LAW REVIEW 15094[1]
October 2015
(December 2015 Update Added)

Unfavorable Sixth Circuit USERRA Case

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.1.2.1—USERRA applies to part-time, temporary, probationary, and at-will employment
1.2—USERRA forbids discrimination
1.3.1.4—Affirmative defenses under USERRA
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Slusher v. Shelbyville Hospital Corp., **No. 15-5256 (6th Cir. October 26, 2015)**

The facts

Richard Slusher is an orthopedic surgeon and a reserve officer. He is not a member of the Reserve Officers Association, but he is certainly eligible and we are trying to recruit him.

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[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find almost 1,400 "Law Review" 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. The Reserve Officers Association (ROA) initiated this column in 1997.

[2] Captain Wright is the author or co-author of more than 1,200 of the more than 1,400 "Law Review" articles available at www.servicemembers-lawcenter.org. He has been dealing with the federal reemployment statute for 33 years and has made it the focus of his legal career. He developed the interest and expertise in this law during the decade (1982-92) that he worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), he largely drafted the interagency task force work product that President George H.W. Bush presented to Congress (as his proposal) in February 1991. On October 13, 1994, President Bill Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA), Public Law 103-353. The version that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. Wright has 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, at Tully Rinckey PLLC. For the last six years (June 2009 through May 2015), he was the Director of ROA's Service Members Law Center (SMLC), as a full-time employee of ROA. In June 2015, he returned to Tully Rinckey PLLC, this time in an "of counsel" relationship. To schedule a consultation with Samuel F. Wright or another Tully Rinckey PLLC attorney concerning USERRA or other legal issues, please call Mr. Zachary Merriman of the firm's Client Relations Department at (518) 640-3538. Please mention Captain Wright when you call.

The defendant Shelbyville Hospital Corporation operates many hospitals, including Heritage Medical Center (Heritage), a small hospital in eastern Tennessee. Heritage needs one orthopedic surgeon, and that position was vacant in 2010. While searching for a permanent orthopedic surgeon, Heritage relied on physicians serving under short-term contracts. Dr. Slusher began his work at Heritage on July 20, 2010, on what was initially a 30-day contract that was extended several times. In the fall of 2010, Heritage offered Dr. Slusher the permanent orthopedic surgeon position, but he turned down the offer, saying that he "wanted to keep my options open."[3]

On February 25, 2011, Heritage and Dr. Slusher signed a one-year contract for Dr. Slusher to serve the hospital as its temporary orthopedic surgeon. The contract provided that either party could terminate the contract with 90 days of notice. The contract further provided that the hospital could terminate the contract effective immediately. In that situation, the contract required the hospital to pay Dr. Slusher 90 days of pay, in lieu of notice.

Starting on April 7, 2011, Heritage discussed the orthopedic surgeon position with Emmett Mosley, MD. On May 4, 2011, Dr. Slusher received military orders for recall to active duty, and he immediately shared that information with the hospital. Heritage notified Dr. Slusher (prior to his deployment) that it was in discussions with another physician concerning the orthopedic surgeon position. On May 16, 2011, Heritage presented Dr. Mosley a draft contract with a "practice commencement date" of August 1, 2011, but Heritage and Dr. Mosley did not complete their negotiations and sign a contract until many weeks later.

Dr. Slusher reported to active duty as ordered on June 10, 2011, and shortly thereafter he deployed to Iraq. On July 28, 2011, while Dr. Slusher was still on active duty in Iraq, the hospital notified him (apparently by e-mail) that it was terminating its contract with him and that the 90-day termination period would expire on October 26, 2011.[4] The hospital sent Dr. Slusher a "termination agreement." He signed the contract and returned it to the hospital. In an accompanying note, he stated that he would complete his active duty assignment and return to the hospital in early October and work until October 26. As predicted, he returned to work on October 3 and worked until October 26.

On June 1, 2011, Dr. Mosley had dinner with Heritage chief executive officer Dan Buckner to discuss the possibility of Dr. Mosley joining the hospital staff. During the dinner, the conversation touched upon Dr. Slusher's call to active duty and Dr. Mosley's own military career. In an affidavit filed for this case, Dr. Mosley reported:

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[3] In her dissenting opinion, Judge Helene N. White indicated that Dr. Slusher turned down the permanent position because he was still trying to convince his wife to move to Tennessee to join him there.

