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USERRA 101 Final Exam

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Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) and President Bill Clinton signed it into law on October 13, 1994, as Public Law 103-353. USERRA represents a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act, the law that led to the drafting of millions of young men (including my late father) for World War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.

I have been dealing with the VRRA and USERRA for 33 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the interagency task force work product that President George H.W. Bush presented to Congress (as his proposal) in February 1991. The version signed by President Clinton in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301-4335 (38 U.S.C. 4301-4335).

I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), and as an attorney in private practice. For the last six years (June 2009 through May 2015), I have been the Director of the Service Members Law Center (SMLC), as a full-time employee of the Reserve Officers Association (ROA). My status as an employee of ROA ended recently, but I am continuing the SMLC as a volunteer activity, as a

[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1,300 "Law Review" articles about laws that are especially pertinent to those who serve our nation in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997.

member of ROA. I am available to answer questions by e-mail and telephone between 6 pm and 9 pm Eastern Time on Wednesdays and Thursdays. My ROA e-mail is SWright@roa.org and my telephone number is (800) 809-9448, extension 730.

This article is intended to serve as a review of the text of USERRA, the legislative history, the DOL USERRA regulations, and the case law.

Hypothetical situation and questions

Josephine Smith is a Lieutenant Commander in the Coast Guard Reserve. In the summer of 2010, shortly after the Deepwater Horizon explosion and oil spill disaster, she was involuntarily called to active duty by the Coast Guard, for six months. She gave prior oral and written notice to her civilian employer, Daddy Warbucks International (DWI), and her last day at her civilian job was June 15, 2010. Her active duty period began on July 1, 2010.

Smith's period of involuntary active duty ended on December 31, 2010, but the Coast Guard gave her the opportunity to extend her active duty period voluntarily, and she availed herself of that opportunity. Her second order began on January 1, 2011 and ended on December 31, 2011. She took four subsequent voluntary extensions, and she was released from active duty on September 30, 2015. She gave DWI prior notice of the 2011 extension but not the four subsequent extensions.

Smith applied for reemployment on November 15, 2015, by means of a certified letter sent to the DWI personnel office. The personnel office denied her application for reemployment, contending:

a. **The Uniformed Services Employment and Reemployment Rights Act (USERRA) only applies to the "real military" and not to the Coast Guard.**
b. **USERRA has a five-year limit on the duration of service, and Smith was gone for five years and five months, from June 15, 2010 until November 15, 2015.**
c. **Smith gave up her right to reemployment when she failed to notify DWI of the four extensions of her active duty period, from January 1, 2012 until September 30, 2015.**
d. **Smith gave up her right to reemployment when she failed to apply for reemployment immediately after she left active duty on September 30, 2015.**

Is Smith entitled to reemployment at DWI? Please analyze, and refer to the relevant sections of the statute.

Let us assume that Josephine is within the five-year limit and that she meets the other USERRA eligibility requirements. She is entitled to reemployment, but during her last active duty period (October 1, 2014 through September 30, 2015) she suffered a serious leg and knee injury during a volleyball game. Her DWI job requires vigorous physical activity, and Josephine is unable to do that job, at least for a few months until she fully recovers from recent knee surgery.

What obligation, if any, does DWI have to accommodate Josephine's disability? Does the obligation apply to an injury incurred during a recreational activity? Or is the obligation limited to combat injuries?

Josephine began her job at DWI in August 2009, less than a year before she began the relevant active duty period. DWI has a defined contribution pension plan [a 401(k) plan], but it only applies to employees who have been on the payroll of the company for at least a year. Josephine would have met the one-year threshold in August 2010, seven weeks after she left her job when she was called to the colors. Upon reemployment on December 1, 2015, is Josephine entitled to participate in the 401(k) plan retroactive to August 2010?

Under the DWI pension plan, each individual employee contributes 5% of his or her total DWI compensation (including overtime pay and night differential pay) to an individual account in the employee's name, and DWI matches all these contributions. The employee's contributions and the employer matches are considered to be vested after the employee has worked for DWI for five years.

Josephine would have reached the five-year threshold in August 2014, if she had not left her job for military service in June 2010. Is Josephine considered to be vested upon her reemployment?

After she returns to work for DWI on December 1, 2015, is Josephine entitled to make up the missed employee contributions to the pension account and to receive the employer matches? How long does she have to make up these contributions? How will it be determined how much Josephine *would have earned* from DWI but for her absence from work for military service? What rule applies if the amount of her imputed earnings cannot be determined with reasonable certainty?

