions of 38 U.S.C.A. § 4311 (“USERRA”), under which Plaintiff’s Count I relies, apply to him even though he was not in federal service. This statute, entitled “Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited,” makes it illegal for an employer to discriminate against an employee who performs services in a “uniformed service.” Plaintiff argues that by refusing him paid leave Defendants have violated this federal statute. Defendants argue that this statute does not apply to Plaintiff because he was not in a “uniformed service” as the same is defined in federal law. Uniformed Service is defined as excluding a tour of duty while under state control and not under federal control. Defendants
are correct: 20 C.F.R. § 1002.57(b) issued by the United States Department of Labor states as follows:

National Guard service under authority of State law is not protected by USERRA. However, many states have laws protecting the civilian job rights of National Guard members who serve under State orders. Enforcement of those State laws is not covered by USEERA or these regulations.

Because Plaintiff’s tour of duty was clearly under the authority of the State of Illinois, USERRA has no applicability to his case.

Plaintiff objects to the use of a Rule 12(b)(6) motion to decide this case on its merits. However, this type of motion is a proper vehicle to dispose of a case that is not plausible on its face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). While Plaintiff need not plead facts in his Complaint to support his claim, he must plead sufficient factual content to draw a reasonable inference that Defendants are liable for the alleged misconduct. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). He has failed to so here.

Since Count I relies solely on USERRA, the Motion to Dismiss Count I is granted.

**B. Count II - IMLAA**

Since federal jurisdiction was based on USERRA in Count I, jurisdiction over Count II, IMLAA, is based on supplemental
jurisdiction. The Court declines to exercise jurisdiction, neither to determine the applicability of the IMLAA to Plaintiff’s case nor to determine the applicability of the State Mandates Act to IMLAA. Count II is therefore dismissed for lack of federal jurisdiction.

IV. CONCLUSION

For the reasons stated here herein, Defendants’ Motion to Dismiss Count I is granted. Count II dismissed for lack of federal jurisdiction.

IT IS SO ORDERED.

[Signature]

______________________________
Harry D. Leinenweber, Judge
United States District Court

Dated: 5/2/2018
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION  

DAVID MUELLER,  

Plaintiff,  

v.  

CITY OF JOLIET; BRIAN BENTON,  
in his official and  
individual capacity as the  
CHIEF OF POLICE; and EDGAR  
GREGORY, in his individual  
capacity,  

Defendants.  

Case No. 17 C 7938  

Judge Harry D. Leinenweber  

ORDER  

Plaintiff’s Motion to Reconsider (Dkt. No. 33) is denied. Defendants’ Motion to Dismiss Count I of the First Amended Complaint (Dkt. No. 37) is granted. The Court declines to exercise jurisdiction to determine the applicability of the IMLAA to Plaintiff’s case or to determine the applicability of the State Mandates Act, 30 ILCS 805/1 et seq., to the IMLAA. Defendants’ Motion to Strike (Dkt. No. 48) is denied.  

STATEMENT  

Plaintiff, an employee of the Joliet Police Department, has sued the City and its Chief and Deputy Chief of Police for allegedly violating the Uniformed Service Members Employment and Reemployment Act, 38 U.S.C. § 4311 (“USERRA”) (Count I), and the Illinois Military Leave of Absence Act, 5 ILCS 325/1 (“IMLAA”) (Count II). The Court dismissed Count I of the original Complaint on the basis that Plaintiff did not come under the coverage of the USERRA and declined to exercise supplemental jurisdiction on Count
II, the state law IMLAA claim. Plaintiff filed a Motion to Reconsider the dismissal of the USERRA claim or, in the alternative, to file a First Amended Complaint. The Court granted leave to file the First Amended Complaint, and Defendants responded by objecting to reconsideration and with a Motion to Dismiss Count I of the First Amended Complaint. The facts are not really disputed so that the real questions before the Court are ones of law.

The undisputed facts have been clearly laid out in the parties’ filings and in the Court’s previous Memorandum Opinion. *Mueller v. City of Joliet*, No. 17 C 7938, 2018 WL 2045451, at *1-2 (N.D. Ill. May 2, 2018). Briefly, the Plaintiff, a member of the National Guard, received deployment orders requiring him to report for active full-time duty to the Illinois National Guard Counter Drug Task Force. The orders were executed by Richard J. Hayes, Jr., the State Adjutant General, on behalf of the Governor of Illinois. Plaintiff was informed by his superiors at the Police Department that he only qualified for “unpaid leave of absence” during his deployment, which reduced his compensation during his leave because his National Guard pay was less than his municipal pay. Plaintiff contends that this decision violates the USERRA and/or the IMLAA. Defendants’ position, with which the Court agreed, was that the USERRA did not apply because Plaintiff was on in-state service while on duty with the National Guard.

The legal dispute between the parties therefore involves the interpretation of the words “federal authority” and “state authority.” This legal issue goes back to the twin purposes of the National Guard. When operating under federal authority, the member is under the direction of the President of the United States and performs a federal function such as suppression of an
insurrection or assisting in the case of national emergencies such as national disasters. On the other hand, when the member is under state authority he is under the direction of the Governor or his designee and performs a state function, such as riot control or enforcement of state criminal law. Here, Plaintiff, as a member of a state drug interdiction task force, was attempting to enforce a state criminal law. This limitation is clearly delineated in 32 U.S.C. § 112, under which, for a state to qualify for federal funding for drug interdiction, a state must certify (1) that the counter drug operations are to be conducted while the personnel are not involved in federal service, (2) the use of the National Guard is authorized by and is consistent with State law, and (3) the Governor of the State has determined that plan activities serve a state law enforcement purpose. The obvious reason for the certification requirement is to comply with the Posse Comitatus Act (“PCA”), 18 U.S.C. § 1385, which prohibits the use of the Army or Air Force in enforcing state criminal laws. When a National Guard is under federal service, it is considered a part of the Army. The cases are legion in which guardsmen are utilized as members of anti-drug task forces and provide evidence in subsequent drug prosecutions. In such cases, defendants routinely endeavor to have testimony and evidence suppressed as obtained in violation of the PCA. In all cases where the Guard has been called into duty by the State, such defenses have failed because the members of the National Guard were under state service rather than federal service. See Gilbert v. United States, 165 F.3d 470, 474 (6th Cir. 1999); accord United States v. Hutchings, 127 F.3d 1255, 1258 (10th Cir. 1997); United States v. Benish, 5 F.3d 20, 26 (3rd Cir. 1993).
Plaintiff argues that the guardsmen’s annual training activities and homeland security activities are under federal authority. This is true, but the purpose of such activities is to ensure that the National Guard is ready if needed for federal services, and such training is required by the Act of the President of the United States. Thus, members who are undergoing annual or periodic training may be in federal service and thus qualify for the protection of the USSERA. This is not the case here.

Harry D. Leinenweber, Judge
United States District Court

Dated: 11/16/2018
IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DAVID MUELLER,
Plaintiff-Appellant

v.

CITY OF JOLIET; BRIAN BENTON, in his official and individual capacity as the Chief of Police; and EDGAR GREGORY, in his individual capacity,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
(Honorable Harry D. Leinenweber, No. 1:17-cv-7938)

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND URGING REVERSAL

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CERTIFICATE OF COMPLIANCE

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Use of the National Guard to Support Drug Interdiction Efforts in the
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This matter arises under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. 4301 et seq. USERRA prohibits employment discrimination against members of the armed forces and ensures reemployment for servicemembers who are absent from civilian employment because they are called to active duty. The United States has a strong interest in ensuring that USERRA is properly interpreted. The Secretary of Labor has substantial administrative responsibilities under USERRA, 38 U.S.C. 4321-4333, and has promulgated regulations implementing the statute, 20 C.F.R. Pt.
1002. In addition, the Attorney General may enforce USERRA in court against public and private employers, and the Office of Special Counsel may enforce USERRA against federal government employers through the Merit Systems Protection Board process. 38 U.S.C. 4323-4324.


**STATEMENT OF THE ISSUE**

Whether USERRA protects an Army National Guard member serving under 32 U.S.C. 112 and 502(f) in a state counter-drug operation.

**STATEMENT OF THE CASE**

1. **USERRA And The Army National Guard**

   USERRA prohibits employment discrimination against members of “a uniformed service.” 38 U.S.C. 4311(a). The statute defines “uniformed services” to include the Army National Guard “when engaged in * * * full-time National Guard duty.” 38 U.S.C. 4303(16). The question in this case is whether an Army
National Guard member’s service in a state counter-drug operation pursuant to orders issued under 32 U.S.C. 112 and 502(f) falls within that definition.

The Army National Guard is one of the seven reserve components of the United States armed forces. 10 U.S.C. 10101. It serves a dual federal-state role, acting as both a reserve unit to supplement the national Army with “trained units and qualified persons available for active duty in the armed forces, in time of war or national emergency, and at such other times as the national security may require,” 10 U.S.C. 10102; see also 32 U.S.C. 102, and, when not in federal military service, as an organized militia for each of the 50 States, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands, 32 U.S.C. 101(1) and (4). See Tirado-Acosta v. Puerto Rico Nat’l Guard, 118 F.3d 852, 852-853 (1st Cir. 1997).

Army National Guard members can be called to duty in three different ways, each of which has different consequences for the member’s legal status and entitlements: (1) active military duty under Title 10 of the U.S. Code (Title 10 status); (2) duty under Title 32 of the U.S. Code (Title 32 status), including full-time National Guard duty; and (3) state active duty under state law.

First, a National Guard member can be called into active service in the Army under Title 10 of the U.S. Code. When a National Guard member is called into active federal military service under Title 10, he is deemed part of the United States Army and is “relieved from duty in the National Guard of his State” so long as his Title 10 service continues. See 10 U.S.C. 12401; 32 U.S.C. 325; Perpich v. Department of Def., 496 U.S. 334, 345, 347 (1990).
Second, National Guard members may be called to perform duty under Title 32 of the U.S. Code. National Guard members in Title 32 status are generally under the command of state officials but receive their pay and benefits from the federal government. See generally Lawrence Kapp & Barbara Salazar Torreon, Cong. Research Serv., RL30802, Reserve Component Personnel Issues: Questions And Answers 19 (2018), available at https://fas.org/sgp/crs/natsec/RL30802.pdf. Relevant here, 32 U.S.C. 502(f) provides that National Guard members may, pursuant to federal regulations, “be ordered to perform training or other duty in addition to” the mandatory annual training required under Section 502(a). 32 U.S.C. 502(f). Among other duties, National Guard personnel may “be ordered to perform full-time National Guard duty under section 502(f) of [Title 32] for the purpose of carrying out [state] drug interdiction and counter-drug activities.” 32 U.S.C. 112(b).

Finally, National Guard members may be called up by state Governors for “state active duty” to respond to natural disasters or other such emergencies. See National Guard Regulation 680-1, Personnel Assets Attendance and Accounting, at 7, 40 (Apr. 15, 2019), available at https://go.usa.gov/xEw44; Kapp & Torreon, supra, at 18-19. National Guard members performing state active duty “are under state command and control and are paid from state funds.” 32 C.F.R. 536.97(a)(3). Although USERRA does not protect National Guard members serving state active duty, “many States have laws protecting the civilian job rights of National Guard members” called up for state active duty. 20 C.F.R. 1002.57(b); see also S. Rep. No.
158, 103d Cong., 1st Sess. 43-44 (1993) (explaining that the statutory definition of “uniformed services” was intended “to exclude National Guard members performing non-federally funded State National Guard duties from coverage under” USERRA).

