LAW REVIEW 13082

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**Escalator Principle Not Limited to Automatic Promotions—**
**District of Puerto Rico Gets it Wrong**

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

1.3.1.2—Character and duration of service
1.3.2.2—Continuous accumulation of seniority-escalator principle
1.4—USERRA enforcement

***Rivera-Melendez v. Pfizer Pharmaceutical, Inc.,* 2011 U.S. Dist. LEXIS 130238 (D. Puerto Rico Nov. 9, 2011).**

As I explained in Law Review 104[1] and other articles, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA)[2] in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act, the law that led to the drafting of millions of young men (including my late father) for World War II. A year later, as part of the Service Extension Act of 1941, Congress amended the VRRA to make it apply to voluntary enlistees as well as draftees.

In late 1945 and early 1946, approximately 9 million men (including my late father) and a few thousand women left active duty shortly after victory was achieved. Those who left private sector or federal jobs[3] when called to the colors (voluntarily or involuntarily) had the right to reemployment after they were discharged or released from active duty.
The Supreme Court has decided 16 cases about the VRRA and one about USERRA.[4] In the very 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).[5] In that same case, the Supreme Court held that the reemployment statute "is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold,* 328 U.S. at 285.

USERRA (enacted in 1994) codifies the escalator principle in section 4313(a)(2)(A) and section 4316(a). The first cited subsection provides that a person who meets the USERRA eligibility criteria[6] is to be reemployed "in the

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[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 894 articles about 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 added another 82 so far in 2013.
[2] USERRA is codified in title 38, United States Code, sections 4301 through 4335 (38 U.S.C. 4301-35).
[3] The VRRA has applied to the Federal Government and to private employers since 1940. In 1974, Congress expanded the law to make it apply to state and local governments as well.
[4] Please see Category 10.1 in our Subject Index, available at www.servicemembers-lawcenter.org. You will find a case note about each of these 17 cases.
[5] The citation means that you can find this case in Volume 328 of *United States Reports,* starting on page 275. The specific language quoted is at the bottom of page 284 and the top of page 285.
[6] The person must have left the civilian job for the purpose of performing voluntary or involuntary uniformed service and must have given the employer prior oral or written notice. The person must have been released from the period of service without having exceeded the cumulative five-year limit on the duration of periods of service related to the employer relationship for which the person seeks reemployment and without having received a

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, 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).

Section 4316(a) provides: "A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person *would have attained* if the person had remained continuously employed." 38 U.S.C. 4316(a) (emphasis supplied).

In 1946, when the Supreme Court decided *Fishgold,* more than half of all private sector employees were unionized. Today, that figure is less than 8%.[7] Unions are still strong today in some industries, such as railroads,[8] airlines, automobile-making, and steelmaking. In most of the private sector (including pharmaceutical manufacturing, as in this case) unions are rare.

When there is a union and a collective bargaining agreement (CBA) between the union and the employer, it is generally easy to determine where the returning veteran *would have been employed* if he or she had not been called to the colors. Under a typical CBA, promotions, pay raises, layoffs, and other important events are governed by seniority, which is determined by date of hire with the employer. Let us say that our returning veteran (Joe Smith) was hired on July 15, 2008. Mary Jones (hired July 14, 2008) is one step above Smith on the seniority roster, and Bob Williams (hired July 16, 2008) is one step below Smith. In determining what *would have happened* to Smith if he had not been called to the colors, we need only look to what has happened to Jones and Williams.

The more difficult but also more common question today is *how does the escalator principle apply in a non-union situation?* If the escalator principle only applies to *automatic* promotions that the returning veteran would have received with absolute certainty, that principle is of little value today, when unions, CBAs, and automatic promotions are unusual in the private sector.