DWI reemployed Josephine in December 2015 but has adamantly refused to accord Josephine her USERRA rights concerning the pension and her rate of pay upon reemployment. In January 2017, 13 months after Josephine returned to work, DWI fired her after catching her making a personal telephone call at work. Josephine claims and is prepared to prove that other DWI employees (not RC members) have been caught making personal telephone calls at work and were only counseled for this violation of DWI rules.

Does the firing violate USERRA? What section or sections apply?

Josephine has retained you to represent her. You sent a formal demand letter to the company, and the company ignored your letter. You then filed suit against DWI in the appropriate federal district court.

DWI responded to your lawsuit with a motion to compel arbitration. The company has appended to its motion a copy of an agreement that Josephine signed in late July 2009, just

before she was hired by the company. The personnel office told her at the time that she must sign the agreement or she would not be hired.

The agreement states that if Josephine ever has a dispute with DWI related in any way to her employment she must submit the dispute to binding arbitration. Will Josephine be held to this agreement? Should the court grant the company's motion to compel arbitration?

Answers

1. **Is Josephine Smith entitled to reemployment? Yes.**

Under the Uniformed Services Employment and Reemployment Rights Act (USERRA), a person has reemployment rights if he or she meets five conditions:

a. Must have left a civilian job (federal, state, local, or private sector) for the purpose of performing "service in the uniformed services" as defined by USERRA.
b. Must have given the employer prior oral or written notice, unless doing so was precluded by military necessity or otherwise impossible or unreasonable.
c. Must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment. There are nine exemptions—kinds of service that do not count toward exhausting the person's limit.
d. Must have been released from the period of service without having received a disqualifying bad discharge from the uniformed service.
e. Must have made a timely application for reemployment with the pre-service employer, after release from the period of service.

The employer (DWI) has contended that the Coast Guard is not a "real service" and that Josephine Smith does not have the right to reemployment for that reason. This contention is clearly wrong.

Section 4303 of USERRA[2] defines 16 terms used in this law, including the term "uniformed services," which is defined as follows:

> The term "uniformed services" means the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency.[3]

[2] 38 U.S.C. 4303.
[3] 38 U.S.C. 4303(16).

USERRA does not define the term “Armed Forces,” but the term is defined in the definitions section of title 10, as follows:

> (4) The term "armed forces" means the Army, Navy, Air Force, Marine Corps, *and Coast Guard*.[4]

Josephine Smith clearly left her civilian position at DWI for the purpose of performing uniformed service, as defined by USERRA.

Josephine Smith was required to give prior notice to DWI before she left her civilian job in June 2010 for uniformed service, and she gave such notice. I would have recommended that she keep DWI informed of each of the extensions of her active duty, but such continuing notice was not required. *See Sutton v. City of Chesapeake,* 713 F. Supp. 2d 547, 551 (E.D. Va. 2010). Josephine meets the criterion as to prior notice.

It is not a problem that Josephine left her civilian job on June 15, 2010 and began her active duty period on July 1, 16 days later. Josephine needed time to get her affairs in order before reporting to active duty, and this 16-day preparation period is protected by USERRA. *See* 20 C.F.R. 1002.74.

After Josephine was released from active duty on September 30, 2015, she had 90 days (until December 29) to apply for reemployment, because her period of uniformed service was in excess of 180 days. *See* 38 U.S.C. 4312(e)(1)(D). Josephine’s November 15 application for reemployment was timely under USERRA.

DWI contends that Josephine exceeded the five-year limit because five years and five months transpired between June 15, 2010 (her last day at the job before she went on active duty) and November 15, 2015 (when she applied for reemployment). It is the *period of service* (not the period of absence from the civilian job) that is subject to the five-year limit. The period between June 15 and July 1, while Josephine was getting her affairs in order and preparing to report to active duty as ordered, does not count toward Josephine’s five-year limit under USERRA. Similarly, the period between September 30 (when Josephine was released from active duty) and November 15 (when she applied for reemployment) does not count toward her five-year limit. *See* 20 C.F.R. 1002.100.

Section 4312(c) of USERRA[5] sets forth nine exemptions—kinds of service that do not count toward exhausting the individual’s five-year limit. Section 4312(c)(4)(A) exempts from the five-year limit service performed by a person who was “ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12302, 12304, or 12305 of title 10 *or under section 331, 332,*

[4] 10 U.S.C. 101(a)(4) (emphasis supplied).
[5] 38 U.S.C. 4312(c).