[4] By notifying Dr. Slusher of the contract termination *while he was on active duty in Iraq,* the hospital substantially reduced the amount of money it was required to pay him for terminating the contract without notice. Instead of giving him 90 days of pay for terminating his contract without notice, the hospital only paid him for 23 more days. He returned to work on October 3, after release from active duty, and worked until terminated on October 26.

a. Buckner stated that Dr. Slusher's deployment had "really messed things up" for the hospital.
b. Dr. Mosley stated: "In that case I am surprised that you are talking to me, because I am also a military reservist."
c. Dr. Mosley informed Buckner that he (Mosley) had almost completed his military commitment and would not be signing up again, so it was most unlikely that he would be called up.
d. Buckner stated: "I already knew that. I had to check you out with corporate to be sure that you would not be called to active duty, before I approached you about employment at the hospital."

Dr. Slusher's lawsuit against Heritage

Shortly after he returned from active duty in October 2011, Dr. Slusher filed a formal written complaint against Heritage with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). After DOL-VETS closed his case[5] Dr. Slusher retained private counsel and sued the hospital and its CEO (Buckner)[6] in the United States District Court for the Eastern District of Tennessee, claiming that Heritage violated both section 4311 of USERRA (discrimination) and section 4312 (right to reinstatement after military service). Dr. Slusher also claimed that the hospital had breached its contract with him.[7]

This case may be one of those rare "pure question of law" cases wherein the facts are not in dispute and the real dispute is about how the law (in this case USERRA) applies to the undisputed facts. Both parties moved for summary judgment in the District Court. The District Court judge denied Dr. Slusher's motion for summary judgment and granted the defendants' motion for summary judgment on all counts. This appeal followed.[8]

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[5] DOL-VETS concluded that Dr. Slusher's USERRA complaint had merit and so advised the employer, but the employer refused to negotiate with DOL-VETS and this lawsuit resulted.

[6] USERRA's definition of "employer" includes "a *person,* institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities." 38 U.S.C. 4303(4)(A)(i) (emphasis supplied). Under this provision, a supervisor or official of the employer who violates USERRA in making employment decisions can be personally liable, and a lawsuit can be maintained against the individual as well as the corporate employer, as was done in this case.

[7] Dr. Slusher's breach of contract claim was brought under Tennessee's common law. When you file a suit in federal court, based on a federal statute like USERRA, you can bring closely related state law claims in the same federal lawsuit, under the "supplemental jurisdiction" of the federal court, as provided for in section 1367(a) of title 28 of the United States Code [28 U.S.C. 1367(a)]. Please see Law Review 1173 (September 2011). The contract provided if the employee were called to active duty and received less pay on active duty than he had been receiving from the hospital, the employer would pay him differential pay to make up the difference, but the contract provided that the duty to pay differential pay did not apply to employees who left "brief, nonrecurrent" positions for military service. Based on this exclusion, the District Court and the Court of Appeals ruled against him on the differential pay issue.

[8] As is always the case in our federal appellate courts, this case was heard by a panel of three judges. Judge David McTeague was appointed to the 6th Circuit by President George W. Bush and confirmed by the Senate in 2005, after he had already served 13 years as a United States District Court Judge for the Western District of Michigan,

Dr. Slusher's claim under section 4312 of USERRA

As I have explained in Law Review 1281 and other articles, a person must meet five simple conditions to have the right to reemployment under USERRA:

a. Must have left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services.
b. Must have given the employer prior oral or written notice.
c. Must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, related to the employer relationship for which the person seeks reemployment.[9]
d. Must have served honorably and must have been released from the period of service without having received a disqualifying bad discharge from the military.
e. Must have made a timely application for reemployment after release from the period of service.[10]

The affirmative defenses under USERRA

In this case, Heritage apparently conceded that Dr. Slusher met these five conditions. Heritage relied on section 4312(d) of USERRA, which provides three affirmative defenses to the employer's obligation to reemploy. Here is the text of section 4312(d):

> (d)
> (1) *An employer is not required to reemploy a person under this chapter if*--
> (A) the employer's circumstances have so changed as to make such reemployment impossible or unreasonable;
> (B) in the case of a person entitled to reemployment under subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313, such employment would impose an undue hardship on the employer; or
> (C) *the employment from which the person leaves to serve in the uniformed services is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period.*
> (2) In any proceeding involving an issue of whether--
> (A) any reemployment referred to in paragraph (1) is impossible or unreasonable because of a change in an employer's circumstances,

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having been appointed by President George H.W. Bush and confirmed by the Senate in 1992. Judge Gilbert S. Merritt, Jr. was appointed to the 6th Circuit by President Jimmy Carter and confirmed by the Senate in 1977. He took senior status in 2001 but continues to hear cases. Judge Helene N. White was appointed by President George W. Bush and confirmed by the Senate in 2008. It appears that none of these three appellate judges has ever served our country in uniform.

