LAW REVIEW 16005[1]
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Don't Burn the Bridge back to your Pre-Service Job

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

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***Preda v. Nissho Iwai American Corp.,* 128 F.3d 789 (2d Cir. 1997).**[3]

Gabriel I. Preda is a naturalized American citizen who was born and raised in Rumania, during the reign of the hated Communist dictator Nicolae Ceausescu. He was hired by Nissho Iwai

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[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 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 Ms. JoAnne Perniciaro of the firm's Client Relations Department at (518) 640-3538. Please mention Captain Wright when you call.

[3] This is a decision of a three-judge panel of the United States Court of Appeals for the Second Circuit, the federal appellate court that sits in New York City and hears appeals from district courts in Connecticut, New York, and Vermont. The citation means that you can find this decision in Volume 128 of *Federal Reporter Third Series,* starting on page 789.

American Corporation (a Japanese corporation operating in the United States) (hereinafter "Nissho") in 1988. He enlisted in the United States Army on October 12, 1990.[4] He was honorably discharged about 18 months later, in early 1992. In November 1991, he wrote a letter to the company, in anticipation of his coming discharge, and requested reinstatement, which the company denied. This lawsuit resulted. Preda represented himself both in the District Court and in the Court of Appeals.

On November 2, 1990, just three weeks after he enlisted in the Army, Preda wrote a bizarre letter to the president of Nissho. In the letter, he compared Japanese society and his former employer to Rumania under Ceausescu, Germany under Hitler, and Italy under Mussolini. The company denied his request for reemployment, alleging two defenses. First, the company asserted that the letter showed that Preda had left his job because of his hatred of Japan and the company, not in order to serve the United States in the Army.[5] Second, the company asserted that the letter amounted to cause for discharge and meant that Preda was not qualified for reinstatement to employment.

As I have explained in Law Review 15067 and other articles, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA)[6] and President Bill Clinton signed it into law on October 13, 1994. USERRA was 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. Under USERRA's transition rules, the new law applies to "reemployments initiated" after the 60th day following the date of enactment of USERRA—that is, December 12, 1994. This case was decided by the Court of Appeals after USERRA's enactment, but the VRRA applies to this case because Preda completed his active Army service and applied for reemployment in early 1992.

As I have explained in Law Review 15116 and other articles, an individual 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.

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[4] The reemployment statute has always applied to persons who leave civilian jobs for *regular* military service, as well as Reserve Component members. Please see Law Review 719 (May 2007).

[5] I think that this defense was not available. It seems clear that Preda left his job in order to perform Army service. Why he chose to enlist is irrelevant. Perhaps he enlisted because he hated Nissho and Japanese society in general.

[6] Public Law 103-353. USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-4335).

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.[7]
d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.[8]
e. Must have made a timely application for reemployment after release from the period of service.[9]

Under the VRRA, the eligibility criteria were similar but not identical. Under that law, the person leaving a job for active duty was not required to give prior notice to his or her civilian employer, although giving such notice was certainly recommended, but the Reserve Component (RC) member leaving a job for active duty for training (annual training) or inactive duty training (drills) was required to "request a leave of absence" from the civilian employer. Moreover, under the VRRA the returning veteran seeking reemployment was required to demonstrate that he or she was "still qualified to perform the duties of such position."[10]

After the discovery process was completed, the defendant employer filed a motion for summary judgment on all the counts[11] of Preda's complaint, and the District Judge granted summary judgment for the employer on all counts.[12] The Second Circuit panel affirmed the summary judgement for the defendant employer on Preda's VRRA count.

In their per curiam decision, the three judges of the Second Circuit panel wrote:

> Courts have unanimously held that in order for a veteran to be qualified to return to a prior position, … the veteran must be not only physically capable of returning to the job

[7] Under section 4312(c) of USERRA, 38 U.S.C. 4312(c), there are nine exemptions from the five-year limit. That is, there are nine kinds of service that do not count toward exhausting the individual's limit. Please see Law Review 201 for a definitive discussion of what counts and what does not count in exhausting the limit.

[8] Under section 4304, the person does not have the right to reemployment if he or she received a dishonorable or bad conduct discharge, as part of the sentence in a court martial conviction for a serious offense. Similarly, persons who have received "other than honorable" administrative discharges or who have been dismissed or "dropped from the rolls" do not have reemployment rights.

[9] After a period of service of 181 days or more, the individual has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

[10] 38 U.S.C. 4304(a) (1993).

[11] In addition to the VRRA count of his complaint, Preda also alleged that the employer violated Title VII of the Civil Rights Act of 1964, the law that forbids employment discrimination on the basis of race, color, sex, religion, or national origin. Preda alleged that the employer discriminated against him based on his national origin (from Rumania) and based on his prior Title VII complaints. The Second Circuit panel upheld the summary judgment for the employer on one of Preda's Title VII counts and reversed and remanded on the other count.

[12] Under Rule 56 of the Federal Rules of Civil Procedure, the District Judge should grant summary judgment if he or she finds, after a careful review of the evidence, that there is *no material issue of fact* and that the moving party is entitled to judgment as a matter of law. A judge granting a summary judgment motion is saying that he or she is convinced that, based on the evidence developed during the discovery process, there is no evidence (beyond a "mere scintilla") to support the non-moving party's case and that no reasonable jury could find for the non-moving party.

but also temperamentally willing and able to work harmoniously with co-workers and supervisors.[13]

The three-judge panel concluded that Preda's bizarre letter to the president of Nissho established clearly (sufficiently for summary judgment purposes) that Preda was not qualified under the "temperamentally willing and able to work harmoniously with co-workers and supervisors" standard and affirmed the summary judgment for the employer on that basis.