359, 360, 367, or 712 of title 14."[6] Josephine was *involuntarily* called to active duty by the Coast Guard, under one of these title 14 sections.

Josephine's period of active duty from July 1, 2010 through December 31, 2010 is exempt from the five-year limit, under section 4312(c)(4)(A). Even if all the other periods (January 1, 2011 through September 30, 2015) are not exempt, Josephine is short of the five-year limit by about three months.

It should be emphasized that the five-year limit is *cumulative* with respect to Josephine's employer relationship with DWI. For example, if Josephine began her DWI employment on August 1, 2009, we must look to the period from August 2009 (when Josephine was hired by DWI) until she left her job in June 2010 to determine if Josephine had used any part of her five-year limit during that period. For purposes of this answer, we are assuming that during the 2009-10 period Josephine's military service was limited to weekend drills and annual training in the Coast Guard Reserve, and those periods are exempt from the five-year limit under section 4312(c)(3).

2. What position is Josephine entitled to upon reemployment?

Because Josephine meets the USERRA conditions, the employer is required to reemploy her "in the position of employment in which the person [Josephine] 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).

The position that Josephine would have attained if continuously employed is probably but not necessarily the position that she left five years earlier. If it can be shown with reasonable certainty that Josephine would have been promoted to a better or higher position, she is entitled to that position (or a position of like seniority, status, and pay) upon her reemployment. On the other hand, Josephine is not protected from a downgrade or layoff that *clearly would have happened anyway* even if she had not left her job in June 2010 for Coast Guard service.

For purposes of this exercise, let us assume that DWI has been operating profitably and expanding moderately during the 2010-15 time period, when Josephine was away from her job for military service. There is no evidence that Josephine's job would have gone away or that she would have been terminated anyway even if she had not been away from work for service, but neither is there evidence to establish that she would have been promoted into a better job. If Josephine had remained continuously employed, she would still be in the same job, but she would have received several pay raises adding up to a 20% pay increase. By reemploying Josephine with exactly the same salary that she had been earning five years earlier, DWI has violated section 4313(a)(2)(A).

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[6] 38 U.S.C. 4312(c)(4)(A) (emphasis supplied). Title 14 of the United States Code pertains to the Coast Guard.

3. **Is DWI required to accommodate Josephine's disability resulting from the leg injury in the volleyball game? Yes.**

Because Josephine is entitled to reemployment and has returned to work with a disability incurred *during* her period of service, DWI is required to make accommodations for her under section 4313(a)(3) of USERRA, which provides as follows:

> (3) In the case of a person who *has a disability incurred in, or aggravated during, such service*, and who (after reasonable efforts by the employer to accommodate the disability) is not qualified due to such disability to be employed 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--
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> (A) in any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer; or
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> (B) if not employed under subparagraph (A), in a position which is the nearest approximation to a position referred to in subparagraph (A) in terms of seniority, status, and pay consistent with circumstances of such person's case.

38 U.S.C. 4313(a)(3) (emphasis supplied).

The employer's obligations under this section apply whenever the returning service member has a disability (temporary or permanent) that was *incurred in or aggravated during* the period of service. It matters not that Josephine's leg injury was incurred during a volleyball game, not in combat.

DWI is required to make reasonable efforts to accommodate Josephine's disability in the position that she left in 2010 and almost certainly would have maintained if she had been continuously employed. If there is no reasonable accommodation that would enable Josephine to perform that job, DWI must reemploy her in another position for which she is qualified or can become qualified with reasonable employer efforts and that is of like seniority, status, and pay. If there is no such position of like seniority, status, and pay for which Josephine is qualified or can become qualified, DWI must reemploy her in the position that is as close as possible (in terms of seniority, status, and pay) to the position to which Josephine would be entitled but for her disability.