[9] As is explained in Law Review 201, there are nine exemptions to the five-year limit—kinds of service that do not count toward exhausting an individual's limit.

[10] If the period of service was more than 30 days but less than 181 days, as in this case, the person has 14 days (starting on the date of release) to apply for reemployment. 38 U.S.C. 4312(e)(1)(C).

(B) any accommodation, training, or effort referred to in subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313 [38 USCS § 4313] would impose an undue hardship on the employer, or

(C) the employment referred to in paragraph (1)(C) is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period,

the employer shall have the burden of proving the impossibility or unreasonableness, undue hardship, or *the brief or nonrecurrent nature of the employment without a reasonable expectation of continuing indefinitely or for a significant period.*[11]

Section 4312(d) establishes three *affirmative defenses* that an employer-defendant can raise in USERRA cases. The term "affirmative defense" has been defined as follows: "New matter constituting a defense; new matter which, assuming the complaint to be true, constitutes a defense to it."[12]

Section 4331 of USERRA[13] gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL published draft USERRA regulations, for notice and comment, in the *Federal Register* in September 2004. After considering the comments received and making a few adjustments, DOL published the final regulations in December 2005. The regulations are published in Title 20 of the *Code of Federal Regulations* at Part 1002.[14] One section of the regulations is directly on point:

§ 1002.139 **Are there any circumstances in which the pre-service employer is excused from its obligation to reemploy the employee following a period of uniformed service? What statutory defenses are available to the employer in an action or proceeding for reemployment benefits?**

(a) Even if the employee is otherwise eligible for reemployment benefits, the employer is not required to reemploy him or her if the employer establishes that its circumstances have so changed as to make reemployment impossible or unreasonable. For example, an employer may be excused from reemploying the employee where there has been an intervening reduction in force that would have included that employee. The employer may not, however, refuse to reemploy the employee on the basis that another employee was hired to fill the reemployment position during the employee's absence, even if reemployment might require the termination of that replacement employee;

(b) Even if the employee is otherwise eligible for reemployment benefits, the employer is not required to reemploy him or her if it establishes that assisting the employee in

[11] 38 U.S.C. 4312(d) (emphasis supplied).
[12] *Black's Law Dictionary, Revised Fourth Edition,* page 82
[13] 38 U.S.C. 4331.
[14] 20 C.F.R. Part 1002.

becoming qualified for reemployment would impose an undue hardship, as defined in § 1002.5(n) and discussed in § 1002.198, on the employer; or,

(c*) Even if the employee is otherwise eligible for reemployment benefits, the employer is not required to reemploy him or her if it establishes that the employment position vacated by the employee in order to perform service in the uniformed services was for a brief, nonrecurrent period and there was no reasonable expectation that the employment would continue indefinitely or for a significant period.*

(d) *The employer defenses included in this section are affirmative ones, and the employer carries the burden to prove by a preponderance of the evidence that any one or more of these defenses is applicable.*[15]

Corresponding rule under the prior reemployment statute

As I explained in Law Review 15067 (August 2015), Congress enacted USERRA in 1994 as a long-overdue rewrite of the Veterans' Reemployment Rights (VRR) law, which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA).[16] Under the VRR law, it was necessary to establish, as an eligibility criterion for reemployment rights, that one had left an "other than temporary" job for the purpose of performing military service or training.[17]

I explained in Law Review 120 that the VRR law did not give rulemaking authority to the Department of Labor (DOL), but DOL did publish a *VRR Handbook.* While employed as a DOL attorney, I co-edited the 1988 edition of that *Handbook*, which replaced the 1970 edition. Several courts, including the Supreme Court, have accorded a "measure of weight" to the interpretations expressed in the *VRR Handbook*.[18]

The *VRR Handbook* states the following about the requirement that one leave an "other than temporary" job in order to have reemployment rights:

> One of the conditions of eligibility for rights under the reemployment statute is leaving employment in "other than a temporary position" for military service, training, or examination. The statute does not define the phrase "other than temporary," but court

[15] 20 C.F.R. 1002.139 (bold question in original, emphasis by italics supplied).
[16] The STSA is the law that led to the drafting of millions of young men, including my late father, for World War II.
[17] It was not necessary to establish that one's pre-service job was "permanent"—only "other than temporary." Telling your wife that she is "other than ugly" does not equal telling her that she is "beautiful."
[18] *See Monroe v. Standard Oil Co.,* 452 U.S. 549, 563 n. 14 (1981); *Leonard v. United Air Lines, Inc.,* 972 F.2d 155, 159 (7th Cir. 1992); *Dyer v. Hinky-Dinky, Inc.,* 710 F.2d 1348, 1352 (8th Cir. 1983); *Smith v. Industrial Employers and Distributors Association*, 546 F.2d 314, 319 (9th Cir. 1976), *cert. denied*, 431 U.S. 965 (1977); *Helton v. Mercury Freight Lines, Inc.,* 444 F.2d 365, 368 n. 4 (5th Cir. 1971).

