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Another New and Favorable USERRA Case

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1.1.3.3—USERRA applies to National Guard service
1.3.1.3—Timely application for reemployment
1.3.2.9—Accommodations for disabled veterans
1.4—USERRA enforcement

***Brown v. Prairie Farms Dairy, Inc.,* 872 F. Supp. 2d 637 (M.D. Tenn. 2012).**

Jerry Brown, an enlisted member of the Tennessee Army National Guard, began work for Prairie Farms Dairy in June 2007. Mr. Brown took military leave from his job on March 28-31, 2008; April 1-11, 2008; May 19-30, 2008; June 2-6, 2008; February 23-27, 2009; March 16-20, 2009; April 30-May 1, 2009; June 25-26, 2009; July 10, 2009; December 2-4, 2009; and December 5, 2009 to January 8, 2010.

Mr. Brown's final military leave was scheduled to last a year and was expected to include his deployment to Iraq, but he suffered a wrist injury during the pre-deployment training and was medically disqualified from deployment and released from active duty after just 34 days. After a period of service in the uniformed services of more than 30 days but less than 181 days, the returning veteran has 14 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(C). Mr. Brown met that deadline when he applied for reemployment on January 18, 2010.

As of that date, Mr. Brown met the qualifications for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA). He left his job at Prairie Farms Dairy for the purpose of performing uniformed service, and he gave the employer prior notice. He did not exceed the cumulative five-year limit with respect to the duration of his periods of uniformed service relating to his employer relationship with the dairy. He was released from the period of service without having received the sort of punitive or other-than-honorable discharge that would disqualify him under section 4304 of USERRA, 38 U.S.C. 4304. After release, he made a timely application for reemployment at the dairy.

Section 4312(f) of USERRA addresses the kind of documentation that the employer is permitted to demand of the returning veteran seeking reemployment:

(f)

(1)A person who submits an application for reemployment in accordance with subparagraph (C) or (D) of subsection (e)(1) or subsection (e)(2) shall provide to the person's employer (upon the request of such employer) documentation to establish that—

(A) the person's application is timely;

(B) the person has not exceeded the service limitations set forth in subsection (a)(2) (except as permitted under subsection (c)); and

(C) the person's entitlement to the benefits under this chapter has not been terminated pursuant to section 4304.

(2) Documentation of any matter referred to in paragraph (1) that satisfies regulations prescribed by the Secretary shall satisfy the documentation requirements in such paragraph.

(3)

(A) Except as provided in subparagraph (B), the failure of a person to provide documentation that satisfies regulations prescribed pursuant to paragraph (2) shall not be a basis for denying reemployment in accordance with the provisions of this chapter if the failure occurs because such documentation does not exist or is not readily available at the time of the request of the employer. If, after such reemployment, documentation becomes available that establishes that such person does not meet one or more of the requirements referred to in subparagraphs (A), (B), and (C) of paragraph (1), the employer of such person may terminate the employment of the person and the provision of any rights or benefits afforded the person under this chapter.

(B) An employer who reemploys a person absent from a position of employment for more than 90 days may require that the person provide the employer with the documentation referred to in subparagraph (A) before beginning to treat the person as not having incurred a break in service for pension purposes under section 4318(a)(2)(A).

(4) An employer may not delay or attempt to defeat a reemployment obligation by demanding documentation that does not then exist or is not then readily available.

38 U.S.C. 4312(f).

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. The Department of Labor (DOL) published proposed USERRA regulations, for notice and comment, in September 2004. After considering the comments received and making a few adjustments, DOL published the final USERRA regulations in December 2005. The regulations are now published in title 20, Code of Federal Regulations, Part 1002.

The DOL USERRA Regulations specifically address the kind of documentation that the returning veteran is required to produce, upon the employer's demand, under section 4312(f). The Regulation lists seven kinds of documentation that the returning veteran might provide, but the first item listed is "DD (Department of Defense) 214 Certificate of Release or Discharge from Active Duty." 20 C.F.R. 1002.123(a)(1).

Under section 4312(f)(1) of USERRA, the returning veteran is required to provide documentation establishing that his or her application for reemployment is timely, that he or she has not exceeded the five-year limit set forth in section 4312(c), and that he or she is not disqualified from reemployment by having received one of the unfavorable discharges listed in section 4304. The DD-214 clearly documents these three elements. It shows the date that the service member was released from the period of service (January 8, 2010), so the application for reemployment (made on January 18, 2010) was clearly timely. The DD-214 shows the beginning date and end date of the most recent period of service and also the amount of active duty previously served, so Mr. Brown was well within the five-year limit set forth in section 4312(c). The DD-214 shows that Mr. Brown's service was honorable and that he did not receive one of the disqualifying bad discharges listed in section 4304.

