# Law Review 13022

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**The Escalator Can Descend as well as Ascend**

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1.2—USERRA forbids discrimination
1.3.2.2—Continuous accumulation of seniority—escalator principle
1.4—USERRA enforcement

***Milhauser v. Minco Products,* 701 F.3d 268 (8th Cir. 2012), *rehearing denied,* 2013 U.S. App. LEXIS 955 (8th Cir. Jan. 14, 2013).**

Douglas Milhauser began working for Minco Products as a maintenance technician in 2006.[1] He was also a reservist—service not mentioned in the court decision. Between 2007 and 2009, he took military leave from his civilian job three times, and the last military leave began in March 2009.

Milhauser's 2009 call-up was cut off prematurely when he suffered a serious reaction to an inoculation and was hospitalized. He was medically cleared in May 2009 and was released from active duty. He promptly applied for reemployment and was scheduled to return to work on June 3, 2009.

In 2008, Minco began experiencing a decline in customer orders, and the company posted its first ever annual loss in that year. Customer orders continued to decline in 2009. As a result, the company began a series of actions to cut costs. Despite these measures, in March of 2009 Minco decided that it had to reduce its workforce, and the company eliminated 18 jobs in March. That reduction proved to be insufficient, and the company eliminated an additional 32 jobs in June. The second round of job cuts happened to correspond with Milhauser's return from military service, and his job was one of the jobs eliminated.

As part of the second round of job cuts, Minco found it necessary to eliminate four of the 13 positions in the department where Milhauser had been employed. The supervisor of the department was tasked to identify the four employees who should be terminated, based on job duties, technical expertise, and subjective factors as attitude and work ethic. The supervisor selected Milhauser as one of the four employees to be let go, and Milhauser did not return to work on June 3, 2009.

Milhauser retained private counsel and sued Minco in the United States District Court for the District of Minnesota.[2] Milhauser asserted that terminating his employment immediately upon his return from military service violated both section 4311 and section 4312 of USERRA.

Section 4311(a) of USERRA provides: "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." 38 U.S.C. 4311(a) (emphasis supplied).

Under section 4311(c) [38 U.S.C. 4311(c)], Milhauser was not required to prove that his military service or obligations were *the sole reason* that Minco terminated his employment. Milhauser only needed to prove that his service and obligations were *a motivating factor* in the employer's decision to terminate his employment. If he had proved that, the burden of proof would have shifted to the employer to prove that *it would have fired Milhauser anyway* even if he had not been a member of a uniformed service and had not been away from work for service.

In what was probably his stronger argument, Milhauser argued that the employer violated sections 4312 and 4313 of USERRA, in that it failed to reemploy him upon his release from active duty, although he clearly met the USERRA eligibility criteria for reemployment.[3] A person returning from a period of uniformed service of less than 91 days[4] and meeting the USERRA reemployment conditions is entitled to reemployment "in the position of employment in which the person *would have been employed* if the continuous employment of such person with the employer had not been interrupted by such service." 38 U.S.C. 4313(a)(1)(A) (emphasis supplied).

The case was tried to a jury, properly instructed by Judge Joan N. Erickson. Based on the evidence put on by both Milhauser and Minco, the jury found that *Minco would have terminated Milhauser's employment anyway* even if he had not been called to the colors in March 2009. The jury also found for the employer on the 4311 claim—found that Milhauser had not proved by a preponderance of the evidence that his performance of uniformed service was *a motivating factor* in the company's decision to terminate his employment. Milhauser appealed on the section 4312 claim but not on the section 4311 claim.

As is explained in Law Review 104[5] (December 2003) and other articles, Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which dates back to 1940. There have been 17 United States Supreme Court cases under the reemployment statute since it was enacted in 1940, and the first case was decided in 1946.