2. Facts And Procedural History


   Plaintiff alleges that, after learning of plaintiff’s deployment orders, the Deputy Chief of the Joliet Police Department “yelled at and belittled” him for “fucking over the Department” and “trying to double dip on pay,” and subsequently criticized him in front of other officers for “screwing over the Department by leaving them one supervisor short.” Doc. 1, at 7 (internal quotation marks omitted). Plaintiff further alleges that, a little over a month into his deployment, the Chief of the Joliet Police Department informed plaintiff by email that he would be placed on an unpaid leave of absence during his deployment and thus would not accrue vacation and personal days during that time. Doc. 1, at 5. According to plaintiff,

   1 Citations to “Doc. __, at __” refer to documents in the district court record, as numbered on the docket sheet, and page numbers within those documents.
the Police Department treated “similarly situated non-military” employees differently; for example, it permitted another officer to continue accruing leave and receiving pay while on non-military administrative leave. Doc. 1, at 8. Plaintiff alleges that his “decision to re-enlist with the National Guard” and his “active duty status” were a “motivating factor” in defendants’ decision to deny him leave benefits and compensation while deployed. Doc. 1, at 8. Plaintiff alleges that, as a result of that decision, he was forced to request early release from his National Guard duty, causing him to lose National Guard pension benefits. Doc. 1, at 5-6.


Defendants moved to dismiss plaintiff’s complaint. Docs. 10, 12. Relevant here, defendants argued that plaintiff’s service in the Illinois Army National Guard

² Plaintiff’s state-law IMLAA claim is based on the denial of both benefits and compensation. See Doc. 1, at 11-12 (stating that IMLAA requires public employers to compensate employees on military leave the difference between their regular compensation and military pay).
counter-drug task force was not protected by USERRA because it was state, not federal, National Guard service. Doc. 12, at 4-8. Plaintiff opposed the motion, arguing that his service constituted “full-time National Guard Duty” under Title 32 of the U.S. Code, which USERRA expressly covers. Doc. 20, at 2-7 (citing 32 U.S.C. 101(19) and 38 U.S.C. 4303(13)).

The district court granted defendants’ motion to dismiss. Doc. 32. The court agreed with defendants that the relevant question was whether plaintiff’s service in the National Guard counter-drug task force was “under state control” or “federal control,” citing a Department of Labor (DOL) USERRA regulation stating that “National Guard service under authority of State law is not protected by USERRA.” Doc. 32, at 7-8 (quoting 20 C.F.R. 1002.57(b)). The court concluded that plaintiff’s “tour of duty was clearly under the authority of the State of Illinois” (Doc. 32, at 8), noting that his order to report was issued by the Illinois Department of Military Affairs and signed by its Adjutant General (the head of the state National Guard), not by “the President of the United States” (Doc. 32, at 6). Although the federal government funded “at least some of the costs” of plaintiff’s service in the Illinois counter-drug operation, the district court concluded that such funding did not render his service “federal” such that it came within USERRA’s protections. Doc. 32, at 6. The court reasoned that deeming plaintiff’s service in the Illinois counter-drug task force to be “federal” for USERRA purposes would violate both the terms of 32 U.S.C. 112, which permits National Guard members to participate in drug interdiction programs only “while not in federal service” (Doc. 32, at 6 (quoting 32
U.S.C. 112(a)(1)), as well as the Posse Comitatus Act, 18 U.S.C. 1385, which “prohibits the use of the Army or Air Force in the execution of criminal laws” (Doc. 32, at 4; see Doc. 32, at 6-7).³

c. Plaintiff filed a motion to reconsider or, in the alternative, for leave to file an amended complaint. Doc. 33. Plaintiff argued that, contrary to the district court’s conclusion, his order to serve in the state counter-drug program was in fact “under federal authority” because it was issued pursuant to Title 32 of the U.S. Code (specifically, 32 U.S.C. 112 and 502(f)) and he “was paid by the United States Army” for his service. Doc. 33, at 4-6. Plaintiff reiterated that USERRA expressly covers “full-time National Guard duty,” which includes duty performed under 32 U.S.C. 502(f) for which the member is “entitled to pay from the United States” (Doc. 33, at 4-6 (quoting 10 U.S.C. 101(d)(5) and 32 U.S.C. 101(19))), and noted that the DOL regulation on which the district court relied confirms that “[s]ervice under federal authority” includes “full-time National Guard duty” under “Title 32 of the United States Code” (Doc. 33, at 7 (quoting 20 C.F.R. 1002.57(a)) (emphasis omitted)). Plaintiff also urged that the Posse Comitatus Act is irrelevant to this analysis, as that Act applies to Army National Guard members only when they are called up to active military duty under Title 10, not when they are “in a Title 32 status.” Doc. 33, at 10.

The district court granted plaintiff leave to file an amended complaint and set a briefing schedule for plaintiff’s motion to reconsider. Doc. 35. Plaintiff filed an

³ Having dismissed plaintiff’s USERRA claim, the district court declined to exercise supplemental jurisdiction over his state-law IMLAA claim. Doc. 32, at 8-9.
amended complaint that same day, which included additional allegations that he was entitled to, and received, pay from the United States for his service in the state counter-drug task force. Doc. 36, at 6; see 32 U.S.C. 101(19) (defining full-time National Guard duty to be duty for which, among other things, the member is “entitled to pay from the United States”).

Defendants opposed plaintiff’s reconsideration motion and, in the same filing, moved to dismiss his amended complaint. Doc. 43. Defendants argued that the district court had correctly concluded that plaintiff’s service in the counter-drug operation was under state, not federal, authority within the meaning of 20 C.F.R. 1002.57, and contended that how plaintiff was paid was irrelevant to whether his service was state or federal for USERRA purposes. Doc. 43, at 6-13. Defendants acknowledged that plaintiff’s orders were issued under both Sections 112 and 502(f) of Title 32 and that Section 502(f) “literally fall[s] within the legal definition of ‘Full-Time National Guard Duty.’” Doc. 43, at 11. They argued, however, that the relevant question was whether his service was under state or federal authority, and that service in a state counter-drug operation under 32 U.S.C. 112 can, by definition, never be “federal” because Section 112 on its face states that National Guard personnel may participate in such programs only when they are “not in Federal service.” Doc. 43, at 8-11 (quoting 32 U.S.C. 112(c)(2)).

d. The district court denied plaintiff’s reconsideration motion and granted defendants’ motion to dismiss plaintiff’s amended complaint based on the same reasoning in its original dismissal order. Doc. 55. Specifically, the court concluded
that because plaintiff, “as a member of a state drug interdiction task force, was attempting to enforce a state criminal law,” his service in the task force was necessarily state, not federal, for USERRA purposes. Doc. 55, at 3. The court noted, as it did in its earlier order, that 32 U.S.C. 112 permits National Guard members to participate in state counter-drug operations only when “not involved in federal service,” and reiterated its belief that deeming plaintiff’s service federal for USERRA purposes would run afoul of the Posse Comitatus Act. Doc. 55, at 3.

SUMMARY OF ARGUMENT

1. A straightforward application of USERRA’s statutory definitions demonstrates that the statute covers plaintiff’s service in the Illinois National Guard Counter Drug Task Force. USERRA applies to members of “a uniformed service,” 38 U.S.C. 4311(a), which it defines to include “the Army National Guard * * * when engaged in * * * full-time National Guard duty,” 38 U.S.C. 4303(16). “Full-time National Guard duty,” in turn, is defined in Title 32 to mean “training or other duty * * * performed by a member of the Army National Guard * * * in the member’s status as a member of the National Guard of a State under,” inter alia, Section 502 of Title 32, “for which the member is entitled to pay from the United States.” 32 U.S.C. 101(19).

Plaintiff’s service in the Illinois National Guard Counter Drug Task Force plainly satisfies that definition. His service involved “duty” by a “member of the Army National Guard” in his “status as a member of the National Guard of a State”— Illinois. 32 U.S.C. 101(19). The service was “under” Section 502(f) of Title
32, *ibid.*, which authorizes other duties in addition to National Guard members’ mandatory training, including “carrying out drug interdiction and counter-drug activities” under “a State drug interdiction and counter-drug activities plan” approved by the Secretary of Defense, 32 U.S.C. 112(a) and (b)(1). And plaintiff was “entitled to pay from the United States” for his service. 32 U.S.C. 101(19); see 32 U.S.C. 502(f)(1) (stating that duty under Section 502(f) must be “with the pay and allowances provided by law” unless the National Guard member consents otherwise).

2. The district court failed to conduct this statutory analysis. Rather, the court concluded that a DOL USERRA regulation, 20 C.F.R. 1002.57(b), required it to perform a case-specific analysis of whether plaintiff’s service was best characterized as “federal,” which USERRA would cover, or “state,” which USERRA would not. Deeming plaintiff’s service in the counter-drug task force fundamentally state service, the court concluded that it fell outside USERRA’s protection. In doing so, the district court ignored USERRA’s plain language and misinterpreted this DOL regulation, which clearly states that “[s]ervice under Federal authority” for USERRA purposes “includes duty under Title 32 of the United States Code, such as * * * full-time National Guard duty.” 20 C.F.R. 1002.57(a). Furthermore, the court overlooked 20 C.F.R. 1002.5(l), which provides that “[s]ervice in the uniformed services includes * * * National Guard duty under Federal statute.”

The district court also suggested that considering plaintiff to be a federal employee for USERRA purposes while performing state drug interdiction operations
would violate the Posse Comitatus Act, 18 U.S.C. 1385, and the funding restrictions of 32 U.S.C. 112(a)(1). Doc. 32, at 6-7. But recognizing that USERRA protects plaintiff’s service in the Illinois counter-drug task force does not run afoul of the Posse Comitatus Act, 18 U.S.C. 1385, as that Act applies only to National Guard members performing active federal military service under Title 10, not to National Guard members performing service in a Title 32 status. Nor does the language of 32 U.S.C. 112, the statute governing National Guard counter-drug activities, prohibit a conclusion that a National Guard member’s participation in such activities is protected by USERRA. To the contrary, Section 112(b)(1) provides that state National Guard members may “be ordered to perform full-time National Guard duty under [32 U.S.C.] 502(f)” to carry out a state drug interdiction plan—a type of duty that USERRA expressly covers, 38 U.S.C. 4303(16), 4311(a).

Finally, the district court’s decision creates unnecessary tension with other areas of law—such as the Federal Tort Claims Act and the doctrine of intra-military immunity—which recognize National Guard members performing service under Title 32 to be federal employees. The district court’s decision could also potentially deter qualified and capable individuals from serving in the National Guard, thereby undermining one of USERRA’s key purposes. See 38 U.S.C. 4301(a).
ARGUMENT

USERRA’S PROTECTIONS APPLIED TO PLAINTIFF’S SERVICE IN THE ILLINOIS NATIONAL GUARD COUNTER-DRUG TASK FORCE

A. USERRA Protects An Army National Guard Member When That Member Performs Full-Time National Guard Duty In A State Counter-Drug Operation Pursuant To 32 U.S.C. 112 And 502(f)

Plaintiff’s Title 32 service in the Illinois Army National Guard counter-drug task force was covered by USERRA under a straightforward reading of the relevant statutory terms. 4

USERRA protects members of “a uniformed service.” 38 U.S.C. 4311(a). USERRA expressly defines “uniformed services” to include the Army National Guard “when engaged in * * * full-time National Guard duty.” 38 U.S.C. 4303(16). Title 32 of the U.S. Code governs the National Guard. Title 32 defines “[f]ull-time National Guard duty” to mean “training or other duty” performed by an Army National Guard member in the member’s “status as a member of the National Guard of a State * * * under section 316, 502, 503, 504, or 505 of [Title 32] for which the member is entitled to pay from the United States.” 32 U.S.C. 101(19) (emphasis added). Plaintiff’s service in the Illinois Army National Guard counter-drug task force satisfies the three elements of that definition.

