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# First Circuit Reemphasizes Broad Scope of the Escalator Principle

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**1.3.2.2—Continuous accumulation of seniority-escalator principle**
**1.4—USERRA enforcement**

***Rivera-Melendez v. Pfizer Pharmaceuticals LLC,* 2013 U.S. App. LEXIS 19398 (1st Cir. Sept. 20, 2013).[1]**

As I explained in Law Review 104 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Rights Act (USERRA)[2] in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act, the law that led to the drafting of millions of young men (including my late father) for World War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] This is a very recent decision of the United States Court of Appeals for the First Circuit. The First 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. The First Circuit reversed the decision of the United States District Court for the District of Puerto Rico in *Rivera-Melendez v. Pfizer Pharmaceutical, Inc.,* 2011 U.S. Dist. LEXIS 130238 (D. Puerto Rico Nov. 9, 2011). The District Court decision is discussed in detail in Law Review 13082 (June 2013). I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 949 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 another 127 so far in 2013.

[2] USERRA is codified in title 38, United States Code, sections 4301-4335 (38 U.S.C. 4301-4335).

[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. You will find a case note about each Supreme Court reemployment rights case.

[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

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 only 6.6%.[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

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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 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] See http://www.bls.gov/news.release/union2.nr0.htm.

[8] Six of the 17 Supreme Court decisions on reemployment rights 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.

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.

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 "Active Pharmaceutical Ingredient (API) 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.

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[10] 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. I am pleased to report that the First Circuit agrees with me.

Rivera-Melendez appealed to the First Circuit, and as is standard in our federal appellate courts the case was assigned to a panel of three appellate judges. In this case, the panel consisted of Judge Sandra Lynch (Chief Judge of the First Circuit, appointed by President Clinton in 1995), Judge Juan R. Torruella (appointed by President Reagan in 1984), and Senior Judge[11] Kermit Lipez (appointed by President Clinton in 1998). Judge Lipez wrote the decision, and the other two judges joined in a unanimous decision.

In a scholarly and well-written decision, Judge Lipez cited the text and legislative history of USERRA, the USERRA regulations promulgated by the Department of Labor (DOL),[12] and case law under the VRRA and USERRA. His decision includes the following most interesting paragraphs:

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[10] A Magistrate Judge does not have the same status and authority as a Federal District Judge, who is appointed by the President with Senate confirmation and life tenure. If all parties consent (as occurred in this case), a Magistrate Judge can make a binding decision. Otherwise, the Magistrate Judge must make a recommendation that the District Judge must review and accept, modify, or reject. When all parties agree to let the Magistrate Judge decide, his or her decision can be appealed to the Court of Appeals like a District Judge's decision.

[11] After attaining sufficient years of service and age, a federal judge can take "senior status" and continue hearing cases, on a reduced calendar basis. Fortunately, most federal "senior status" judges continue hearing cases for as long as their health permits, and taking senior status means that the President can appoint a new judge, with Senate confirmation.

[12] Section 4331 of USERRA, 38 U.S.C. 4331, gives DOL the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL promulgated proposed USERRA

“The district court held that Rivera's attempt to invoke the escalator principle was improper because "[a]n escalator position is a promotion that is based solely on employee seniority. . . . [and] does not include an appointment to a position that is not automatic, but instead depends on the employee's fitness and ability and the employer's exercise of discretion." Dist. Ct. Op. at 17-18 (citation omitted) (internal quotation marks omitted). In concluding that the escalator principle and the reasonable certainty test do not apply to non-automatic promotions, the district court relied primarily upon *McKinney v. Missouri-Kansas-Texas Railroad Co.*, 357 U.S. 265 (1958), a case in which the Supreme Court interpreted the Universal Military Training and Service Act of 1951. There the Court held that a returning veteran seeking reemployment "is not entitled to demand that he be assigned a position higher than that he formerly held when promotion to such a position depends, not simply on seniority or some other form of automatic progression, but on the exercise of discretion by the employer." Id. at 272. Accordingly, the district court found that "the purpose of the escalator principle is to 'assure that those changes and advancements that would necessarily have occurred simply by virtue of continued employment will not be denied the veteran because of his absence in the military service,'" Dist. Ct. Op. at 18 (quoting *McKinney*, 357 U.S. at 272) (emphasis added), and that the principle therefore had no applicability to the facts of Rivera's case.