In that first case, the Supreme Court enunciated the "escalator principle" when it held: "[The returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946).[6]

It has always been the case that the "escalator" can descend as well as ascend. The descending escalator is particularly a problem during a serious recession. The point of the reemployment statute is to put the returning veteran (who meets the law's eligibility criteria) in the position that he or she *would have attained if continuously employed*. The reemployment law does not protect the veteran from a bad thing like a layoff or job elimination that *clearly would have happened anyway* even if the individual had not left the civilian job for uniformed service.

The world has changed a great deal since the Supreme Court decided *Fishgold* in 1946. At the time, unions represented more than half of all private sector employees in the United States, but today that percentage is less than 8%.[7]

When a union represents the workforce of a company, there is almost always a collective bargaining agreement (CBA) between the company and the union. The CBA generally provides that layoffs, when they are necessary, are to be based strictly on seniority, and recalls from layoff status are also based on seniority. Thus, the most recently hired employees will be the first to be laid off and the last to be called back from layoff.

When there is a union and a CBA, it is usually easy to determine the *escalated reinstatement position* of the returning veteran. Let us say that Joe Smith is our returning veteran. Bob Jones was hired by the company one day before Joe Smith was hired, and Mary Williams was hired one day after Smith. To determine Smith's escalated reinstatement position, we need only look to the position of Jones and Williams at the time that Smith returns from service.

As is quite common today, the Minco workforce is not represented by a union, and the court in this case determined that seniority had little to do with the selection of four of the 13 employees in Milhauser's department for job termination. In the absence of union and a CBA, determining the *escalated reinstatement position* of the returning veteran is more difficult but not impossible. In this case, Minco established, to the satisfaction of a properly selected and properly instructed jury, that Milhauser's escalated reinstatement position was no position at all—that his job would have been terminated anyway even if he had not been called to the colors.

On appeal, Milhauser argued that *termination* can never be the appropriate escalated reinstatement position, but the Court of Appeals rejected that argument. I believe that the court got it right.

Section 4331 of USERRA (38 U.S.C. 4331) gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. In accordance with this section, the Department of Labor (DOL) published proposed USERRA regulations in September 2004, for notice and comment. After considering the comments received and making a few adjustments, DOL published the final USERRA Regulations in December 2005.

The USERRA Regulations are codified in title 20 of the *Code of Federal Regulations* in Part 1002 (20 C.F.R. Part 1002). The pertinent section provides: "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*." 20 C.F.R. 1002.194 (emphasis supplied).

The Court of Appeals decision cites this DOL Regulation and accords deference to it: "We accord considerable deference to the Secretary's interpretation, since she is tasked with 'implementing the provisions' of USERRA."

If you do an Internet search on this case, you will find many write-ups by attorneys, both on the employer side and the employee side. I find that some of the exultation on the employer side and some of the wailing on the employee side are overstated and illogical.

Some of the wailers have suggested that this case means that an employer can make a mockery of USERRA simply by asserting as to the returning veteran that "we would have let him go anyway." I think that this assertion is incorrect. Minco did much more than *assert* that Milhauser would have been terminated anyway. The company *proved* to the satisfaction of the jury that, even apart from the times that he was away from work for service, Milhauser's job performance was "inconsistent and sometimes poor" and that Milhauser would have been terminated in June 2009 even if he had not been in the military.

USERRA is an important and powerful law, but it is not a "magic bullet" that entitles you to lifetime employment despite poor performance. Let us be realistic. If you are a career reservist in the post-9/11 era, your frequent and lengthy absences from work will inevitably detract from your value as an employee, in the eyes of the employer. It is incumbent on you to make a maximum effort to be the best employee you can be when you are not away from work for service.

I have heard from a senior Navy Reserve officer who disparaged his colleagues and supervisors at his civilian job, saying: "Those folks are obsessed with the color of the paint in the bathrooms. Don't they know that there is a war on?" I respectfully suggest that this is the wrong attitude. If your employer's business is bathroom painting, you should be focused on that subject when you are at work. I know that it is not easy to set aside the intense experience of combat when you leave active duty, but to remain employed and employable you need to learn to set aside your military concerns, at least to some extent, and focus on doing a good job for your civilian employer.

