

# Law Review 1289

September 2012

## Affirmative Defenses under USERRA

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

1.1.2.1—Part-time, temporary, probationary, and at-will employment

1.3.1.4—USERRA affirmative defenses

1.3.2.9—Accommodations for disabled veterans

1.7—USERRA regulations

### Q: What is an affirmative defense?

**A:** The term “affirmative defense” has been defined as follows: “In code pleading. New matter constituting a defense; new matter which, assuming the complaint to be true, constitutes a defense to it.” *Black’s Law Dictionary*, Revised Fourth Edition, page 82.

### Q: Does the Uniformed Services Employment and Reemployment Rights Act (USERRA) provide affirmative defenses to the employer’s obligation to reemploy the returning veteran?

**A:** Yes. Section 4312(d) of USERRA provides:

“(d)

(1) An employer is not required to reemploy a person under this chapter if—

(A) the employer’s circumstances have so changed as to make such reemployment impossible or unreasonable;

(B) in the case of a person entitled to reemployment under subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313, such employment would impose an undue hardship on the employer; or

(C) the employment from which the person leaves to serve in the uniformed services is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period.

(2) In any proceeding involving an issue of whether—

(A) any reemployment referred to in paragraph (1) is impossible or unreasonable because of a change in an employer’s circumstances,

(B) any accommodation, training, or effort referred to in subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313 would impose an undue hardship on the employer, or

(C) the employment referred to in paragraph (1)(C) is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period, *the employer shall have the burden of proving* the impossibility or unreasonableness, undue hardship, or the brief or nonrecurrent nature of the employment without a reasonable expectation of continuing indefinitely or for a significant period.”

**38 U.S.C. 4312(d) (emphasis supplied).**

Section 4331(a) of USERRA [38 U.S.C. 4331(a)] gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. In September 2004, the Secretary published proposed USERRA regulations in the *Federal Register*. After considering the comments received and making a few adjustments, the Secretary published the final USERRA regulations in December 2005. The regulations are published in the Code of Federal Regulations (C.F.R.) in Title 20, Part 1002. The regulations include a section about the employer affirmative 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.”

**20 C.F.R. 1002.139** (bold question in original).

Let us take three scenarios to understand how these affirmative defenses work. In Scenario One, Joe Smith works for the XYZ Company, which has 1,000 employees when Joe was called to active duty, in the Marine Corps Reserve, in September 2012. Joe serves on active duty for a year and is released from active duty on September 15, 2013. Joe meets the USERRA eligibility criteria for reemployment, in that:

1. He left his job for service in the uniformed services in September 2012.
2. He gave the employer prior oral or written notice.
3. He has not exceeded the five-year cumulative limit under section 4312(c) of USERRA, 38 U.S.C. 4312(c).
4. He was released from active duty without receiving the sort of bad discharge that will disqualify him under section 4304, 38 U.S.C. 4304.
5. He made a timely application for reemployment on September 16, 2013, well within the 90 permissible days after he was released from active duty on September 15, 2013.

During the year that Joe was on active duty, XYZ went through very hard times, and 900 of the 1,000 employees were dismissed. Joe probably would have been among those dismissed if he had not been in Afghanistan on active duty at the time, but we do not know that for certain because this is a non-union situation and dismissals are not based on seniority.

XYZ defends based on 38 U.S.C. 4312(d)(1)(A)—that the company’s changed circumstances (going from 1,000 employees to 100 employees) make it impossible or unreasonable to reemploy Joe Smith, although he meets the USERRA eligibility criteria. XYZ has the burden of proof on this issue. Based on this factual scenario, the company will probably prevail.

In Scenario Two, Mary Jones is hired by the ABC Department Store in November 2012. She is told that her job starts on November 23 (the day after Thanksgiving) and runs through December 26 (the day after Christmas). Mary has not worked for ABC before, and she has been told that there is no reason for her to expect to be invited back to work for Christmas season 2013.