First, plaintiff’s service in the counter-drug task force was “duty” performed in his “status as a member of the National Guard of a State,” namely, Illinois. 32 U.S.C. 101(19).

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4 The United States takes no position on the merits of plaintiff’s USERRA claim.
Second, plaintiff’s deployment orders state that he was called up under Section 502(f) of Title 32 to serve “Full-time National Guard Duty” in the counter-drug task force. Doc. 20-1, at 2; see 32 U.S.C. 112(b) (providing that National Guard members may “be ordered to perform full-time National Guard duty under section 502(f) of [Title 32] for the purpose of carrying out drug interdiction and counter-drug activities”). Duty performed under Section 502(f) qualifies as “[f]ull-time National Guard duty.” 32 U.S.C. 101(19). As such, the First Circuit has recognized that participation in a state drug interdiction program under 32 U.S.C. 112 and 502(f) constitutes “the performance of full-time National Guard duty.” Tirado-Acosta v. Puerto Rico Nat’l Guard, 118 F.3d 852, 856 (1st Cir. 1997) (internal quotation marks omitted).

Third, National Guard members performing duty under Section 502(f) are “entitled to pay from the United States” for that service. 32 U.S.C. 101(19); see 32 U.S.C. 502(f) (providing that a National Guard member is entitled to “the pay and allowances provided by law” for duty performed under section 502(f) unless he consents to perform such duty “without pay and allowances”). Indeed, plaintiff alleges in his amended complaint that he was both entitled to, and received, pay from the United States Army for his service in the Illinois counter-drug task force. See Doc. 36, at 6.

Thus, because plaintiff’s service in the Illinois counter-drug task force constituted “[f]ull-time National Guard duty” as that term is defined in Title 32, 32 U.S.C. 101(19), it qualified as a “uniformed service” within the meaning of
USERRA, 38 U.S.C. 4303(16). See also 20 C.F.R. 1002.5(l) (“Service in the uniformed services includes * * * National Guard duty under Federal statute.”). Accordingly, plaintiff was entitled to USERRA’s protection while serving in the state counter-drug task force. 38 U.S.C. 4311(a).

B. The District Court’s Analysis Was Erroneous In Several Respects

The district court did not perform the statutory analysis outlined above to determine whether plaintiff’s service constituted “full-time National Guard duty” and, consequently, a “uniformed service” protected by USERRA. Instead, citing a DOL USERRA regulation, the district court attempted to answer the more abstract question whether plaintiff’s service in the counter-drug task force was “under state control” or “federal control.” Doc. 32, at 7; see Doc. 32 at 8 (citing 20 C.F.R. 1002.57(b)). Finding that plaintiff’s service “was clearly under the authority of the State of Illinois” (Doc. 32, at 8)—namely, because his orders came from the Illinois Adjutant General and he was performing a state criminal-law function—the district court concluded that it was not protected by USERRA. In doing so, the district court erred in several respects.

1. First and foremost, the district court ignored the plain language of the statute. As discussed above, USERRA defines “uniformed services” to include “full-time National Guard duty,” 38 U.S.C. 4303(16), and plaintiff’s service in the counter-drug task force under 32 U.S.C. 502(f) fell squarely within the statutory definition of “full-time National Guard duty” provided in 32 U.S.C. 101(19). Thus, whether plaintiff’s full-time National Guard duty in the counter-drug task force is
deemed “under state control” or “federal control” is beside the point, as Congress expressly extended USERRA’s protection to plaintiff’s service.

The DOL regulation on which the district court relied, 20 C.F.R. 1002.57, does not provide otherwise; to the contrary, that regulation is consistent with USERRA’s text. As the district court noted, the regulation explains that USERRA protects “only Federal National Guard service,” 20 C.F.R. 1002.57, not “service under authority of State law,” 20 C.F.R. 1002.57(b). But under subsection (a), the regulation defines “[s]ervice under Federal authority” to include not only “active duty performed under Title 10” but also “duty under Title 32,” including “active duty for training, inactive duty training, or full-time National Guard duty.” 20 C.F.R. 1002.57(a) (emphasis added); see also 20 C.F.R. 1002.5(l). Thus, consistent with USERRA’s statutory definition of “uniformed services,” the regulation recognizes that USERRA protects “full-time National Guard duty” under Title 32, including plaintiff’s duty under 32 U.S.C. 502(f)—in other words, that such duty is deemed “[s]ervice under Federal authority” for purposes of USERRA. 20 C.F.R. 1002.57(a).

2. Second, the district court incorrectly concluded (see Doc. 32, at 6-7; Doc. 55, at 3) that deeming plaintiff’s service in the Illinois counter-drug task force to be covered by USERRA would run afoul of the Posse Comitatus Act. The Posse Comitatus Act prohibits the use of “any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws” except where “expressly authorized by
the Constitution or Act of Congress.” A National Guard member, however, is not “part of the Army,” ibid., unless he has been ordered into active military service under Title 10. See 10 U.S.C. 12401, 12405; Clark v. United States, 322 F.3d 1358, 1368 (Fed. Cir. 2003) (“National Guard members are only serving in the federal military when they are called into formal military service.”); see generally Perpich v. Department of Def., 496 U.S. 334, 343-347 (1990). Accordingly, a National Guard member serving in a Title 32 status, as plaintiff was, is not subject to the Posse Comitatus Act. See Gilbert v. United States, 165 F.3d 470, 473-474 (6th Cir. 1999); United States v. Hutchings, 127 F.3d 1255, 1258 (10th Cir. 1997); United States v. Benish, 5 F.3d 20, 25-26 (3d Cir. 1993).6

3. The district court likewise erred in concluding that Section 112’s language—namely, its qualification that National Guard members may participate in drug interdiction programs only when they are “not in Federal service,” 32 U.S.C. 112(a)(1) and 112(c)(2)—dictates that plaintiff’s service in the Illinois counter-drug

5 A posse comitatus is a “group of citizens who are called together to help the sheriff keep the peace or conduct rescue operations.” Posse Comitatus, Black’s Law Dictionary (10th ed. 2014).

task force could not qualify as “service under Federal authority” for USERRA purposes. See Doc. 33, at 6-7; Doc. 55, at 3. The phrase “in Federal service” in Section 112 refers to National Guard members called into active federal military service under Title 10. See, e.g., 10 U.S.C. 12401 (noting that National Guard members “are not in active Federal service except when ordered thereto under law”). As the district court correctly noted, the “obvious reason” for including this limitation in Section 112 was “to comply with the Posse Comitatus Act.” Doc. 55, at 3; see Hutchings, 127 F.3d at 1258; Tirado-Acosta, 118 F.3d at 853; H.R. Rep. No. 989, 100th Cong., 2d Sess. 455 (1988) (commenting on a prior version of the bill enacting Section 112). But nothing in Section 112 suggests that National Guard members performing federally-funded state drug interdiction work cannot be performing “[s]ervice under Federal authority” for USERRA purposes. 20 C.F.R. 1002.57(a). To the contrary, Section 112 expressly provides that a National Guard member may “be ordered to perform full-time National Guard duty under section 502(f)” to carry out a counter-drug plan, 32 U.S.C. 112(b)(1)—a type of duty that USERRA plainly covers, 38 U.S.C. 4303(16), 4311(a).7

Indeed, both Congress and the courts have recognized the federal nature of Title 32 duty in other contexts. For example, National Guard members engaged in full-time National Guard duty under Title 32 are statutorily designated as federal

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employees for purposes of the Federal Tort Claims Act. 28 U.S.C. 2671; see

Likewise, courts have held that National Guard members serving under orders issued pursuant to 32 U.S.C. 502(f) are federal employees for purposes of the Feres doctrine of intra-military immunity. See Matreale v. New Jersey Dep’t of Mil. & Veterans Affairs, 487 F.3d 150, 154-157 (3d Cir. 2007), cert. denied, 552 U.S. 1099 (2008); cf. United States ex rel. Conover v. Anthony, 781 F. Supp. 2d 257, 260-264 (D. Md. 2011) (holding that Air National Guard members training under 32 U.S.C. 502 were federal employees for purposes of the False Claims Act’s intra-military immunity provision).

And one district court recently held that National Guard members performing full-time National Guard duty in a state counter-drug operation under 32 U.S.C. 112 and 502(f) were federal employees, and thus that the United States, rather than the state National Guard, was the correct defendant in a 42 U.S.C. 1983 and state-law employment discrimination lawsuit. Cordry-Martinez v. Oregon Army Nat’l Guard, No. 6:17-cv-663, 2017 WL 4778591, at *2 (D. Or. Oct. 20, 2017) (citing Matreale); cf. 32 U.S.C. 715 (providing that the United States may settle claims for personal injury or death caused by a National Guard member performing full-time National Guard duty under Title 32). The district court’s conclusion that National Guard members engaged in Title 32 duty cannot be federal employees for USERRA purposes creates unnecessary tension with these settled areas of law.
4. Finally, the district court’s conclusion significantly undermines USERRA’s protections and could potentially impact the willingness of individuals, who do not control their deployment assignments, to serve in the National Guard. Congress enacted USERRA for the express purpose of “encourag[ing] noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service.” 38 U.S.C. 4301(a)(1). Taken to its logical conclusion, the district court’s reasoning could be read to exclude from USERRA’s coverage a large swath of National Guard service that Congress expressly intended to protect—namely, any full-time National Guard duty under Title 32 that is federally funded but under state control.

In short, although National Guard members performing full-time National Guard duty under Title 32 may be under state control, they are paid by the federal government and deemed to be performing “[s]ervice under Federal authority,” 20 C.F.R. 1002.57(a), for purposes of USERRA and its implementing regulations. Congress determined that National Guard members serving full-time National Guard duty under 32 U.S.C. 502(f), as plaintiff was here, are entitled to USERRA’s protections against employment discrimination. 38 U.S.C. 4303(16), 4311. The district court erred in concluding otherwise.
CONCLUSION

This Court should reverse the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND URGING REVERSAL:

(1) complies with Circuit Rule 29 because it contains 5097 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface requirements of Circuit Rule 32(b) and Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word, in 12-point Century Schoolbook font.

s/ Christine A. Monta
CHRISTINE A. MONTA
Attorney

Dated: June 27, 2019
CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2019, I filed a true and correct copy of the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND URGING REVERSAL with the United States Court of Appeals for the Seventh Circuit using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Christine A. Monta
CHRISTINE A. MONTA
Attorney
BAUER, Circuit Judge. Sergeant David Mueller took a leave of absence from the City of Joliet Police Department to report for active duty in the Illinois National Guard Counterdrug Task Force. When the Joliet Police Department placed him on unpaid leave, Mueller resigned from his National Guard
position and sued the City of Joliet and his supervisors for employment discrimination. The issue on appeal is whether the Uniformed Service Members Employment and Reemployment Rights Act (“USERRA”), which prohibits discrimination against those in “service in a uniformed service,” protects Mueller’s National Guard duty.

Mueller sued under USERRA, claiming that the Joliet Police Department’s denial of compensation and benefits while he was on National Guard duty amounted to illegal, anti-military discrimination. The defendants moved to dismiss the complaint, arguing that his National Guard counterdrug duty was authorized under Illinois law and not covered by USERRA. The district court judge agreed and granted the defendants’ motion to dismiss. Mueller appeals and argues that “service in the uniformed services” explicitly covers full-time National Guard duty, including counterdrug activities under 32 U.S.C. §§ 112 and 502(f). We find that the plain language of USERRA covers Title 32 full-time National Guard duty and reverse the district court’s dismissal.