In citing the precedential authority of *McKinney*, the district court failed to consider the subsequently decided Supreme Court case of *Tilton v. Missouri Pacific Railroad Co.*, 376 U.S. 169 (1964). In *Tilton*, reemployed veterans claimed that they were deprived of seniority rights to which they were entitled under the Universal Military Training and Service Act when their employer assigned them seniority based upon the date that they returned from military service and completed the training necessary to advance to the higher position, rather than the date that they would have completed the training if they had not been called into service. Id. at 173-74. The Eighth Circuit had relied upon *McKinney* to deny the claims, as the promotion at issue ‘was subject to certain contingencies or 'variables'" and therefore was not automatic. Id. at 178-79. The Supreme Court reversed, finding that *McKinney* "did not adopt a rule of absolute foreseeability,’ id. at 179, and that "[t]o exact such certainty as a condition for insuring a veteran's seniority rights would render these statutorily protected rights without real meaning," id. at 180. The Court concluded that Congress intended a reemployed veteran . . . to enjoy the seniority status which he would have acquired by virtue of continued employment but for his absence in military service. This requirement is met if, as a matter of foresight, it was reasonably certain that advancement would have occurred, and if, as a matter of hindsight, it did in fact occur. Id. at 181. Read together, *McKinney* and *Tilton* suggest that the appropriate inquiry in determining the proper reemployment position for a returning servicemember is not whether an advancement or promotion was automatic, but rather whether it was reasonably certain that the returning servicemember would have attained the higher position but for his absence due to military service. The Department has certainly adopted this construction of the regulations and the relevant precedents. See 70 Fed. Reg. 75,246-01, 75,272 (stating that "general principles regarding the application of the escalator provision . . . require that a service member receive a missed promotion upon reemployment if there is a reasonable certainty that the promotion would have been granted" (citing *Tilton*, 376 U.S. at 177; *McKinney*, 357 U.S. at 274)); see also 20 C.F.R. § 1002.191. We accord this interpretation substantial deference. *See Massachusetts v. U.S. Nuclear Regulatory Comm'n*, 708 F.3d 63, 73 (1st Cir. 2013) (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

The district court also misinterpreted the regulations governing USERRA. For instance, the court cited 20 C.F.R. § 1002.191 for the proposition that the escalator principle ‘is intended to provide the employee with any seniority-based promotions that he would have obtained 'with reasonable certainty' had he not left his job to serve in the armed forces.’ Dist. Ct. Op. at 17 (emphasis added). However, nothing in section 1002.191 suggests that the escalator principle is limited to "seniority-based promotions." Furthermore, the next section states that "[i]n all cases, the starting point for determining the proper reemployment position is the escalator position." 20 C.F.R. §

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regulations, for notice and comment, in September 2004. After considering the comments received an making a few changes, DOL promulgated the final USERRA regulations in the *Federal Register* on December 19, 2005. The regulations are codified in title 20 of the Code of Federal Regulations, at Part 1002 (20 C.F.R. Part 1002).

1002.192 (emphasis added).

The court also cited section 1002.213 in support of its conclusion that "[a]n escalator position is a promotion that is based solely on employee seniority." Although sections 1002.210-.213 specifically address "seniority rights and benefits," and make clear that the reasonable certainty test and escalator principle apply to promotions that are based on seniority, these sections do not limit the application of the reasonable certainty test and the escalator principle to seniority-based promotions.

Finally, the district court misinterpreted the Department of Labor's commentary on the proposed regulations. In its order on Rivera's motion for reconsideration, the court stated that "[t]he commentary merely emphasizes . . . that the final rule is designed to avoid relying on whether or not the employer has labeled the position as 'discretionary.' However, the commentary does much more than that: it unambiguously states that '[s]ections 1002.191 and 1002.192 . . . incorporate the reasonable certainty test as it applies to discretionary and non-discretionary promotions.' 70 *Fed. Reg.* 75,246-01, 75,271.

Pfizer attempts to save the district court from its error, stating that, despite its broad language, the district court actually applied the reasonable certainty test and determined as a matter of law that it was not reasonably certain that Rivera would have attained the API Team Leader position. That position has no grounding in the district court's analysis. In its decision on Pfizer's motion for summary judgment, the district court emphasized throughout that any promotion to the API Team Leader position was non-automatic, and therefore not subject to the escalator principle and the reasonable certainty test. There was a similar emphasis in the district court's decision on Rivera's motion for reconsideration. The court only engaged the evidence in the summary judgment record to determine that the promotion was in fact discretionary.

Because the district court erred in finding that the escalator principle and the reasonable certainty test apply only to automatic promotions, and because the court did not apply those legal concepts to Rivera's claim, the district court's grant of summary judgment cannot stand. The court's analysis of Rivera's claim to the API Team Leader position was premised on its fundamental misapprehension of the correct legal standard, which in turn compromised its view of the evidence. We prefer to have the district court decide in the first instance if the summary judgment record reveals genuine issues of material fact on the question of whether it is reasonably certain that Rivera would have been promoted to the API Team Leader position if his work at Pfizer had not been interrupted by military service. We therefore remand to the district court for reconsideration of the motion for summary judgment in light of the correct legal standard." [Internal footnotes and page numbers omitted.]

Pfizer can ask the First Circuit for rehearing *en banc.* If granted, the case will be reheard by all the active (not Senior Status) judges of the First Circuit. As a final step, Pfizer can ask the Supreme Court for a writ of *certiorari.*[13] I think that it is most unlikely that the First Circuit would grant rehearing *en banc* and even more remote that the Supreme Court would grant *certiorari.*

This case will most likely be remanded to the District of Puerto Rico for a trial on the merits. Of course, it is also possible that the parties will agree to a settlement. We will keep the readers informed of developments in this most important and interesting case.

I congratulate attorney Jose L. Barrios-Ramos of the Puerto Rico law firm Pirillo Hill Gonzalez & Sanchez for his excellent representation of Mr. Rivera-Melendez. I also congratulate the Honorable M. Patricia Smith, the Solicitor of the United States Department of Labor, for the excellent *amicus curiae* brief filed by DOL in this case. Judge Lipez praised the DOL *amicus* brief in footnote 6 of his opinion.

[13] Four of the nine Justices of the Supreme Court must vote to grant *certiorari,* or it is denied and the decision of the Court of Appeals becomes final.