Mary is a member of the Army Reserve, and she is called to active duty on December 15, 2012, for one year—she is released from active duty on December 14, 2013. Mary meets the USERRA eligibility criteria as to prior notice to ABC, not exceeding the five-year limit with respect to her employment relationship with ABC, release from active duty without a disqualifying bad discharge, and timely application for reemployment on December 15, 2013.

ABC defends based on 38 U.S.C. 4312(d)(1)(C). It appears that the employer will be able to prove, by preponderance of the evidence, that Mary’s ABC employment (the employment that she left to report to active duty on December 15, 2012) was brief and non-recurrent and that Mary had no reasonable expectation that her ABC employment would continue indefinitely or for a significant time. Thus, ABC prevails, based on this affirmative defense.

Scenario Three is based on 38 U.S.C. 4312(d)(1)(B) and is more complicated. This affirmative defense is only available “in the case of a person entitled to reemployment under subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313.”

Subsections (a)(3) and (a)(4) of section 4313 deal with the situation of a returning veteran who meets the USERRA eligibility criteria for reemployment but who is not qualified for the position that he or she would have attained, but for the period of uniformed service, because of a disability incurred or aggravated during the period of service. Subsection (b)(2)(B) of section 4313 deals with the returning veteran who meets the USERRA eligibility criteria but who is not qualified to perform the duties of the position that he or she would have attained if continuously employed, for a reason other than a disability incurred or aggravated during the period of service.[\[1\]](#)

Under section 4313 of USERRA, 38 U.S.C. 4313, the employer is required to make reasonable efforts to accommodate the returning disabled veteran who meets the USERRA criteria, or the returning veteran who meets the criteria but who is not qualified for some other reason. Under section 4312(d)(1)(B), the employer is exempted from the requirement to make these accommodations if making them would impose an “undue hardship” on the employer.

Section 4303 of USERRA defines 16 terms, including the term “undue hardship” which is defined as follows:

“(15)The term “undue hardship”, in the case of actions taken by an employer, means actions requiring significant difficulty or expense, when considered in light of—

(A) the nature and cost of the action needed under this chapter;

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

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

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

### **38 U.S.C. 4303(15).**

Let us assume that Charlie Cox left his job at the MNO Corporation, where he had been a heavy equipment operator, to join the Army in January 2009. Charlie deployed to Afghanistan, where he was severely wounded in action—he lost both legs and his left arm. After extensive treatment and rehabilitation, Charlie was medically retired from the Army in January 2013. Charlie meets the USERRA eligibility criteria for reemployment at MNO.

Under 38 U.S.C. 4313(a)(3) and (4), MNO is required to make reasonable efforts to enable Charlie to return to his job as a heavy equipment operator. If there is no reasonable accommodation that will enable Charlie (with no legs and only one arm) to return to the equipment operator job, MNO must reemploy Charlie in some other position for which he is qualified (despite the severe disability) or for which he can become qualified with reasonable employer efforts.

Under section 4312(d)(1)(B), MNO can defend by showing that the kind of accommodations that would be required to enable Charlie to return to work, either as an equipment operator or in some other position, would impose an “undue hardship” on MNO. This is an affirmative defense for which MNO bears a heavy burden of proof, especially in view of USERRA’s definition of “undue hardship.”

It should be emphasized that section 4312(d)(1)(B) is a very narrow affirmative defense that is very difficult to establish and only applies in unusual circumstances. Section 4312(d)(1)(B) only comes up in a handful of cases each year.

---

[\[1\]](#) For example, let us assume that Alex Adams worked for the DEF Corporation as the Manager of Information Technology, and he left his job for five years of military service. Alex meets the USERRA eligibility criteria for reemployment, but during the five years that he was on active duty there have been massive changes in the information technology field. Alex is not qualified to resume his duties as the Manager of Information Technology, because the systems that he knows are no longer in use and he has no familiarity with the systems that are in use at the time he returns from military service.