I. BACKGROUND

David Mueller was hired as a City of Joliet police officer and subsequently promoted to sergeant. On August 15, 2015, Mueller enlisted in the National Guard and performed active duty service on multiple occasions thereafter. In March 2016, Mueller received notice from the National Guard advising him of an opening in the Illinois National Guard Counterdrug Task Force. Mueller applied for the position. On March 23, he received orders to report for “Full Time National Guard Duty” in Romeoville, Illinois. The Adjutant General of the Illinois
No. 18-3609

National Guard executed the orders, assigning Mueller to counterdrug support in accordance with 32 U.S.C. § 112 from May 9, 2016, through September 30, 2016.

During this time, Brian Benton served as the City’s Chief of Police and Edgar Gregory served as the City’s Deputy Police Chief. Upon receiving his order to report for National Guard duty, Mueller informed them of his deployment orders and his upcoming active duty with the National Guard. On May 9, Mueller began active duty with the Illinois National Guard Counterdrug Task Force. On June 15, Benton sent an email to Mueller stating that Mueller would be placed on an “unpaid leave of absence,” would have to use his benefit time while away, and would “not continue to accrue leave time, such as vacation or personal days.” On August 1, Mueller resigned from his National Guard position and returned to the Joliet Police Department. From his full-time military employment on May 9 to his return on August 1, Mueller did not receive compensation from the Joliet Police Department and had to use 120 hours of accrued time and benefits.

Mueller sued the City of Joliet, Benton, and Gregory for violating USERRA and the Illinois Military Leave of Absence Act. The defendants moved to dismiss and the district court agreed, deciding that USERRA did not cover Mueller’s position since it “was clearly under the authority of the State of Illinois” and that the state law claim lacked federal jurisdiction. The district court judge noted that Mueller’s orders came from the State Adjutant General and looked to a Department of Labor regulation, 20 C.F.R. § 1002.57(b), stating that: “National Guard service under authority of State law is not protected by USERRA.” The judge also added that if Mueller’s position was
considered "federal service" then it would violate both the Posse Comitatus Act and the funding provision of 32 U.S.C. § 112(a)(1). Mueller moved to reconsider and for leave to file an amended complaint. The defendants moved to dismiss the amended complaint and the district court granted the motion for the same reasons: that Mueller, “as a member of a state drug interdiction task force, was attempting to enforce a state criminal law” and consequently not covered by USERRA.

II. DISCUSSION

Mueller, supported by the United States and several State governments as amici, appeals the district court judgment and argues that the judge misinterpreted USERRA by excluding Mueller’s service from protection. Specifically, he argues that USERRA’s discrimination section protects “service in a uniformed service,” which 38 U.S.C. § 4303(13) defines as including “full-time National Guard duty.” Mueller argues his service is explicitly categorized as full-time National Guard duty and federally authorized by 32 U.S.C. §§ 112 and 502(f).

We review de novo a district court’s grant of a Federal Rules of Civil Procedure 12(b)(6) motion to dismiss. Roberts v. City of Chicago, 817 F.3d 561, 564 (7th Cir. 2016). In doing so, we accept all well-pleaded facts in the complaint as true. Id. We note that here the issue concerns statutory interpretation and is thus a question of law. Commodity Futures Trading Comm’n v. Worth Bullion Grp., Inc., 717 F.3d 545, 549 (7th Cir. 2013). We start with “the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” Id. at 550 (quoting Turley v. Gaetz, 625 F.3d
The statutory scheme of USERRA and National Guard service make it clear that Mueller’s “Full-Time National Guard Duty” is authorized by federal law and protected by USERRA. The USERRA employment discrimination section states that those in “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.” 38 U.S.C. § 4311(a). The definitions section of USERRA defines “service in the uniformed services” as “the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes … full-time National Guard duty.” 38 U.S.C. § 4303(13). Instead of engaging in this statutory analysis, the district court looked to a Department of Labor regulation that said National Guard service under State law authority is not protected by USERRA. 20 C.F.R. § 1002.57(b). Even if the regulation were necessary to interpret USERRA, the previous subsection states that “National Guard service under Federal authority is protected by USERRA,” which “includes duty under Title 32 of the United States Code, such as … full-time National Guard duty.” 20 C.F.R. § 1002.57(a). As pointed out by the amici, the regulation serves to clarify that USERRA does not protect National Guard service in “State Active Duty,” which is under exclusive State authority. Both USERRA and the regulation state, in plain language, that Title 32 full-time National Guard duty is covered.

The district court also erred in its interpretation of 32 U.S.C. § 112 and the Posse Comitatus Act by conflating federal
service and federal authority. Section 112 of Title 32 covers counterdrug activities and specifically creates a mechanism whereby the federal government provides funds to a State who has its counterdrug plan approved by the Department of Defense. 32 U.S.C. § 112. The district court erroneously concluded that since multiple provisions of Section 112 barred personnel “in Federal service” from performing counterdrug activities, Mueller’s service could not be under “Federal authority.” First, equating federal service and federal authority creates unnecessary contradictions between 32 U.S.C. § 112 and the Department of Labor regulation that considers Title 32 full-time National Guard duty as “under Federal authority.” Second, the language of USERRA does not limit protection to those in “Federal service” like the Army or Navy but to those in “service in a uniformed service,” which explicitly includes Title 32 full-time National Guard duty. The Posse Comitatus Act likewise only bars the Army and Air Force from domestic law enforcement, but does not apply to Title 32 National Guard duty. 18 U.S.C. § 1385. Federal service for purposes of the Posse Comitatus Act refers to standing active duty forces organized under Title 10 of the U.S. Code. While the Army National Guard and the Air National Guard are reserve components of the Army and Air Force, respectively, the National Guards are covered by different statutes (i.e., Title 32) than those that apply to the active duty forces (i.e., Title 10). Because Title 32 full-time National Guard duty is considered State service that is distinct from the Army and Air Force, extending USERRA’s protection to Mueller does not violate 32 U.S.C. § 112 or the Posse Comitatus Act.
In sum, the district court erroneously conflated federal authority and federal service, and misinterpreted the Department of Labor regulation’s binary between federal authority and state authority. USERRA’s discrimination provision does not turn on such distinctions since, by constructing Title 32 activities under Section 112 as “Full-Time National Guard Duty,” Congress intended for Mueller’s service to be covered by USERRA. We decline the invitation to carve out an exception for Section 112 counterdrug activities when there is no textual or public policy rationale to do so.

III. CONCLUSION

We conclude that the district court judge erred in its interpretation of USERRA and Title 32 National Guard service under Section 112. The plain language of Title 32 contemplates Mueller’s service as “Full-Time National Guard Duty,” which USERRA explicitly covers. The judgment of the district court is therefore REVERSED and we remand for further proceedings consistent with this opinion, including the reinstatement of Mueller’s state-law claim.
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

THOMAS M. SHEA,

Plaintiff,

v.

IRON WORKERS DISTRICT COUNCIL
OF NEW ENGLAND PENSION FUND;
TRUSTEES OF THE IRON WORKERS
DISTRICT COUNCIL OF NEW
ENGLAND PENSION FUND; IRON
WORKERS DISTRICT COUNCIL OF
NEW ENGLAND ANNUITY FUND;
TRUSTEES OF THE IRON WORKERS
DISTRICT COUNCIL OF NEW
ENGLAND ANNUITY FUND

Defendants.

Civil Action No. 13-12725-NMG

PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56 and Local Rule 56.1, Plaintiff Thomas M. Shea, by his
undersigned attorneys, moves for summary judgment in his favor in the above-captioned case.
There is no genuine issue of material fact that Defendants have violated the Uniformed Services
by denying Shea his full service pension and payments into his annuity fund account due to his
military leave. As set forth in detail in Plaintiff’s memorandum in support of his motion for
summary judgment, Plaintiff is entitled to judgment as a matter of law.
Respectfully submitted,

THOMAS M. SHEA, PLAINTIFF,

By his attorneys:

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Dated: October 16, 2015
CERTIFICATE OF SERVICE

I hereby certify that the foregoing document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants via First Class Mail.

/s/ Jennifer A. Serafyn
Jennifer A. Serafyn
Assistant United States Attorney

Dated: October 16, 2015
158 F.Supp.3d 20
United States District Court, D. Massachusetts.

Thomas M. SHEA, Plaintiff,
v.

Civil Action No. 13-12725-NMG

| Signed February 1, 2016 |

Synopsis
Background: Participant brought action against his employers' pension and annuity funds, alleging that funds unlawfully refused to award pension credits and annuity contributions to participant for his periods of military service in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA). Participant moved for summary judgment.

Holdings: The District Court, Gorton, J., held that:

[1] even if participant's periods of military service were not exempt from five-year limit, participant's periods of service amounted to three years of service, and thus five-year limit on cumulative military service set by USERRA did not preclude participant's claim for reemployment benefits;

[2] employer's pension plan imposed more restrictive requirements on pension eligibility than the requirements set forth in USERRA, and thus reemployment requirements in USERRA preempted pension plan's requirements with respect to servicemembers who returned from military service longer than 180 days and who timely applied for reemployment;

[3] genuine issue of material fact existed as to whether participant properly applied for reemployment as required by pension plan, precluding summary judgment in participant's action against pension fund;

[4] genuine issue of material fact existed as to whether participant timely applied for reemployment, precluding summary judgment as to issue of standing in participant's claim for discrimination on the basis of his military service; and

[5] genuine issue of material fact existed as to whether participant timely applied for reemployment after each period of his military service, precluding summary judgment in participant's action against annuity fund.

Motion granted in part and denied in part.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (17)


Purpose
The role of summary judgment is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. Fed. R. Civ. P. 56(a).


Burden of proof
The burden is on the moving party in a summary judgment motion to show, through the pleadings, discovery and affidavits, that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).


Materiality and genuineness of fact issue
On a summary judgment motion, a fact is material if it might affect the outcome of the suit under the governing law; a genuine issue of material fact exists where the evidence with respect to the material fact in dispute is such that a reasonable jury could return a verdict for the nonmoving party. Fed. R. Civ. P. 56(a).
Federal Civil Procedure

Burden of proof

If the moving party satisfies its burden on a summary judgment motion, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine, triable issue. Fed. R. Civ. P. 56(a).

Federal Civil Procedure

Presumptions

On a summary judgment motion, the court must view the entire record in the light most favorable to the non-moving party and make all reasonable inferences in that party's favor. Fed. R. Civ. P. 56(a).

Federal Civil Procedure

Absence of genuine issue of fact in general

Summary judgment is appropriate if, after viewing the record in the non-moving party's favor, the court determines that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

Armed Services

Compensation

Employer's pension plan imposed more restrictive requirements on pension eligibility than the requirements set forth in Uniformed Services Employment and Reemployment Rights Act (USERRA), and thus reemployment requirements in USERRA preempted pension plan's requirements with respect to servicemembers who returned from military service exceeding 180 days and who timely applied for reemployment; USERRA only required servicemembers returning from military service exceeding 180 days to apply for reemployment within 90 days to accrue pension credits for that period of service, and pension plan required servicemembers to apply for reemployment, work 300 hours within one year, and accrue 2.5 pension credits within five years. 38 U.S.C.A. §§ 4302, 4312.

Federal Civil Procedure

Employees and Employment Discrimination, Actions Involving

Genuine issue of material fact existed as to whether participant properly applied for reemployment after his first military deployment as required by employer's pension plan, precluding summary judgment in participant's action against pension fund, alleging that it unlawfully refused to award pension credits for participant's periods of military service in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA). 38 U.S.C.A. § 4312(e)(1)(D); 20 C.F.R. § 1002.115(c).