When the dairy demanded documentation in support of Mr. Brown's application for reemployment, he promptly provided a copy of his DD-214, on January 25, 2010. The documentation that Mr. Brown provided was all that he was required to provide, but the dairy was not satisfied. The dairy also demanded that he provide a physician's statement about the condition of his injured wrist and his ability to return to his job as a route sales driver.[1]

The doctrine of *expressio unius est exclusio alterius**[2]*** clearly applies here. In section 4312(f), Congress has listed three items that the returning veteran is required to document, upon the employer's request. Listing these three items clearly means that the employer is precluded from demanding documentation of any kind.

The United States Court of Appeals for the 6th Circuit[3] has applied the *expressio unius est exclusio alterius* maxim to section 4304 of USERRA. *See Petty v. Metro Government of Nashville-Davidson County,* 538 F.3d 431 (6th Cir. 2008), *cert. denied,* 129 S. Ct. 1933 (2009).[4] In his opinion in this case, Judge John T. Nixon applied this same maxim of statutory construction to section 4312(f). He wrote: "Consequently, any efforts by Defendant to impose requirements that go beyond those outlined in USERRA—even if they were a general 'company policy' and were not imposed on Plaintiff specifically—cannot serve as a condition on Plaintiff's reemployment under section 4312." *Brown,* 872 F. Supp. 2d at 643.

Mr. Brown met the eligibility criteria for reemployment under USERRA, and he applied for reemployment with a disability[5] incurred or aggravated during uniformed service. Under section 4313(a)(3) of USERRA [38 U.S.C. 4313(a)(3)], the employer was required to make reasonable efforts to accommodate Mr. Brown's physical limitations in the route sales driver position that he left to report to active duty. If Mr. Brown's limitations could not be reasonably accommodated in that position, the dairy was required to reemploy him in *some other position of employment* for which he was qualified or could become qualified with reasonable employer efforts and that provided like seniority, status, and pay, or the closest approximation thereof that was consistent with the circumstances of Mr. Brown's case.

Judge Nixon wrote: "Having found that Plaintiff had a right to reemployment under section 4312, Defendant had an obligation to reemploy Plaintiff in a position consistent with the dictates of section 4313. While Defendant attempts to cast doubt on Plaintiff's physical qualifications, such considerations cannot be taken into account before reemployment. Put differently, once Plaintiff has satisfied the prerequisites in section 4312—which the Court has already found Plaintiff to have done—then Plaintiff must be reemployed, and only then, when determining the particular position in which to reemploy Plaintiff, can Defendant consider Plaintiff's qualifications." *Brown,* 872 F. Supp. 2d at 645.

Judge Nixon denied the dairy's motion for summary judgment and set this case for trial. Thereafter, the parties settled. The terms of the settlement are confidential, but suffice it to say that Mr. Brown is satisfied.

I congratulate attorney Joseph Napiltonia[6] for his diligent, imaginative, and effective representation of Mr. Brown. Mr. Napiltonia is a life member of ROA. He served on active duty as an enlisted member of the Navy SEALs and later as a junior officer in the Army. I invite your attention to www.servicemembers-lawcenter.org. You will find Mr. Napiltonia's advertisement for his law practice, focusing on USERRA.

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[1] Mr. Brown's job at the dairy required him to repeatedly lift, load, and pull 45-pound cases of milk, stack the cases up to six high, and reach, push, bend, twist, and work in extreme temperatures.

[2] To express one is to exclude all the others.

[3] The 6th Circuit is the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee.

[4] This citation means that you can find the *Petty* case in Volume 538 of *Federal Reporter, Third Series,* starting on page 431. The *"cert. denied"* reference means that the Supreme Court declined to review the decision of the 6th Circuit. I discuss the implications of *Petty* in detail in Law Review 0864 (December 2008). I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 857 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform. You will also find 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 112 in 2011.

[5] Under USERRA, it matters not whether the disability resulting from the wrist injury is permanent or temporary.

[6] A USERRA claimant is not required to "exhaust remedies" with DOL or to obtain a "right to sue letter" from DOL as a condition precedent to filing suit in the appropriate federal district court. Mr. Brown did not file a complaint with DOL—he retained Mr. Napiltonia and filed suit directly. This is the way that most successful USERRA cases are brought. In general, the USERRA claimant is better served by retaining private counsel and bypassing DOL, especially if the claimant can find a lawyer like Joseph Napiltonia.