In connection with the enactment of USERRA in 1993-94, the House Committee on Veterans' Affairs, chaired by the venerable Representative G.V. "Sonny" Montgomery[9] of Mississippi, held extensive hearings and wrote a thorough report (House Report No. 103-65). Most of that report is reprinted in the 1994 edition of *United States Code Congressional & Administrative News,* at pages 2449 through 2515. In two instructive paragraphs, at pages 2463-64, the Committee summarizes the escalator principle as follows:

"Thus, whatever position the returning serviceperson would have attained with reasonable certainty (*see Tilton v. Missouri Pacific R. Co.,* 376 U.S. 169, 180 (1964)), but for the absence for military service, would be the position guaranteed upon return. This could be the same position or a higher, lower, or lateral (e.g., a transfer) position or even possibly layoff or severance status (*See Derepkowski v. Smith-Lee Co., Inc.,* 371 F. Supp. 1071 (E.D. Wis. 1974)), depending on what has happened to the employment situation in the servicemember's absence.

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disqualifying bad discharge from the military. After release from service, the person must have made a timely application for reemployment. Please see Law Review 1281 for a detailed discussion of these criteria, and please see Law Review 201 for a detailed discussion of the five-year limit.

[7] Unions are doing better in the public sector.

[8] Six of the 17 Supreme Court cases under the reemployment statute deal with railroads as employer-defendants.

[9] Representative Montgomery was a World War II Army veteran and participated in the D-Day invasion on June 6, 1944. After the war, he remained active in the Army National Guard and rose to the rank of Major General, serving as the Adjutant General of Mississippi. He was elected to the U.S. House of Representatives in 1966 and served through 1996. For more than a decade, culminating in 1994, he chaired the House Committee on Veterans' Affairs and was the "father" of many important laws for veterans. USERRA was the last one and perhaps the most important. Representative Montgomery was also a life member of ROA for many years and until he passed away in 2006.

The Committee intends to affirm the interpretation of 'reasonable certainty' as 'a high probability.' (*see Schilz v. City of Taylor, Michigan,* 825 F.2d 944, 946 (6th Cir. 1987), which has sometimes been expressed in percentages. *See Montgomery v. Southern Electric Steel Co.,* 410 F.2d 611, 613 (5th Cir. 1969) (90 percent success of probationary employees becoming permanent meets reasonable certainty test); *Pomrening v. United Air Lines, Inc.,* 448 F.2d 609, 615 (7th Cir. 1971) (86 percent pass rate of training class meets reasonable certainty test)."

Luis A. Rivera-Melendez was employed by Pfizer Pharmaceutical, Inc. at its Puerto Rico manufacturing plant when he was called to active duty and deployed to Iraq in 2008. He was released from active duty in October 2009 and met the USERRA eligibility criteria. He returned to work for Pfizer at the same plant, but not in the same position that he had held before he was called to the colors.

Rivera-Melendez worked for Pfizer as an "API[10] Group Leader." In March 2009, while Rivera-Melendez was on active duty in Iraq, Pfizer eliminated the API Group Leader position and replaced it with two new positions, API Team Leader (the position of greater status and promotion opportunity) and API Service Coordinator. Those Pfizer employees who had been serving in API Group Leader positions were given the opportunity to apply for API Team Leader positions. No employees were automatically selected for API Team Leader. Selections were made based on experience and qualifications.

There apparently was conflicting testimony as to whether Rivera-Melendez was aware of these Pfizer developments while he was on active duty in Iraq and whether he had the opportunity to apply for an API Team Leader position. His wife also worked for Pfizer at the same plant, and she may have mentioned these developments to him in a telephone conversation or an e-mail.

I respectfully submit that Magistrate Judge Marcos E. Lopez[11] has missed an important point here. Rivera-Melendez was on active duty at the tip of the spear, in combat in Iraq. He should not have had to concern himself about what was happening at the Pfizer plant in Puerto Rico. The whole point of USERRA, as well as the Servicemembers Civil Relief Act, is to remove these civilian matters from the service member's mind, to the maximum extent feasible, so that he or she can devote his or her full attention to the life-and-death matters at hand. This is a safety issue, for the individual service member and for his or her colleagues. If I am in the Humvee next to Rivera-Melendez, I should not have to worry that he is not paying attention to his sector of the horizon because he is concerned about his civilian job at home.

When Rivera-Melendez returned to work after his military service, it was as an API Service Coordinator, the lesser position. He argued that if he had not been in Iraq on active duty at the time, he would have applied for the API Team Leader and would have been selected, with reasonable certainty. After Pfizer rejected that argument, Rivera-Melendez brought this lawsuit in the United States District Court for the District of Puerto Rico.