When you are "on the clock" at your civilian job, you should be devoting your full attention to the employer's business. You should not be making or taking calls at work that pertain to your reserve unit. Military full-timers who routinely deal with Reserve and National Guard personnel must be made to understand that *you must not call Reserve and Guard personnel at their civilian jobs*. If you must conduct a recall exercise, do so during evening or weekend hours, not while members of the unit are at their civilian jobs.

In the last 11 ½ years, we as a nation have asked civilian employers to put up with a lot, as almost 870,000 National Guard and Reserve personnel have been called to the colors, some of them repeatedly. We must not add to the annoyance of civilian employers by calling these personnel at their civilian jobs.

In several articles, I have stressed that *you must not use the employer's telephone, equipment, or time* to contact me, or Employer Support of the Guard and Reserve (ESGR), or DOL-VETS, or a private attorney to complain about your employer or to seek information and assistance in dealing with the employer concerning the inevitable conflicts between your military and civilian responsibilities. Nonetheless, I continue to receive e-mails complaining about employers that clearly come from the employer's e-mail system. *Wrong. When you send an e-mail from the computer on your desk at work, even on your Yahoo or Gmail account, you must assume that your employer is reading the e-mail and monitoring your use of employer-paid time for activities that do not support the employer.*

I also don't want you to call me on your cell phone *while you are driving*. Even if you are using a hands-free device, talking on a cell phone while driving is very dangerous and may be unlawful. The problem is the *distraction of your mind* and not just the distraction of your hands. While you are driving, you should be devoting your full attention to that task. I don't mean to be a scold about this, but it would bother me immensely if someone were to be involved in an accident while talking to me on the telephone.

I would greatly prefer that you call me from the privacy of your own home, outside your civilian work hours. Before calling me, please have your computer on (I will likely want to refer you to some of the articles on our website) and your pertinent military and civilian records available close at hand. Call me from your home phone or a *personal* cell phone, not a cell phone provided to you by your civilian employer.

I think that your calling me outside your civilian work hours is so important that I am giving up two evenings per week to make it possible for you to call me here at ROA headquarters. I am here until 10 pm Eastern Time on Mondays and Thursdays, answering calls and e-mails. Monday or Thursday evening is a very good time to call, because I do not receive a lot of calls on those evenings.

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[1] The facts in this article come directly from the appellate court decision. In accordance with standard practice, the facts are stated in the light that is most favorable to the jury verdict, which favored the defendant employer.

[2] It appears that Milhauser did not file a claim with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), and he was not required to do so before filing suit with private counsel. Unlike other statutes, USERRA has no "exhaustion of remedies" requirement, and one does not need a "right to sue letter" before filing suit in federal court.

[3] It is not disputed that Milhauser left his civilian job for the purpose of service and gave the employer prior oral or written notice. He was released from the period of service without having exceeded the cumulative five-year limit and without having received a disqualifying bad discharge. After release from service, he made a timely application for reemployment at Minco.

[4] Milhauser's period of service was originally expect to last more than 91 days, but the period was cut short after he suffered a serious reaction to an inoculation. It is the actual period of service, not the expected period, that controls for USERRA purposes.

[5] Please see www.servicemembers-lawcenter.org. You will find 844 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. We added 122 new articles in 2012, and we have already added 22 more new articles in January 2013.

[6] This citation means that you can find the *Fishgold* case in Volume 328 of *United States Reports* starting at page 275, and you can find the particular language at pages 284-85. Please see Law Review 13002 for a detailed explanation of how court decisions are cited.

[7] Unions have had great growth in federal, state, and local government employment, but in the private sector unions today are rare, except in certain heavily unionized industries like automobile and steel manufacturing, railroads, and airlines.