Please note that the employer's obligations under section 4313(a)(3) *are not limited to vacant positions.* If there is a position for which Josephine is qualified or can become qualified with reasonable employer efforts, Josephine is entitled to that position *even if it means that the incumbent in the position must be displaced.*

In Law Review 0640 (December 2006), attorneys Lisa C. Cassilly and Matthew J. Gilligan wrote the following:

> May a Disabled Veteran "Bump" Another Employee Out of a Job?
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> What does an employer do if the only appropriate job for which the returning veteran qualifies is currently occupied by another employee? For example, Employee X was a forklift driver in a manufacturing facility before being called up with his National Guard unit to serve in Iraq. X loses a leg when his vehicle is struck by a roadside bomb. He returns to his employer, but can no longer drive a forklift. Despite the employer's reasonable efforts to accommodate him, X can only qualify for a clerk position in the front office—a position currently occupied by Z, an employee with seniority greater than X.
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> Quite different from what the ADA [Americans with Disabilities Act] would require, USERRA contemplates that the employer may need to "bump" Z to accommodate the returning veteran. Here, Z's job is the only appropriate job for which the veteran can qualify. The DOL's recently published USERRA regulations provide that an employer "may not refuse to reemploy a returning service member [because] someone else was hired to fill [his] position during his absence, even if … reemployment might require the termination of the replacement employee" [20 C.F.R. § 1002.139(a)]. Moreover, a number of courts interpreting USERRA and its predecessor statute have concluded that certain hardships fall within contemplation of the act, including the possibility that reemployment of the veteran may compromise the rights of other employees, displace other employees, or even result in their termination. See, e.g., *Nichols v. Dep't Veteran Affairs,* 11 F.3d 160, 163 (Fed. Cir. 1993) which states "A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. Employers must tailor their workforces to accommodate returning veterans' statutory rights to reemployment. Although such arrangements may produce temporary work dislocations for non-veteran employees, those hardships fall within the contemplation of the act, which is to be construed liberally to benefit those who 'left private life to serve their country.'" *Hembree v. Georgia Power Co.,* No. 77-1775A, 1979 U.S. Dist. LEXIS 8187, at *11-12 (N.D. Ga. Dec. 4, 1979), aff'd, 637 F.2d 423 (11th Cir. 1981) held that the company was obligated to reemploy a disabled employee in "nearest approximation" to prior position "regardless of whether an opening currently existed and regardless of whether placing plaintiff in the job would … compromise rights of other employees". These courts place the burden on employers to "tailor their workforces to accommodate returning veterans' statutory rights to reemployment" *(Nichols,* 11 F.3d at 163).

USERRA's provisions for returning disabled veterans are *over and above* the employer's obligations under the Americans with Disabilities Act (ADA), but this USERRA provision only applies to a returning service member who left employment with this particular employer and who meets the USERRA eligibility criteria. For more information about USERRA's protections for

the returning disabled veteran, please see Law Review 0640 (December 2006) and Law Review 0854 (November 2008).

4. Josephine has valuable pension rights under section 4318 of USERRA.

Because Josephine met the USERRA eligibility criteria and returned to work for DWI, she has valuable pension rights under section 4318 of USERRA, which reads as follows:

> § 4318. Employee pension benefit plans
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> (a) (1) (A) Except as provided in subparagraph (B), in the case of a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974) or a right provided under any Federal or State law governing pension benefits for governmental employees, the right to pension benefits of a person reemployed under this chapter shall be determined under this section.
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> (B) In the case of benefits under the Thrift Savings Plan, the rights of a person reemployed under this chapter shall be those rights provided in section 8432b of title 5. The first sentence of this subparagraph shall not be construed to affect any other right or benefit under this chapter.
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> (2) (A) *A person reemployed under this chapter shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services.*
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> (B) *Each period served by a person in the uniformed services shall, upon reemployment under this chapter, be deemed to constitute service with the employer or employers maintaining the plan for the purpose of determining the nonforfeitability of the person's accrued benefits [vesting] and for the purpose of determining the accrual of benefits under the plan.*
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> (b) (1) An employer reemploying a person under this chapter shall, with respect to a period of service described in subsection (a)(2)(B), be liable to an employee pension benefit plan for funding any obligation of the plan to provide the benefits described in subsection (a)(2) and shall allocate the amount of any employer contribution for the person in the same manner and to the same extent the allocation occurs for other employees during the period of service. For purposes of determining the amount of such liability and any obligation of the plan, earnings and forfeitures shall not be included. For purposes of determining the amount of such liability and for purposes of section 515 of the Employee Retirement Income Security Act of 1974 or any similar Federal or State law governing pension benefits for governmental employees, service in the uniformed services that is deemed under subsection (a) to be service with the employer shall be deemed to be service with the employer under the terms of the plan or any applicable collective bargaining agreement. In the case of a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability of the plan described in this paragraph shall be allocated--