Federal Civil Procedure

Employees and Employment Discrimination, Actions Involving

Genuine issue of material fact existed as to whether participant's third military deployment was deployed sixth time. 38 U.S.C.A. § 4312(a).
was a continuation of his second deployment under employer's pension plan, such that reemployment requirement did not apply, precluding summary judgment in participant's action against pension fund, alleging that it unlawfully refused to award pension credits for participant's periods of military service in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA). 38 U.S.C.A. § 4312(e)(1)(D).


Employees and Employment Discrimination, Actions Involving

Genuine issue of material fact existed as to whether participant's actions at union hall amounted to indication to pre-service employer that he was former employee returning from military service and seeking reemployment, such that participant complied with reemployment requirement in employer's pension plan after his third and fourth deployments, precluding summary judgment in participant's action against pension fund, alleging that it unlawfully refused to award pension credits for participant's periods of military service in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA). 38 U.S.C.A. § 4312(e)(1)(D).


Employees and Employment Discrimination, Actions Involving

Genuine issue of material fact existed as to whether participant timely submitted application for his reemployment to his pre-military service employer after his fifth military deployment as required by employer's pension plan, precluding summary judgment in participant's action against pension fund, alleging that it unlawfully refused to award pension credits for participant's periods of military service in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA). 38 U.S.C.A. § 4312(e)(1)(D).


Employees and Employment Discrimination, Actions Involving

Genuine issue of material fact existed as to whether participant timely applied for reemployment post-military service with his pre-service employer as required by employer's pension plan, precluding summary judgment as to issue of standing in participant's claim against pension fund for allegedly discriminating against participant on the basis of his military service in violation of Uniformed Services Employment and Reemployment Rights Act (USERRA). 38 U.S.C.A. § 4311.

[14] Armed Services

Adverse Employment Actions

To prevail on a claim for discrimination on the basis of military service under the Uniformed Services Employment and Reemployment Rights Act (USERRA), the plaintiff must make an initial showing that his military service was a motivating or substantial factor for the action taken by the employer. 38 U.S.C.A. § 4311(c)(1).

1 Cases that cite this headnote

[15] Armed Services

Evidence in general

Weight and sufficiency of evidence

If a plaintiff makes an initial showing in a discrimination claim under the Uniformed Services Employment and Reemployment Rights Act (USERRA) that his military service was a motivating or substantial factor for an adverse employment action, the burden then shifts to the employer to prove, by a preponderance of the evidence, that it would have taken the action regardless of plaintiff's military service. 38 U.S.C.A. § 4311(c)(1).

[16] Armed Services
In determining whether an employer would have taken an adverse employment action regardless of plaintiff's military service in a discrimination claim under the Uniformed Services Employment and Reemployment Rights Act (USERRA), the underlying issue is not whether the employer is entitled to impose heightened requirements on an employee for a particular reason but whether it would have done so even if the employee had not served in the military. 38 U.S.C.A. § 4311(c)(1).

I. Background and procedural history

A. The parties

Plaintiff Thomas M. Shea ("Shea" or "plaintiff") is an ironworker and union member who has participated in defendants' pension and annuity fund programs since 1982. Plaintiff enlisted in the United States Navy Reserve in 1999 and now serves as a Senior Chief Petty Officer. He resides in Massachusetts.

Defendant Iron Workers District Council of New England Pension *24 Fund ("the Pension Fund") is managed in accordance with a multi-employer, defined-benefit pension plan known as "the Pension Plan." The Pension Plan is an employee pension benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(2)(A). The Pension Fund is an employer within the meaning of § 4303(4)(c) of USERRA, with respect to its obligation to provide benefits to eligible employees pursuant to § 4318.


Defendant Iron Workers District Council of New England Annuity Fund ("the Annuity Fund") is managed in accordance with a multi-employer, defined-contribution pension plan known as "the Annuity Plan." The Annuity Plan is an employee pension plan within the meaning of § 1002(2)(A) of ERISA and is an employer within the meaning of § 4303(4)(c) of USERRA, with respect to its obligation to provide benefits to eligible employees pursuant to § 4318.

Defendant Trustees of the Iron Workers District Council of New England Annuity Fund ("the Annuity Fund Trustees") administers the Annuity Fund and is the plan sponsor under § 1002(16)(B) of ERISA.
B. The Pension Plan
The Pension Plan provides monthly benefits to retired employees who have accumulated a total of 30 pension credits and at least 15 pension credits as of December 31, 2006. Employees receive 1) one full pension credit if they work at least 1,200 hours in a calendar year, 2) a fraction of a pension credit if they work between 300 and 1,200 hours in a calendar year and 3) no pension credit if they work fewer than 300 hours in a calendar year. Employees who work more than 1,200 hours in a calendar year can “bank” the extra hours and apply them to another calendar year.

The Pension Plan allows servicemembers returning from a period of military service to accrue retroactively pension credits for that period as long as they 1) are not dishonorably discharged, 2) return to employment with a covered employer within 90 days of completing the period of service, 3) work at least 300 hours for a covered employer within one year from the date of discharge and 4) accrue 2.5 pension credits within five years after the date of discharge.

The Pension Plan also incorporates the five-year limit set forth in USERRA which provides servicemembers with reemployment rights and benefits so long as, inter alia,

§ 4312(a)(2). The five-year limit does not apply to periods of military service during which the servicemember was ordered to or retained on active duty 1) in accordance with 10 U.S.C. § 12302 which pertains to servicemembers in “Ready Reserve”, see § 4312(c)(4)(A), or 2) under any provision of law due to a war or national emergency declared by the President or Congress, as determined by the appropriate Secretary, unless the active duty consists of training, see § 4312(c)(4)(B).

C. The Annuity Plan
The Annuity Plan requires the Annuity Fund Trustees to “establish individual Employee Accounts to track each Annuity Plan member’s interest in the Annuity Fund.” A servicemember who is timely reemployed after a period of military service is entitled to an annuity contribution from the employer to his or her individual employee account for that period of military service. The Annuity Plan places the responsibility for making those contributions on the last employer for whom the servicemember worked before entering military service.

The Annuity Plan also incorporates the five-year limit on cumulative military service set forth in § 4312(a)(2) and the active duty exemptions set forth in § 4312(c)(4)(A) and (B).

D. Plaintiff’s military and employment history
Over the course of his employment from 1982 to 2007, plaintiff participated in the Pension and Annuity Funds, earned 22 pension credits and banked 6.13 supplementary credits. His last employer prior to his first military deployment in 2007 was Capco Steel Corporation (“Capco Steel”), a company which “has since gone out of business.”

1. First deployment
Plaintiff’s first deployment, to Iraq, began on June 4, 2007 and ended ten and a half months later on April 18, 2008. His order of deployment expressly stated:

The member is ordered to active duty ... in support of the national emergency declared under Presidential Proclamation 7463 of 14 SEP 01. Under the provisions of [38 U.S.C. § 4312(c)(4)(A) and (B)], this period of active duty is exempt from the 5-year cumulative service limitation on reemployment rights under [USERRA].

On March 11, 2002, the Secretary of the Navy issued a memorandum to the Chief of Naval Operations declaring that:

In accordance with 38 U.S.C. 4312(c)(4)(b) ..., I have determined that
Navy and Marine Corps Reserve personnel voluntarily ordered to or retained [on] active duty (other than for training) in support of the national emergency declared under Presidential Proclamation 7463 of [14] September 2001, will have those periods of service exempted [f]rom the five-year limitation for reemployment rights under [USERRA].

After his honorable discharge from deployment, plaintiff attended military training for 58 days between mid-April, 2008 and late August, 2008. He subsequently worked 112 hours for Capco Steel between August 25, 2008 and September 14, 2008.

2. Second deployment

Shea’s second deployment, to Afghanistan, began on January 1, 2009 and ended one year later on January 6, 2010. His order of deployment contained the same declaration of exemptions under § 4312(c)(4)(A) and (B) as the first order of deployment, excerpted above. To prepare for the deployment, he commenced his time on military duty a few months in advance so that he could attend Construction Inspector School from October 15, 2008 to December 17, 2008.

Plaintiff asserts that he did not apply for reemployment when he returned from his second deployment because 1) his third deployment began within 90 days of his date of honorable discharge and 2) the Pension Plan purportedly treats “any non-work periods less than 90 days apart” as one continuous period.

3. Third deployment

Shea’s next deployment, to Bahrain, began on April 1, 2010 and was completed six months later on September 30, 2010. Plaintiff avers that he was “[o]rdered to active duty for special work under the authority of title 10 USC section 12301(d)” and that the Secretary of the Navy had previously issued a memorandum, dated March 1, 2007, providing that the secretaries of the Military Departments have each determined the period of service under 10 U.S.C. 12301(d) as exempt from the five year limit as provided in 38 U.S.C. 4312(c) (4)(B).

After he was honorably discharged from deployment, plaintiff left immediately for his next deployment. The parties agree that his third and fourth deployments occurred during one continuous period.

*26 4. Fourth deployment and applications for benefits

Plaintiff was sent to Kuwait for his fourth deployment beginning on October 1, 2010. His military documentation indicates that the deployment was completed 11 months later, on September 3, 2011. The order for his fourth deployment contained the same declaration of exemptions under § 4312(c)(4)(A) and (B) as the first order of deployment.

Plaintiff first applied for service pension benefits in February, 2011 and again in August, 2011. The Pension Fund Trustees denied the applications based upon his purported failure to satisfy the reemployment requirements in the Pension Plan that he 1) timely return to covered employment, 2) work at least 300 hours within one year of his date of discharge and 3) earn 2.5 pension credits within five years of the date of his discharge.

Prior to his official release from deployment, plaintiff purportedly worked eight hours for Francis Harvey & Sons on August 26, 2011. He also sent a letter, dated August 26, 2011, to a Michael J. Durant at “Ironworkers Local Union 7” stating:

Please accept this letter as formal notice that I have returned to work on 26AUG2011. Pursuant to §§ 4301-4335 of USERRA, I am entitled to be reinstated as soon as possible in my former position and am entitled
to receive benefits accrued during my absence.

Plaintiff was honorably discharged from the Navy. Within 90 days, he went to his local union hall at least nine times and signed his name on the out-of-work list, talked to other union members about prospective jobs, and notified the business agent that he was returning from active duty and seeking to be reemployed.

He subsequently worked 24 hours for Shiloh Steel Erectors (“Shiloh Steel”) from December 5, 2011 through December 7, 2011.

5. Fifth deployment

Plaintiff claims that he returned to military service on December 7, 2011 in anticipation of his fifth deployment, to Afghanistan, which began on January 20, 2012 and was completed about 18 months later on July 9, 2013. His order of deployment contained the same declaration of *27 exemptions under § 4312(c)(4)(A) and (B) as the first order of deployment.

Within 90 days of his return from Afghanistan, he worked eight hours for Magnificent Concrete (“Magnificent Concrete”) and 56 hours for Structures Derek International (“Structures Derek”) between August and October, 2013. He subsequently worked 133 hours for Southern Folger Detention Equipment Company (“Southern Folger”) in December, 2013 and January, 2014.

6. Later deployments

Plaintiff asserts that his sixth deployment sent him back to Afghanistan, beginning in late January, 2014 and ending one year later. He submits that, although he cannot locate his order of deployment, the period of service “almost certainly falls under § 4312(c)(4)(A) & (B) and would therefore be exempt” from the five-year limit on cumulative military service. He does not contend that he applied for reemployment or worked for a covered employer within 90 days of his return from his sixth deployment.

