

# Law Review 1282

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## DOJ Gets Job Back for Mobilized Navy Reservist

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1.1.1.6—USERRA Applies to State and Local Governments

1.2—USERRA Forbids Discrimination

1.3.2.2—Continuous Accumulation of Seniority—Escalator Principle

1.4—USERRA Enforcement

The *Star Tribune* (Minnesota) reported on August 10, 2012 (on pages B-1 and B7) that enlisted Navy Reservist Michael Schutz obtained his job back, along with back pay and other relief, through the efforts of the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS) and the United States Department of Justice (DOJ). It is good to see that the system does work as advertised, at least some of the time.

Schutz was hired as a full-time police officer by Truman, Minnesota in 2005. He was called to active duty by the Navy and deployed to Kuwait. He completed his active duty honorably and returned home to Minnesota, and he made a timely application for reemployment with the Truman Police Department (TPD). Although he had been a full-time police officer before he was called to the colors, he was reinstated as a part-time officer, with a substantial loss of pay.

It appears to be uncontested that Schutz met the eligibility criteria for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA). He left his job for the purpose of performing service in the uniformed services, and he gave the employer prior oral or written notice. He did not exceed the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to his employment relationship with the TPD, and since his call-up was involuntary this period of service does not count toward his five-year limit.<sup>[1]</sup> He was released from active duty without the sort of bad discharge that would disqualify him under section 4304 of USERRA, 38 U.S.C. 4304. After release from active duty, he made a timely application for reemployment with the TPD.

Because Schutz met the USERRA eligibility criteria, the TPD was required to reemploy him “in the position of employment in which the person [Schutz] *would have been employed* if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform.” 38 U.S.C. 4313(a)(2)(A) (emphasis supplied).

The TPD reemployed Schutz in a part-time position, contending that state aid cuts during his deployment made this downgrade necessary. This TPD action was not necessarily a violation of USERRA. To determine the lawfulness of the downgrade, we need to determine what *would have happened* to Schutz's TPD job if he had not been called to the colors. Were there other TPD police officers whose salaries were supported by state aid? What happened to their jobs when the state aid was cut?

It should be emphasized that the position that the returning veteran *would have attained if continuously employed* is not always equal to or better than the position that he or she left. This is particularly the case during an economic downturn. USERRA does not protect a veteran like Schutz from a reduction of hours or a reduction-in-force that *clearly would have happened anyway* even if he had remained continuously employed in the civilian job. Determining what *would have happened anyway* is often the contested issue in a USERRA case like this.

After Schutz complained to DOL-VETS concerning the reduction from full-time to part-time status, the TPD accused Schutz of misconduct, claiming he falsified 75 minutes on his time card, amounting to about \$25 in pay. The TPD demanded that Schutz turn in his badge, his radio, and his keys.

Schutz then filed a new USERRA claim with DOL-VETS, asserting that the time card issue was a pretext and that he had been fired for complaining to DOL-VETS about the reduction in hours. Under section 4311(b) of USERRA, 38 U.S.C. 4311(b), it is unlawful for an employer to reprise against an individual for having filed a USERRA complaint. *Even if Schutz's initial USERRA complaint was without merit*, it was unlawful to reprise against him for having filed the complaint.

The time card issue arose shortly after Schutz filed his complaint with DOL-VETS, and that proximity in time is certainly suspicious, but the fact that the firing chronologically followed the complaint does not, by itself, prove that the complaint caused the firing. We all need to be wary of the *post hoc ergo propter hoc* logical fallacy. That is Latin for “after which, therefore because of which.” The crowing of the rooster at 6:20 a.m. does not cause the sun to rise at 6:30, although the rooster may believe that to be the case.

DOL-VETS investigated Schutz's two claims, about the reduction in hours and about the firing, and found both to have merit. DOL-VETS then tried unsuccessfully to persuade the TPD to come into compliance with USERRA. In accordance with section 4322(e) of USERRA [38 U.S.C. 4322(e)], DOL-VETS advised Schutz of the results of the agency's investigation and of Schutz's right to request referral to DOJ. In accordance with section 4323(a)(1), Schutz requested referral, and DOL-VETS referred the case file as requested. DOJ agreed that Schutz's case had merit, and DOJ filed suit, on behalf of Schutz and against the City of Truman, in the United States District Court for the District of Minnesota.

The case has now been settled, very favorably for Schutz. He has received his job back, and all references to the firing have been removed from his personnel file. He has also received substantial back pay, restored vacation hours and pension credit, and other relief. This settlement should be seen as an implicit admission by the TPD that Schutz would not have been downgraded to part-time status if he had not been called to the colors and that the time-card issue was a pretext to hide a reprisal against him for having filed a claim.

Section 4323(d)(1)(C) of USERRA [38 U.S.C. 4323(d)(1)(C)] provides that a federal district court may award double damages (called “liquidated damages”) if the court finds that the employer violated USERRA *willfully*. This sounds like the kind of case where liquidated damages would have been carefully considered if the TPD had not settled.

Schutz was not required to rely on DOL-VETS and DOJ. He could have retained private counsel and filed suit in federal district court, and he could have attained all the same relief plus attorney fees, in accordance with 38 U.S.C. 4323(h)(1). The number of USERRA cases filed by private counsel is much greater than the handful of cases filed by DOJ each year. But it is good to see that the government system does work occasionally.

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[1] Please see Law Review 201 for a definitive discussion of the five-year limit—what counts and what does not count. I invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find 782 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week.