(A) by the plan in such manner as the sponsor maintaining the plan shall provide; or
(B) if the sponsor does not provide--
(i) to the last employer employing the person before the period served by the person in the uniformed services, or
(ii) if such last employer is no longer functional, to the plan.
(2) A person reemployed under this chapter shall be entitled to accrued benefits pursuant to subsection (a) that are contingent on the making of, or derived from, employee contributions or elective deferrals (as defined in section 402(g)(3) of the Internal Revenue Code of 1986) only to the extent the person makes payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of service described in subsection (a)(2)(B). *Any payment to the plan described in this paragraph shall be made during the period beginning with the date of reemployment and whose duration is three times the period of the person's service in the uniformed services, such payment period not to exceed five years.*
(3) For purposes of computing an employer's liability under paragraph (1) or the employee's contributions under paragraph (2), the employee's compensation during the period of service described in subsection (a)(2)(B) shall be computed--
(A) at the rate the employee would have received but for the period of service described in subsection (a)(2)(B), or
(B) in the case that the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).

(c) Any employer who reemploys a person under this chapter and who is an employer contributing to a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter, shall, within 30 days after the date of such reemployment, provide information, in writing, of such reemployment to the administrator of such plan.

38 U.S.C. 4318 (emphasis supplied).

If Josephine had not left her DWI job for military service in June 2015, she would have met the one-year threshold for participation in the plan in August 2010, one year after she began her DWI employment. Upon her reemployment in December 2015, she is entitled to participate in the DWI pension plan, retroactive to August 2010.

Similarly, Josephine would have met the five-year vesting threshold in August 2014, five years after she began working for DWI. Upon her reemployment, she is considered vested.

Upon her reemployment, Josephine is entitled to make up the missed employee contributions to her DWI pension account and to receive the DWI matches. She will make these make-up payments on top of her ongoing resumed regular employee contributions to the account. She will make these contributions from *pre-tax earnings* and by payroll deduction from DWI. She must make up all the missed employee contributions by December 2020, five years after her reemployment.

Josephine is entitled to make up and get DWI matches based on 5% of what she *would have earned from DWI* during each of the pay periods between August 2010 and December 2015. *This includes the overtime pay and night differential pay that she would have received.* To determine how much Josephine would have made in each pay period, we must look to Josephine's work history before and after her military service and we must also consider the experience of Josephine's co-workers during the period of August 2010 until December 2015. Josephine's work history will demonstrate her *propensity to work overtime when overtime opportunities are available.* The experience of Josephine's co-workers during the relevant time will demonstrate the *opportunity to work overtime*.

If the amount that Josephine would have earned for each pay period cannot be determined with reasonable certainty, we must look to Josephine's experience during the last year before she began her period of military service in June 2010. Since Josephine worked for DWI for less than a year before she was called to the colors, we must look to Josephine's experience during her entire pre-service period of DWI employment (August 2009 to June 2010).

5. Is the January 2017 firing of Josephine unlawful under USERRA? Probably so.

Upon her reemployment by DWI, Josephine was entitled to a one-year period of special protection against discharge, except for cause, under section 4316(c) of USERRA, which provides as follows:

> (c) A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause--
> (1) *within one year after the date of such reemployment*, if the person's period of service before the reemployment was more than 180 days; or
> (2) within 180 days after the date of such reemployment, if the person's period of service before the reemployment was more than 30 days but less than 181 days.

38 U.S.C. 4316(c) (emphasis supplied).

As is explained in Law Review 104 and other articles, Congress enacted USERRA (Public Law 103-353) and President Bill Clinton signed it into law on October 13, 1994. USERRA is 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 for World War II.

The VRRA has contained a provision providing for special protection of the returning veteran from discharge, for a limited period after reemployment. USERRA tinkered with the duration of the special protection period but did not change the underlying concept.

Most of USERRA's 1994 legislative history can be found in the 1994 edition of *United States Code Congressional & Administrative News (USCCAN),* at pages 2449 through 2515. The 1994 legislative history contains a most instructive paragraph about the special protection period:

> Section 4315(d) [later renumbered as 4316(c)] would relate the period of special protection against discharge without cause to the length, and not the type, of military service or training. … *Under this provision, the protection [period] would begin only upon a proper and complete reinstatement. See O'Mara v. Peterson Sand & Gravel Co.,* 498 F.2d 896, 898 (7th Cir. 1974).

House Report No. 103-65, 1994 *USCCAN* 2449, 2468 (emphasis supplied).