After discovery, Magistrate Judge Lopez granted Pfizer's motion for summary judgment, under Rule 56 of the Federal Rules of Civil Procedure. He held that USERRA's escalator principle *only applies to automatic promotions,* and not to discretionary promotions as in this case. In my view, he clearly erred.

Rivera-Melendez appealed to the United States Court of Appeals for the First Circuit.[12] Briefs were filed by both parties and by the United States, as *amicus curiae,* in March 2012. It is unclear why the 1st Circuit has not yet decided this case.[13] If the 1st Circuit overturns the summary judgment for Pfizer, which I consider to be likely and

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[10] API apparently is an abbreviation for Active Pharmaceutical Ingredient.

[11] A Magistrate Judge can decide dispositive motions in a civil case if all parties have agreed. Please see Update 2 to Law Review 13075.

[12] The 1st Circuit is the federal appellate court that sits in Boston and hears appeals from district courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.

[13] I invite the reader's attention to Act III, Scene 1 of *Hamlet,* written by William Shakespeare in 1602. In a long soliloquy while contemplating suicide, Prince Hamlet set forth a long litany of all that is wrong with human life, and

also to be right, then there will be a trial and Rivera-Melendez will have the opportunity to try to prove that with *reasonable certainty* he would have applied for and would have been selected for the API Team Leader position if he had not been in Iraq at the time. He may not win, but he should at least get his day in court. This is a very fact-based inquiry and is a question for a jury, not for a judge on summary judgment. Melendez-Rivera should have the opportunity to present evidence about his excellent job performance at Pfizer both before and after his call to the colors, in order to establish that with a high degree of probability he would have been selected for the API Team Leader position.

USERRA has an unusual enforcement mechanism for cases against private sector employers.[14] A person who claims that a private sector employer has violated his or her USERRA rights can file a written complaint with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), and that agency will then investigate the complaint and advise the complainant of the results of its investigation.[15] The complainant can then request that DOL-VETS refer the case file to the United States Department of Justice (DOJ).[16] If DOJ believes the case to have merit, it can file suit on behalf of the complainant, and in the complainant's name, in the appropriate United States District Court, at no cost to the complainant.[17]

If the complainant has chosen not to complain to DOL-VETS, or if the complainant has chosen not to request that DOL-VETS refer the case file to DOJ, or if DOJ has turned down the complainant's request for free legal representation, the individual can file suit in the appropriate federal district court[18] in his or her own name and with private counsel that he or she has retained.[19] If the individual proceeds with private counsel and prevails, the court may award the individual reasonable attorney fees.[20]

In this case, Rivera-Melendez apparently never complained to DOL-VETS. He filed suit directly in the United States District Court for the District of Puerto Rico and was and still is represented by attorney Jose Luis Barrios-Ramos of Barceloneta, Puerto Rico.

Although DOL had no official role in this case, since Rivera-Melendez chose not to file a complaint with the Department, attorneys at DOL's Office of the Solicitor[21] worked with DOJ attorneys and filed an excellent *amicus curiae* brief in the 1st Circuit on March 27, 2012. We are attaching a copy of this brief, immediately after this Law Review article.

We will keep the readers informed of developments in this important case.

> AMICUS BRIEF (pdf)

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"the law's delays" made the list. That situation has only gotten worse in the 411 years since Shakespeare wrote that play.

[14] USERRA's enforcement mechanism for cases against federal agencies and state governments are discussed in other Law Review articles.

[15] 38 U.S.C. 4322(d) and (e).

[16] 38 U.S.C. 4323(a)(1).

[17] 38 U.S.C. 4323(a)(1).

[18] This would be the district court for any district where the employer maintains a place of business. 38 U.S.C. 4323(c)(2).

[19] 38 U.S.C. 4323(a)(3).

[20] 38 U.S.C. 4323(h)(2).

[21] I worked for DOL's Office of the Solicitor, as an attorney, from 1982 to 1992, and that is when I developed the interest and expertise in the VRRA and USERRA.