Shea finally declares that his seventh deployment sent him to Africa, beginning in May, 2015, and continuing through at least November, 2015, and thus lasted for at least six months. The order of deployment contained the same declaration of exemptions under § 4312(c)(4)(A) and (B) as the first order of deployment.

Defendants dispute that characterization of the facts and proclaim that his sixth deployment began in September, 2013, and continued until at least April, 2015, more than 18 months later.

E. Procedural history

In October, 2013, plaintiff initiated this USERRA action by filing a complaint alleging that the Pension Fund and Pension Fund Trustees 1) refused to award him pension credits for his periods of military service in violation of §§ 4302 and 4318, 2) discriminated against him based upon his status as a servicemember by requiring him, but not non-servicemembers, to complete additional years of employment in order to receive pension benefits in violation of § 4311 and 3) refused to contribute to his annuity account in violation of § 4318. Shea later amended the complaint to name the Annuity Fund and Annuity Fund Trustees as additional defendants.

The parties filed the pending cross-motions for summary judgment in October, 2015.

II. Cross-motions for summary judgment

A. Legal standard


Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine issue of material fact exists where the evidence with respect to the material fact in dispute “is such that a reasonable jury could return a verdict for the nonmoving party.”

If the moving party satisfies its burden, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine, triable issue. Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The Court must view the entire record in the light most favorable to the non-moving party and make all reasonable inferences in that party's favor. O'Connor v. Steeves, 994 F.2d 905, 907 (1st Cir.1993). Summary judgment is appropriate if, after viewing the record in the non-moving party's favor, the Court determines that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law.

B. Application

In their cross-motions for summary judgment, the parties specifically dispute whether plaintiff is entitled to accrue pension credits for the 2007-2013 periods of his military service. If he is entitled to accrue pension credits for those periods, he easily satisfied the 30-credit requirement as of 2011, when he applied for pension benefits, and as of 2013, when he returned from his fifth deployment. Satisfaction of the 30-credit requirement would render him eligible to receive pension benefits in retirement and annuity contributions for his periods of military service.

Count 1: Failure to award accrued pension credits

Count 1 asserts that defendants violated §§ 4302 and 4318 by imposing reemployment conditions on plaintiff beyond what USERRA requires and refusing to award plaintiff pension credits that he accrued during his periods of military service.

USERRA entitles a returning servicemember to reemployment rights and benefits if 1) he or she notifies the employer of such military service in advance, 2) the cumulative length of the impending absence and all previous absences required by military service does not exceed five years and 3) he or she notifies the employer of his or her intent to return to employment within 90 days after completing the period of military service. §§ 4312(a) and (e).

Section 4318 provides that 

\[ \text{Section 4318 provides that} \]

\[ \text{each period served by a person in the uniformed services shall, upon reemployment under this chapter, be deemed to constitute service with the employer ... for the purpose of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan.} \]

§ 4318(a)(2)(B). Section 4302 provides that USERRA 1) supersedes any state law, policy, plan or practice that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit but 2) does not supersede, nullify or diminish any federal or state law, policy, plan or practice that establishes a more beneficial or additional right or benefit. § 4302.

a. Five-year limit on military service

Defendants first contend that 1) plaintiff's cumulative military service exceeds the five-year limit set by USERRA and incorporated by the Pension Plan, 2) he does not specify in his memoranda whether or how his periods of military service are exempt from the five-year limit and thus 3) he is not entitled to reemployment benefits such as the accrual of pension credits for his periods of military service.

Plaintiff responds that he has not exceeded five years of cumulative military service based upon evidence that 1) the order of deployment for his third deployment, to Bahrain,
implicitly declared that period of military service exempt under § 4312(c)(4)(B) and 2) the orders of deployment for his other deployments expressly declared those periods of service exempt under §§ 4312(c)(4)(A) and (B). Defendants do not dispute those assertions.

The Court agrees with plaintiff and finds that the periods of his deployments between 2007 and 2013 are exempt from the five-year limit. The Court also finds that the remaining periods of military service, even if they are not exempt from the limit, amount to only three years of service and thus fall short of the five-year threshold. That calculation is based upon the undisputed facts that Shea 1) completed 58 days of training during the four or five months after his first deployment, 2) attended two months of construction training before he began his second deployment and 3) was deployed a sixth time in either September, 2013 or January, 2014 and remains deployed to this day.

The five-year limit on cumulative military service thus does not preclude plaintiff's claim for reemployment benefits such as pension credits for each relevant period of military service. Accordingly, defendants' motion for summary judgment with respect to that issue will be denied.

b. Supersession of the Pension Plan by USERRA

Plaintiff seeks to invalidate the reemployment requirements in the Pension Plan as unlawful on their face. He argues that they impose additional prerequisites on pension eligibility beyond the requirements of § 4318 and in contravention of § 4302.

A servicemember returning from more than 180 days of military service is entitled to reemployment rights and benefits under USERRA if he or she 1) notifies the employer of such military service in advance, 2) has less than five years of cumulative military service and 3) submits an application of reemployment to the employer within 90 days of completing the military service. §§ 4312(a) and (e)(1) (D). A servicemember who submits an untimely application for reemployment does not automatically forfeit his or her reemployment rights and benefits. § 4312(e)(3). Under those circumstances, the servicemember would instead be subject to the rules of conduct, established policy and general practices of the employer concerning employee absence from scheduled work. Id. Here, Shea contends that a servicemember returning from a period of military service exceeding 180 days need only comply with the USERRA requirement of timely application for reemployment to be entitled to his or her accrued pension credits. He concludes that the requirements in the Pension Plan that he must also work 300 hours for a covered employer within one year and accrue 2.5 pension credits within five years constitute additional prerequisites that are expressly prohibited by § 4302.

The Court agrees with plaintiff. A plain reading of § 4312 indicates that, after a period of military service exceeding 180 days, a returning servicemember who applies for reemployment with the employer within 90 days is entitled to accrue pension credits for that period of service, regardless of whether he or she later works 300 hours and accrues 2.5 pension credits in the following months and years. The reemployment requirements in USERRA thus preempt the 300-hour and 2.5-credit requirements in the Pension Plan with respect to servicemembers who return from military service of longer than 180 days and who timely apply for reemployment.

The Court notes that defendants do not suggest that the reemployment of such servicemembers would 1) be impossible or unreasonable under § 4312(d)(2)(A) due to a change in employer circumstances or 2) impose an undue hardship under § 4312(D)(2)(B) as a result of the servicemember's disability or lack of qualification for the position of reemployment. Although § 4312(d)(2)(C) permits an employer to withhold reemployment rights or benefits if it can show that the servicemember's pre-service employment was for a brief, nonrecurrent period and there [w]as no reasonable expectation that such employment [would] continue indefinitely or for a significant period[.]

the bare assertion by defendants that “the nature of employment in the construction industry ... [is] often sporadic” does not satisfy that burden.

The Court further notes that defendants' argument that the 300-hour and 2.5-credit requirements in the Pension Plan comply with ERISA is misplaced because 1) those Plan
requirements are more restrictive than, and thus preempted by, the USERRA requirements concerning a servicemember's entitlement to reemployment rights and benefits and 2) USERRA is a federal statute not preempted by ERISA. See 29 U.S.C. § 1144(d) ("Nothing in this [ERISA] subchapter [on the Protection of Employee Benefit Rights] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections [addressing federal laws other than USERRA] ) ....").

*30 Accordingly, because the 300-hour and 2.5 credit requirements in the Pension Plan are preempted by USERRA specifically with respect to returning servicemembers whose military service exceeds 180 days and who timely apply for reemployment, plaintiff's motion for summary judgment will, to that extent, be allowed and defendants' motion for summary judgment will, to that extent, be denied.

c. Timely application for reemployment

The parties dispute whether plaintiff timely applied for reemployment as required by USERRA and the Pension Plan.

As discussed, USERRA provides that a servicemember returning from a period of military service exceeding 180 days must submit an application for reemployment with the employer within 90 days after completing the period of military service. § 4312(e)(1)(D). The regulations that implement USERRA distinguish between the act of submitting an application for reemployment and the act of reporting to the site of employment. 20 C.F.R. § 1002.115(c) (2006)(emphasis added)("Whether the employee is required to report to work or submit a timely application for reemployment depends upon the length of service ...."). The application for reemployment may be written or verbal. Id.

Although the application for reemployment need not follow a particular format, it should at least indicate that the employee is a former employee returning from service in the uniformed services and that he or she seeks reemployment with the pre-service employer.

20 C.F.R. § 1002.118 (2006). The servicemember must submit the application to 1) the pre-service employer, 2) the agent or representative of the pre-service employer with apparent responsibility for receiving employment applications, or 3) the successor-in-interest to the pre-service employer if there has been a change in ownership. 20 C.F.R. § 1002.119 (2006).

The servicemember may seek or obtain employment with another employer during the 90-day period without giving up his or her reemployment rights with the pre-service employer, unless such alternative employment would constitute cause for the pre-service employer to discipline or terminate the servicemember after reemployment. 20 C.F.R. § 1002.120 (2006).

Plaintiff proclaims that he timely applied for reemployment after each relevant period of military service.

i. First deployment

[9] Shea maintains that he complied with the reemployment requirement after his first deployment because he worked 112 hours for Capco Steel within 90 days after finishing his post-deployment military training. Defendants respond that the 90-day period began on the day that he returned from deployment, not the day that he completed post-deployment training, and that he is ineligible for reemployment rights and benefits because he did not apply for reemployment during that 90-day period.

The evidence is insufficient to support a finding as a matter of law with respect to whether plaintiff properly applied for reemployment. The act of reporting to the employment site is not equivalent to the act of submitting an application for reemployment. See 20 C.F.R. § 1002.115(c). The timeliness of plaintiff's act of reporting to Capco Steel for employment does not adequately address whether he submitted an application for reemployment with his pre-service employer.

Accordingly, summary judgment is unwarranted with respect to whether plaintiff *31 timely applied for reemployment after his first deployment.
ii. Second deployment

[10] Plaintiff submits that he did not need to comply with the reemployment requirement after his second deployment, which ended on January 6, 2010, because that deployment was temporally continuous with his third deployment, which began fewer than 90 days later on April 1, 2010. Defendants respond that the reemployment requirement did apply to him after that second deployment and that his failure to satisfy that requirement precludes his claim to accrued pension credits for the period of his second deployment.

There is a genuine issue of material fact with respect to whether the third deployment was, in fact, a continuation of the second deployment under the Pension Plan such that the reemployment requirement did not apply. Summary judgment is unwarranted with respect to whether plaintiff was required to, or did, comply with the reemployment requirement after the second deployment.

iii. Third deployment

Plaintiff avers that the reemployment requirement did not apply to him after his third deployment because that deployment is deemed to have been part of his fourth deployment. Defendants concede that his third and fourth deployments were “contiguous.”

iv. Fourth deployment

[11] Plaintiff insists that he complied with the reemployment requirement after his fourth deployment because he 1) worked eight hours for Francis Harvey & Sons before his release from the service, 2) went to his local union hall on multiple occasions during the 90-day period after such release, signed the out-of-work list, talked to other union members about employment positions and notified the business agent at the union hall that he had returned from active duty and was seeking reemployment and 3) subsequently worked 24 hours for Shiloh Steel.

The Court notes that plaintiff does not proffer his August 26, 2011 letter to Ironworkers Local Union 7 as evidence of his compliance with the reemployment requirement, perhaps because he does not consider Ironworkers Local Union 7 to have been his pre-service employer.