> decisions have clarified the meaning of the phrase. The determining factor is whether the employment is reasonably expected to continue indefinitely, as opposed to being casual and nonrecurrent. A job need not be "permanent" or "regular" in order to be other than temporary. The labeling of a position as "temporary" by the union or by the employer does not make it temporary within the meaning of the statute.
> The phrase "position other than a temporary position" in the statute refers to the totality of the employee's relationship with the employer, not to the tenure in a specific assignment or job or to the permanence of that job itself. An employee whose "position" is other than temporary can occupy a particular job temporarily. Conversely, an employee's "position" can be merely temporary although the job on which he is working might itself be permanent.
> A position is temporary for purposes of the statute only where the facts surrounding the employment indicate that it was mutually understood to be limited to a specific, brief, and nonrecurrent project or period of time. The statute's exclusion of temporary positions is to be narrowly construed.[19]
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> **The District Court ruled against Dr. Slusher on the affirmative defense and the Court of Appeals majority affirmed.**

Dr. Slusher's position at Heritage was expected to last for *at most* one year, from February 2011 to February 2012. Dr. Slusher probably had no *reasonable expectation* that his job would last until February 2012, because the contract he had signed explicitly provided that the hospital could terminate the agreement with no notice whatsoever, in exchange for paying Dr. Slusher 90 days of pay. Moreover, Dr. Slusher was aware that the hospital was seeking a permanent orthopedic surgeon. Heritage had already offered Dr. Slusher that permanent position, and he had declined the offer.

Writing for himself and Senior Judge McTeague, Judge Merritt found that Heritage had established the "brief, nonrecurrent" affirmative defense, sufficiently for summary judgment purposes. Writing for herself, Judge Helene N. White vigorously dissented, as follows:

> I do not believe that Congress intended to relieve an employer from the reemployment obligation when an employee leaves for uniformed service while under a term contract extending beyond the employee's return from service. We [the 6th Circuit] have said as much already. *See Stevens v. Tennessee Valley Authority,* 687 F.2d 158, 162 (6th Cir. 1982). In *Stevens,* we interpreted the Veterans' Reemployment Rights Act's (VRRA) grant of reemployment rights to veterans who left a civilian position, "other than a temporary position," to serve in the military. *Id.* At 160. In determining whether a position was other than temporary, we analyzed "whether the veteran, prior to his entry into military service, *had a reasonable expectation,* in light of all the circumstances of his employment, that his employment *would continue for a significant or indefinite*

[19] *VRR Handbook,* 1988 edition, pages 3-1 and 3-2.

period." Id. at 161 (emphasis added) [by Judge White] This is the same test at issue here. In rejecting the employer's argument that the employee had no reasonable expectation of continued employment for an indefinite or significant period because he was only hired for a construction project, and thus his term had a definite end date, we explained that it is an "absurdity that an employee having the protection of a fixed period of employment would be worse off than one who could be discharged at will," and further that "[e]ven more absurd would be the assertion that an employee hired for a definite period which had not expired upon his return from military service would nevertheless not be entitled to reemployment. *Id.* at 162.[20]

Dr. Slusher's claim under section 4311 of USERRA

In his lawsuit, Dr. Slusher made a separate claim under section 4311 of USERRA, which provides as follows:

> § 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.
>
> (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.
>
> (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
> (2) under subsection (b), if the person's (A) action to enforce a protection afforded any

[20] Slip opinion, page 17.

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.

(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.*[21]

The Mosley affidavit concerning his conversation with Buckner would seem to provide evidentiary support for Slusher's section 4311 claim. Dr. Mosley reported that Buckner stated that Slusher's call to the colors created major problems for the hospital. Although Mosley was also a reservist, Buckner indicated that Mosley (unlike Slusher) was acceptable because his military commitment was almost over and he did not intend to renew it and it was most unlikely that Mosley would be called to active duty, as Slusher had been.

Some other facts seem to go against Dr. Slusher's section 4311 claim. In the fall of 2010, the hospital offered Dr. Slusher the permanent orthopedic surgeon position and he declined the offer for his own reasons. The hospital was aware of Dr. Slusher's reserve obligations in the fall of 2010, but it was not until months later that Dr. Slusher was recalled to active duty. Perhaps the hospital's anti-military animus against Dr. Slusher arose months later, when the leaders of the hospital became aware that a recall to active duty was more than a theoretical possibility.