Josephine returned to work at DWI in December 2015, but she was not *properly and completely reinstated* because upon reemployment and thereafter she was paid at a rate that was 20% less than it should have been. Josephine's one-year special protection period *never started running and therefore had not expired by the time she was fired in January 2017.*

You can also challenge the lawfulness of the firing under section 4311, which provides:

> § 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited
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> (a) 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.
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> (b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.
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> (c) An employer shall be considered to have engaged in actions prohibited--
> (1) under subsection (a), if the person's membership, application for membership,

> service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or
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> (2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is *a motivating factor* in the employer's action, unless the employer can *prove* that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.
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> (d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.

38 U.S.C. 4311 (emphasis supplied).

To challenge the lawfulness of the firing under section 4311 successfully, you need to establish that Josephine's past Coast Guard service and her obligation to perform future service were at least *a motivating factor* in the employer's decision to fire her. You need not establish that her Coast Guard service was *the sole reason* for the discharge. If you establish that Josephine's Coast Guard service was a motivating factor in the employer's decision, the *burden of proof* (not just the burden of going forward with the evidence) shifts to the employer to prove that it *would have fired her anyway* (not just could have fired her) for lawful reasons unrelated to her military service.

USERRA's 1994 legislative history addresses section 4311 in several very helpful paragraphs:

> Current law [the VRRA] protects Reserve and National Guard personnel from termination from their civilian employment or other forms of discrimination based on their military obligations. Section 4311(a) would reenact the current prohibition against discrimination which includes discrimination against applicants for employment (*see Beattie v. The Trump Shuttle, Inc.,* 758 F. Supp. 30 (D.D.C. 1991), current employees who are active or inactive members of Reserve or National Guard units (*see Boyle v. Burke,* 925 F.2d 497 (1st Cir. 1991)), or employees who have military obligations in the future such as a person who enlists in the Delayed Entry Program which does not require leaving the job for several months. *See Trulson v. Trane Co.,* 738 F.2d 770, 775 (7th Cir. 1984). The Committee [House Committee on Veterans' Affairs] intends that these anti-discrimination provisions be broadly construed and strictly enforced. …
>
> Section 4311(b) [later renumbered as 4311(c)] would reaffirm that the standard of proof in a discrimination or retaliation case is the so-called "but for" test and that the burden of proof is on the employer, once a prima facie case is established. This provision is simply a reaffirmation of the original intent of Congress when it enacted section

> 2021(b)(3) of title 38 in 1968. … [T]he courts in these discrimination cases should use the burden of proof analysis adopted by the National Labor Relations Board and approved by the Supreme Court under the National Labor Relations Act. *See … NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983).
>
> This standard and burden of proof is applicable to all cases brought under this section regardless of the date of accrual of the cause of action. To the extent that courts have relied on dicta from the Supreme Court's decision in *Monroe v. Standard Oil Co.,* 452 U.S. 549, 559 (1981) that a violation of this section can occur only if the military obligation is the sole factor (*see Sawyer v. Swift & Co.,* 836 F.2d 1257, 1261 (10th Cir. 1988), those decisions have misinterpreted the original legislative intent and history and are rejected on that basis.

1994 *USCCAN* at 2456-57.

In this scenario, I recommend that you challenge the lawfulness of the firing under both section 4316(c) and section 4311.

6. **Will the court grant DWI's motion to compel arbitration? Unfortunately, probably so.**

I believe, and ROA has argued in *amicus curiae* briefs, that section 4302(b) of USERRA overrides an agreement (like the agreement Josephine signed when she was hired) to submit future USERRA disputes to binding arbitration. Section 4302(b) provides:

> This chapter supersedes any State law (including any local law or ordinance), *contract, agreement,* policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, *including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.*
>
> 38 U.S.C. 4302(b) (emphasis supplied).

Unfortunately, the 5th Circuit and the 6th Circuit have specifically rejected this argument. *See Garrett v. Circuit City Stores, Inc.,* 449 F.3d 672 (5th Cir. 2006) and *Landis v. Pinnacle Eye Care LLC,* 537 F.3d 559 (6th Cir. 2008). The other circuits have not addressed this specific question under USERRA, although there are some conflicting district court decisions in other circuits. ROA favors a legislative fix—an amendment to USERRA clarifying that USERRA overrides an agreement (signed as a condition of employment) to submit future USERRA disputes to binding arbitration.