Defendants respond to plaintiff's assertions by generally denying that those actions satisfy the reemployment requirement and specifically denying that plaintiff actually performed work for Francis Harvey & Sons. They declare that Francis Harvey & Sons awarded him eight hours of employment benefits merely as a courtesy.

The Court finds that plaintiff's employment history with Francis Harvey & Sons does not properly address whether he applied for reemployment with his pre-service employer because 1) he did not work for Francis Harvey & Sons within the 90-day period following his release from the service and 2) the act of reporting to an employment site is not equivalent to submitting an application for reemployment. The fact that he worked for Shiloh Steel after the 90-day period is also not pertinent to whether plaintiff timely applied for reemployment.

Based upon the evidence before the Court, it is unable to determine, as a matter of law, whether plaintiff's actions at the local union hall amounted to an indication to his pre-service employer that he was a former employee returning from military service and seeking reemployment. Summary judgment is unwarranted with respect to whether plaintiff complied with the reemployment requirement after his third and fourth deployments.

vi. Fifth deployment

[12] Shea avers that he satisfied the reemployment requirement after his fifth deployment because he worked 1) 64 hours for Magnificent Concrete and Structures Derek within 90 days of his release from deployment and 2) 133 hours for Southern Folger after the 90-day period.

The fact that plaintiff reported to those employment sites and was actually employed by those entities does not properly address whether he timely submitted an application for reemployment to his pre-service employer. Summary judgment with respect to whether plaintiff timely applied for reemployment after his fifth deployment is unwarranted.

vi. Later deployments

The amended complaint does not assert claims to pension credits purportedly accrued during plaintiff's sixth and
seventh deployments. The Court therefore declines to consider the dispute between the parties concerning those deployments.

Accordingly, the Court will deny both motions for summary judgment with respect to plaintiff's claim that he is entitled to accrue pension credits for the 2007-2013 periods of his military service.

**Count 2: Discrimination against servicemembers**

Plaintiff contends in Count 2 that defendants violated § 4311 when they discriminated against him, based upon his military service, by requiring him to perform additional years of employment before receiving pension benefits to which he is already entitled under § 4318.

Section 4311 provides that a person who has performed military service “shall not be denied ... any benefit of employment by an employer” on the basis of his or her performance of military service. § 4311(a).

To prevail on his claim, plaintiff must make an initial showing that his military service was a “motivating” or “substantial” factor for the action taken by the employer. § 4311(c)(1); Velazquez–Garcia v. Horizon Lines of P.R., Inc., 473 F.3d 11, 17 (1st Cir.2007). If he is successful, the burden then shifts to the employer to prove, by a preponderance of the evidence, that it would have taken the action regardless of plaintiff's military service. Velazquez–Garcia, 473 F.3d at 17. The underlying issue is not whether the employer is “entitled” to impose heightened requirements on an employee for a particular reason but whether it would have done so even if the employee had not served in the military. See id. at 20.

Here, Shea asserts that the Pension Plan discriminatorily requires him and other returning servicemembers, but not other returning employees such as disabled employees seeking reemployment, to complete 300 hours of employment and accrue 2.5 pension credits in order to receive pension credit for military service. He proffers evidence that defendants intended those additional requirements to prevent returning servicemembers from “tak[ing] advantage of the pension fund and avoid[ing] service within the trade by retiring young.” Defendants respond that plaintiff lacks standing to challenge the 300-hour and 2.5-credit requirements in the Pension Plan because 1) his claims to benefits are barred by USERRA’s five-year limit on cumulative military service and its requirement of timely application for reemployment and thus 2) the 300-hour and 2.5-credit requirements did not cause him an injury sufficient to establish standing. They also deny that the 300-hour and 2.5-credit requirements discriminate against servicemembers and emphasize that they are “unique as they permit up to five (5) *33 years of non-work hours to be converted to creditable service.”

The issue of standing to assert a discrimination claim turns on whether plaintiff timely applied for reemployment with his pre-service employer. That is because, as discussed above, 1) the five-year limit does not preclude his pension claims and 2) with respect to servicemembers returning from over 180 days of military service, the 300-hour and 2.5-credit requirements in the Pension Plan apply only to servicemembers who do not timely apply for reemployment under USERRA.

If the disputed issue of material fact with respect to whether plaintiff timely applied for reemployment is ultimately resolved in his favor, the 300-hour and 2.5-credit requirements will not apply to his pension claims and he will not have standing to raise a discrimination claim under § 4311.

If, however, the issue of timely application for reemployment is resolved in defendants’ favor, then the 300-hour and 2.5 credit requirements will apply to the pension claims. That would furnish plaintiff with 1) a cognizable injury in the form of a denial of pension credits based upon his alleged failure to satisfy those additional requirements and thus 2) standing to assert the discrimination claim. Accordingly, the Court is unable to determine at this stage of the litigation that plaintiff lacks standing to litigate his discrimination claim.

Although defendants apparently concede plaintiff's substantiated assertion that his military service was the motivating factor in their imposition of the 300-hour and 2.5-credit requirements on him, the Court declines to opine on the merits of the discrimination claim until after resolution of the factual dispute with respect to plaintiff's timely applications for reemployment post-military service.

Accordingly, both motions for summary judgment with respect to the discrimination claim will be denied.
Count 3: Failure to make annuity contributions

[17] According to Count 3, defendants violated § 4318 when they refused to contribute to plaintiff's annuity account as required by USERRA and the Annuity Plan. The parties agree that Shea's individual annuity account is a pension benefit account subject to the provisions of § 4318 but dispute his entitlement to annuity contributions.

Section 4318 provides that an employer that reemploys a returning servicemember must contribute to his or her pension benefit account for his or her period of military service in the same manner and to the same extent that it contributes to the pension benefit accounts of other employees. § 4318(b)(1).

The statute allows the employer to allocate the responsibility to make contributions to “the last employer employing the person before the period [of military service]” unless that last employer is no longer functional. Id.

As discussed above, a returning servicemember who seeks reemployment within the meaning of USERRA must have less than five years of cumulative military service and must apply for reemployment with the pre-service employer within 90 days of completing the period of military service. Here, there is a genuine issue of material fact as to whether plaintiff timely applied for reemployment after each relevant period of military service. The resolution of that issue will affect whether Shea is entitled to reemployment benefits such as annuity contributions for his periods of military service.

Accordingly, the Court declines to consider the merits of the annuity claim until the factual dispute with respect to plaintiff's timely application for reemployment is resolved. Both motions for summary judgment with respect to the annuity claim will be denied.

ORDER

For the foregoing reasons, plaintiff's motion for summary judgment (Docket No. 42) is, with respect to the preemption of the 300-hour and 2.5-credit requirements in the Pension Plan for certain servicemembers by USERRA, ALLOWED, but is otherwise DENIED and defendants' motion for summary judgment (Docket No. 45) is DENIED.

So ordered.

All Citations

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF UTAH
CENTRAL DIVISION

PAUL M. COSTELLO,

Plaintiff,

vs.

VETERAN’S TRADING COMPANY, LLC;

Defendant.

Case No.

COMPLAINT

Captain Paul M. Costello, through the undersigned Assistant United States Attorney, complains against Defendant Veteran’s Trading Company, LLC (“VTC”) as follows:

1. This is a civil action involving the Uniformed Services Employment and Re-employment Rights Act of 1994 (“USERRA”), 38 U.S.C. §§ 4301 to 4333. USERRA was enacted to encourage noncareer service in the uniformed services by, among other things, minimizing or eliminating the disadvantages to civilian careers that can result from such service. USERRA specifically protects veterans and Reserve component members from employment discrimination and provides reemployment rights with a pre-service employer following qualifying military service.

2. This Court has jurisdiction under 38 U.S.C. § 4323(b)(1) and 28 U.S.C. § 1331.
3. Venue is proper in the District of Utah, Central Division because VTC has a place of business is in Park City, Summit County, Utah. 38 U.S.C. § 4323(c)(2); 28 U.S.C. §§ 1391(b), 125(2).

**FACTUAL BACKGROUND**

4. Captain Costello is a disabled veteran from the United States Navy where he served as an F-18 fighter pilot. Since 1997, he has served as a United States Naval Reserve member.

5. VTC is a disabled-veteran-owned small business with headquarters in Park City, Utah and sales offices in Florida, Maryland, Texas, and California. John Pierce and Jack Climer founded VTC.

6. Captain Costello began working for VTC on or about April 2006 and was given a 5% interest in the company.

7. In April 2008, VTC gave Captain Costello a 7% interest in the company.

8. In December 2008, Captain Costello was promoted to Vice President for Government Affairs for VTC and was given a small salary in addition to the aforementioned ownership interest.

9. Founder Jack Climer, who also was a disabled veteran, was removed as President of VTC based on a criminal conviction. Climer’s removal as President jeopardized VTC’s favorable financing status as a Service Disabled Veteran Owned Small Business from the Small Business Administration (“SBA”), which required VTC to have a veteran with a disability rating serving as its President and participating in the day-to-day operations of the firm.

10. Consequently, founder John Pierce and principal Steve Culligan offered Captain
Costello the job of President of VTC in January 2012.

11. As President, Captain Costello was given a larger salary, a 25% ownership interest, and a 9% interest in profit sharing.

12. John Pierce had a 45% ownership interest in VTC and a 61% profit sharing interest. Principals Jeffrey Brown and Steven Culligan had a 26% and a 4% ownership interest and a 6% and a 19% profit-sharing interest in VTC respectively.

13. As President, Captain Costello became subject to the “Amended and Restated Operating Agreement of Veterans Trading Company, LLC” (“Operating Agreement”).

14. Among other provisions, the Operating Agreement defines a “member” as “any Person which is a holder of record of one or more Shares.” The Operating Agreement also provides that “[a]ll Members shall be Directors” of VTC. The Operating Agreement expressly provides that members were to be treated as partners only for purposes of taxation.

15. The Operating Agreement further provides that a member may be expelled and may forfeit all his/her shares if, among other things, the member has “two or more unexcused consecutive absences from mandatory special or regular meetings of the members or Board of Directors, after receiving sufficient notice under Section 6.02 and 6.04.”

16. For “special meetings” section 6.02(g) authorizes 24-hours’ notice if given by telephone or in person, 48-hours’ notice if given by electronic means, and 5-days’ notice if sent by regular mail.

17. Section 6.04(d) requires “not less than 10 nor more than 60 days[1]” notice for “each meeting of Members.”
18. To maintain its SBA designation as a SDVOSB, Captain Costello assumed more of an active role in the day-to-day operations at VTC, which required him to participate in numerous conference calls and to attend many out-of-town meetings with suppliers and clients.


20. On or about July 28, 2012, Captain Costello placed a call to John Pierce informing him that the Navy was calling Captain Costello to active duty.

21. Captain Costello began active military duty on October 12, 2012.

22. On May 7-8, 2013, under the direction of John Pierce, Captain Costello presided over a meeting of VTC members in Seattle, Washington. Captain Costello was able to attend and preside over this meeting while he was on approved personal leave from the military.

23. Despite being President of VTC, Captain Costello did not have sole decisionmaking authority to take the company in the direction he wanted. John Pierce, Steve Culligan, and Jeffrey Brown could control the contents of the documents that Captain Costello authored, the offers he could make or accept, the meetings that he could attend, and what he was authorized to represent to suppliers or clients. After meeting with suppliers or clients, Captain Costello would report back to Pierce, Culligan, Brown. In effect, Captain Costello worked for Pierce, Culligan, and Brown.

24. On or about May 15, 2013, Captain Costello was given notice via email at approximately 9:04 a.m. that a special meeting of VTC that would be held later that day. This
electronic notice failed to comply with the Operating Agreement’s requirement of 48-hours’ notice. Nevertheless, even had notice been adequate, Captain Costello was unable to attend the meeting because of his active military duties.