The Merritt-McTeague majority decision affirmed the District Court's grant of summary judgment to the hospital on Dr. Slusher's section 4311 claim. In her dissent, Judge White vigorously disagreed, as follows:

> On the merits of the section 4311 discrimination claim, there is a genuine dispute of material fact whether Slusher's military service was a motivating factor in Heritage's decision to terminate Slusher's contract early. Likewise, there is a genuine issue of material fact whether Heritage would have taken the same action in the absence of Slusher's deployment.[22]

Dr. Slusher's claim under section 4316(c) of USERRA

Section 4316(c) of USERRA provides:

> A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause—

[21] 38 U.S.C. 4311 (emphasis supplied).
[22] Slip opinion, page 20.

(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.[23]

Dr. Slusher's 2011 period of service was more than 30 days but less than 181 days. Therefore, it was unlawful to terminate his employment, except for cause, within 180 days his reemployment. Dr. Slusher returned to work on October 3. His employment was terminated just 23 days later, on October 16.

The Merritt-McTeague majority decision affirmed the grant of summary judgment for the employer on Dr. Slusher's section 4316(c) claim, without much discussion. Judge White strenuously dissented, as follows:

> Because Slusher served between 31 and 180 days in the uniformed services, USERRA prohibits Heritage from discharging Slusher without cause within 180 days following reemployment. 38 U.S.C. 4316(c)(2). Heritage does not argue that Slusher was terminated for cause. Instead, Heritage argues that it did not terminate Slusher, but rather Slusher and Heritage mutually agreed to terminate Slusher's employment. Heritage's argument is unpersuasive. USERRA expressly supersedes any substantive contractual terms that reduce, limit, or eliminate the rights afforded by USERRA. 38 U.S.C. 4302(b). Because the termination notice and termination agreement limit Slusher's substantive USERRA rights, they are superseded. *See Wysocki v. International Business Machine Corp.,* 607 F.3d 1102, 1107 (6th Cir. 2010). Even if Slusher could waive his substantive USERRA rights by agreeing to terminate his contract, he would need to do so by clear and unambiguous language in exchange for consideration that was more valuable than the USERRA rights he gave up. *Id.* at 1107-08. Slusher presented unrebutted evidence that he was unaware of his USERRA rights when he signed the termination agreement. After he learned of his USERRA rights, and prior to reemployment, he asserted them and stated his intention to complete the full term of his employment agreement. In addition, Slusher did not receive additional consideration for signing the termination agreement. Under these circumstances, we should not enforce a termination agreement that has the effect of eliminating Slusher's section 4316 rights. *See id.* at 1108.
>
> Accordingly, if Heritage was required to reemploy Slusher under section 4312, it violated section 4316 by discharging him twenty-three days after he returned from service. Because there is a genuine issue of material fact whether Slusher was entitled to reemployment pursuant to section 4312, I would reverse the district court's grant of summary judgment on Slusher's section 4316 unlawful discharge claim.[24]

[23] 38 U.S.C. 4316(c).
[24] Slip opinion at 18-19.

Where do we go from here?

Under the Federal Rules of Appellate Procedure, Dr. Slusher's next step is to ask the 6th Circuit for rehearing *en banc.* If rehearing *en banc* is granted by a majority of the active judges of the 6th Circuit, there will be new briefs and a new oral argument and the case will be decided by all of the active judges of the 6th Circuit.[25]

If rehearing *en banc* is denied, or if it is granted and the *en banc* 6th Circuit affirms the majority panel decision, Dr. Slusher's final step is to ask the Supreme Court for *certiorari* (discretionary review). If four or more of the nine justices vote for *certiorari,* there will be new briefs and a new oral argument in the Supreme Court.

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

UPDATE TO LAW REVIEW 15094 (December 2015)

The Plaintiff, Dr. Slusher, applied to the 6th Circuit for rehearing *en banc,* and his application was denied. Judge Helene N. White, the dissenter in the 2-1 panel decision against Dr. Slusher, was the only active 6th Circuit judge who voted to grant rehearing *en banc.*

Dr. Slusher's final available step is to apply to the United States Supreme Court for *certiorari* (discretionary review). If four or more of the nine Justices vote to grant *certiorari,* the case will then be set for new briefs and oral argument in the Supreme Court. If the Supreme Court denies *certiorari,* the case is then final.

The Supreme Court grants *certiorari* only about one percent of the time. If Dr. Slusher applies for *certiorari,* we will advise the readers as to whether it is granted or denied.

[25] Senior judges like Judge McTeague do not participate in *en banc* reconsiderations.