25. John Pierce and Steve Culligan set an investor meeting for June 18, 2013, which Captain Costello confirmed his attendance via email. Shortly after confirming his attendance at the June 18, 2013 meeting, Captain Costello received an email notifying him that the June 18, 2013 special meeting with a potential investor had been moved to June 19, 2013 to accommodate the investor’s schedule.

26. Captain Costello informed Steve Culligan that military duties on June 19, 2013 would preclude Captain Costello from attending the meeting.

27. Steve Culligan responded to Captain Costello that the June 19, 2013 meeting could not be changed.

28. On June 13, 2013, six days before the rescheduled meeting, Captain Costello was no longer able to access his email on VTC’s server.

29. On June 14, 2013, Captain Costello left a message for VTC’s information technology contractor to fix the problem with Captain Costello’s email access. The information technology contractor did not respond to Captain Costello.

30. On June 17, 2013, Captain Costello left a message for John Pierce to fix Captain Costello’s denied access to VTC’s email server. Pierce never responded.

31. On June 18, 2013, Captain Costello left a message for Steve Culligan asking him to fix Captain Costello’s denied access to VTC’s email server. Culligan never responded.
32. On June 19, 2013, Captain Costello was attending to his military duties and was unable to join the meeting.

33. After the meeting on June 19, 2013, VTC’s legal counsel called Captain Costello and informed him that his employment with VTC had been terminated for missing two consecutive member meetings. VTC’s legal counsel also informed Captain Costello that his shares in VTC had been forfeited. VTC’s legal counsel never indicated that Captain Costello’s employment had been terminated because of poor performance.

34. On June 20, 2013, Captain Costello received a letter dated June 19, 2013, in which VTC’s counsel reiterated that Captain Costello’s “employment relationship with VTC is hereby terminated” because he missed two consecutive meetings. VTC’s letter also discussed ways to “smooth your transition as an employee from the Company . . . .” VTC’s letter never said that Captain Costello’s employment was terminated because of poor performance.

35. Captain Costello’s active military status ended on or about September 5, 2013, and he re-applied for employment at VTC on or about September 24, 2013.

36. VTC denied Captain Costello’s application for re-employment.

**FIRST CAUSE OF ACTION**
(Violation of 38 U.S.C. § 4311)

37. Captain Costello incorporates herein paragraphs 1-36.

38. Captain Costello was an employee of VTC.

39. Captain Costello rendered service in the uniformed services as an active-duty reservist from on or about October 12, 2012 to September 5, 2013.

40. On June 19, 2013, VTC denied Captain Costello retention in employment and all
the benefits thereof—including but not limited to his salary, benefits, and ownership and
distribution shares in VTC—by terminating his employment. Captain Costello’s membership,
performance of service, and obligation to serve in the uniformed services was a motivating factor
in the decision to terminate his employment.

SECOND CAUSE OF ACTION
(Violation of 38 U.S.C. § 4312)

41. Captain Costello incorporates herein paragraphs 1-40.

42. On or about July 28, 2012, Captain Costello gave advance notice of his October 12,
2012 active-duty military status to VTC member John Pierce.

43. Captain Costello had been absent from VTC by reason of service in the uniform
services for fewer than five years.

44. Captain Costello timely submitted an application for re-employment within 19 days
of ending approximately 11 months of active-duty military service.

45. VTC denied Captain Costello’s request for re-employment.

PRAYER FOR RELIEF

WHEREFORE, Captain Costello requests that this Court grant the following relief:

A. A declaration that VTC violated 38 U.S.C. § 4311 by terminating Captain Costello’s
employment when his active-duty military service precluded him from attending two mandatory
meetings;

B. A declaration that VTC violated 38 U.S.C. § 4312 by refusing to re-hire Captain Costello
upon his timely application to be re-hired after his active-duty military service had ended;

C. A declaration that one or both of VTC’s above-referenced violations were “willful”;

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D. An order requiring that VTC pay Captain Costello as liquidated damages an amount equal to the amount of his loss of wages and other benefits suffered by reason of VTC’s willful failure to comply with the provisions of Title 38 of the United States Code;

E. An order that VTC return Captain Costello’s ownership and distribution shares and pay to Captain Costello all amounts that were distributed to shareholders between June 19, 2013 and the date of judgment; or

F. In the alternative, if return of Captain Costello’s ownership and distribution shares is not possible, then an order requiring VTC to pay Captain Costello in liquidated damages the fair value of those shares as determined at trial;

G. An award of prejudgment interest on the amount of lost wages and value of Captain Costello’s shares in VTC found due;

H. An order requiring VTC to compensate Captain Costello for attorney fees heretofore expended, expert witness fees, expenses for litigation in this action, and expenses for medical care and treatment of health problems, including emotional distress, which VTC caused Captain Costello to suffer; and

I. Any other relief that this Court deems just and equitable.

DATED this 17th day of February 2015.

CARLIE CHRISTENSEN
Acting United States Attorney

/s/ Jared C. Bennett
JARED C. BENNETT
Assistant United States Attorney
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-03090

LINDSEY HUNGER,

Plaintiff,

v.

WALMART INC.,

Defendant.

COMPLAINT

Plaintiff Lindsey Hunger brings this civil action under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301, et seq. (“USERRA”), against Walmart Inc. (“Walmart”). Walmart refused to hire Hunger because she was a member of the Navy Reserve, and because she had a mandatory two-week annual training for which she would have to be absent from work. Hunger alleges as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 and 38 U.S.C. § 4323(b).

2. Venue is proper in this district pursuant to 38 U.S.C. § 4323(c)(2) because Walmart maintains a place of business in this judicial district, and pursuant to 28 U.S.C. § 1391(b) because the events giving rise to this action occurred in this judicial district.
PARTIES

3. The plaintiff, Lindsey Hunger, is a Colorado resident, and was a Colorado resident at the time of the events giving rise to this lawsuit.

4. Defendant Walmart is a Delaware corporation with corporate headquarters located in Arkansas. It is one of the largest retailers in the world; as of May 2019, Walmart operated 106 stores in Colorado including Store No. 5099 located on Rimrock Avenue in Grand Junction, Colorado.

FACTUAL ALLEGATIONS

5. Hunger enlisted in the Navy Reserve in 2015. She currently holds the rank of petty officer third class (E4).

6. As part of their service, Navy Reservists must complete an annual, mandatory, two-week training duty. In 2016, Hunger received orders to report to San Diego for annual training, from July 9 through July 22.

7. At the time, Hunger was also a full-time student, studying to become an elementary school teacher at Colorado Mesa University. Hunger completed her Bachelor’s degree in Elementary Education in December 2016, and was hired as an elementary school teacher in August 2017. She currently teaches third grade.

8. Hunger was in need of a job to pay for basic necessities after finishing the 2015-16 school year, including supporting her two young children who were 7 and 5 years-old at the time, so she applied for a job at the Walmart on Rimrock Avenue in Grand Junction, Colorado, Store No. 5099.

10. At the time she applied, 4-5 open positions at the Rimrock store were posted on Walmart’s website.

11. On May 26, 2016, Walmart’s Personnel Coordinator for Store No. 5099, Kathleen Kelsey, called Hunger and left a voicemail message: “This message is for Lindsey. Lindsey, my name is Kathleen, I’m the Personnel Coordinator at Walmart on Rimrock, in Grand Junction. I was reviewing your application—and, just had some questions I wanted to go over with you. If you could return my call at 248-0031. Thank you, bye-bye.”

12. On May 27, 2016, Hunger spoke to Kelsey on the phone for approximately 11 minutes. Kelsey informed Hunger that the available opening was for a part-time seasonal position, which included general customer service and some stocking duties. Kelsey indicated that Hunger may be able to stay beyond the season in an overnight shift, which would fit with Hunger’s school schedule when school resumed in the fall of 2016.

13. After discussing the details of the open position, Hunger informed Kelsey that she would have to take two weeks off to complete her annual Navy Reserve training. Kelsey responded that summer was a busy time at Walmart, the store needed someone who would be there, and that Walmart could not support Hunger’s absence for two weeks.

14. Upon hearing Hunger’s need for military leave, Kelsey ended the call, stating that she could not hire Hunger.

15. Hunger was receiving public assistance at the time and she was required to document her job search. Officials administering her public assistance benefits indicated that
they needed a reason Hunger was rejected by Walmart, and so she called Kelsey back a few days later.

16. During that conversation, Hunger confirmed with Kelsey that Walmart was not hiring her because of her two-week annual Navy Reserve training, and Hunger also told Kelsey that she was violating her USERRA rights. Kelsey responded that she did not know what USERRA was.

17. At the time Hunger applied for employment, Walmart’s Discrimination & Harassment Prevention Policy (“Employment Discrimination Policy”), the same version of which had been in place since at least 2011, prohibited “refusing to hire” a person because of that individual’s “veteran status.” At the time Hunger applied for employment, Kelsey had worked for Walmart for 25 years, and had worked in personnel matters for 20 of those years.

18. During the Department of Labor (“DOL”) investigation of Hunger’s claim, Kelsey told a DOL investigator that she did not recall having any conversations with Hunger, nor did she recall any of the details of any of these conversations.

19. After being rejected by Walmart, Hunger was shocked that Walmart would refuse to employ her because of her military service obligations. She told her partner at the time, and her unit team in the Navy Reserve, about her conversations with Kelsey.

20. Hunger was qualified for an entry-level retail position at Walmart. At the time she applied, she was a full-time college student with a high-school diploma, and was an active-duty member of the Navy Reserve.
21. After the initial call between Hunger and Kelsey on May 27, 2016, Walmart never called Hunger again to discuss potential employment.

22. Hunger returned to school full-time in the fall of 2016 and was student teaching.

23. After graduating in December 2016, Hunger was able to find some employment as a substitute teacher during the first half of 2017. She did not begin working full-time until she was hired as a full-time elementary school teacher in fall 2017.

**Claim for Relief**

**Violation of USERRA, 38 U.S.C. § 4311(a)**

24. Hunger incorporates by reference and re-alleges the allegations set forth in paragraphs 1 to 23 above.

25. Walmart is liable for damages under USERRA, 38 U.S.C. § 4311(a), for denying initial employment to Hunger because of her membership in, performance of service in, and obligation to serve in the Navy Reserve.

26. Walmart’s violation of Section 4311 of USERRA was willful as contemplated in 38 U.S.C. § 4323(d)(1)(C) in that Walmart showed reckless disregard for whether it engaged in conduct prohibited by USERRA.

27. Walmart is a covered employer subject to USERRA because it has “denied initial employment” to Hunger “in violation of section 4311.” 38 U.S.C. § 4303(4)(A)(v).

28. Hunger’s military service and obligation to serve was a “motivating factor” in Walmart’s decision not to hire her. 38 U.S.C. § 4311(c)(1).
WHEREFORE, Hunger prays for relief as follows:

a. Find that Hunger sustained actual damages in the form of lost wages as a result of Walmart’s refusal to hire her, plus post-judgment interest, costs, and other proper relief;

b. Declare that Walmart’s violation of USERRA was willful;

c. Award liquidated damages to Hunger in an amount equal to the amount of her lost wages and other benefits suffered by reason of Walmart’s willful violation of USERRA, as authorized under 38 U.S.C. § 4323(d)(1)(C); and

d. Any other legal and equitable relief that the Court finds to be just and proper.

JURY DEMAND

Hunger hereby demands a trial by jury of all issues so triable pursuant to Rule 38 of the Federal Rules of Civil Procedure.

Dated October 30, 2019.

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