Would the result be different if USERRA rather than the VRRA had applied to the *Preda* case? *Yes.* Section 4313(a) of USERRA provides as follows:

§ 4313. Reemployment positions

(a) Subject to subsection (b) (in the case of any employee) and sections 4314 and 4315 (in the case of an employee of the Federal Government), a person entitled to reemployment under section 4312, upon completion of a period of service in the uniformed services, shall be promptly reemployed in a position of employment in accordance with the following order of priority:

(1) Except as provided in paragraphs (3) and (4), in the case of a person whose period of service in the uniformed services was for less than 91 days--

(A) 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, *the duties of which the person is qualified to perform*; or

(B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, *only if the person is not qualified to perform the duties of the position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.*

(2) Except as provided in paragraphs (3) and (4), in the case of a person whose period of service in the uniformed services was for more than 90 days--

(A) 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, or a position of like seniority, status and pay, *the duties of which the person is qualified to perform; or*

(B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status and pay, the duties of which the person is qualified to perform, *only if the person is not qualified to perform the duties of a position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.*

(3) In the case of a person who has a disability incurred in, or aggravated during, such

[13] *Preda,* 128 F.3d at 792.

service[14], 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--

(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

(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.

(4) In the case of a person who (A) is not qualified to be employed in (i) 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, or (ii) in the position of employment in which such person was employed on the date of the commencement of the service in the uniformed services for any reason (other than disability incurred in, or aggravated during, service in the uniformed services), and (B) *cannot become qualified with reasonable efforts by the employer, in any other position which is the nearest approximation to a position referred to first in clause (A)(i) and then in clause (A)(ii) which such person is qualified to perform, with full seniority.*[15]

A 1993 report of the House Veterans' Affairs Committee clarifies the intent and meaning of this wordy and complex section, as follows:

> Section 4313, in conformance with the principle that rights, benefits and obligations would no longer be based on the type or nature of military service or training [as under the VRRA], but rather on the length of service or training, would require that the position to which a returning serviceperson shall be reinstated would be determined by the length of service or training.
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> Section 4313 (a)(1), which would apply to periods of service of less than 91 days, would require that a protected individual be reemployed in the "escalator" position, first enunciated by the Supreme Court in *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946), wherein it was stated that the returning serviceperson "steps back on the seniority escalator at the precise point the person would have occupied had he or she kept the position continuously during the war."

[14] There is no indication that Preda could claim to have suffered a disability during his 18 months of active duty.
[15] 38 U.S.C. 4313(a) (emphasis supplied).

Thus, whatever position the returning serviceperson would have attained, with reasonable certainty (*see Tilton v. Missouri Pacific Railway Co.,* 376 U.S. 169, 180 (1964), but for the absence for military service, would be the position guaranteed upon return. This could be the same position or a higher, lower, or lateral (e.g., a transfer) position or even possibly layoff or severance status (*See Derepkowski v. Smith-Lee, 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, Mich.,* 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).

If, however, the returning servicemember is not qualified to perform in the escalator position, after reasonable efforts to qualify the person, the preservice position must then be offered. *The claim that a returning serviceperson is not qualified for the "escalator" position must be proven by the employer and only after reasonable efforts by the employer to enable the serviceperson to become qualified have been undertaken and exhausted.*

Under section 4313(a)(2), unlike the situation where a servicemember has served for less than 91 days and is entitled strictly to the "escalator" position, when the time in service is more than 90 days, the employer would have the option, as is the case under current law, of reemploying that person in the "escalator" position or one of like seniority, status and pay. Since seniority and pay are easily determined, the critical factor for determining equivalency is status.

Although not the subject of frequent court decisions, courts have construed status to include "opportunities for advancement, general working conditions, job location, shift assignment, and rank and responsibility. *Monday v. Adams Packing Association, Inc.,* 85 LRRM 2341, 2343 (M.D. Fla. 1973). *See Hackett v. State of Minnesota,* 120 Labor Cases (CCH) P. 11,050 (D. Minn. 1991). A reinstatement offer in another city is particularly violative of like status. *See Armstrong v. Cleaner Services, Inc.,* 79 LRRM 2921, 2923 (M.D. Tenn. 1972), as would be reinstatement in a position which does not allow for the use of specialized skills in a unique situation.

> Section 4313(a)(3) would address the issue of the position to be granted a serviceperson disabled while in military service, regardless of the length of service, and who is not qualified for the "escalator" position after reasonable efforts to accommodate the disability. That obligation would be to reemploy the returning servicemember in an equivalent position in terms of seniority, status and pay for which the person is qualified or can become qualified with reasonable efforts by the employer to accommodate the disability. That obligation would be to reemploy the returning servicemember in an equivalent position in terms of seniority, status and pay for which the person is qualified or can become qualified with reasonable efforts by the employer. If no such position exists, the nearest approximate position in terms of seniority, status and pay would be required to be found.
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> If a position other than the "escalator" position is offered to a returning disabled servicemember, full company seniority for all purposes is always to be accorded the disabled serviceperson, regardless of whether seniority follows an employee under other circumstances. *See Hembree v. Georgia Power Co.,* 637 F.2d 423 (5th Cir. 1981); *Ryan v. City of Philadelphia,* 559 F. Supp. 783 (E.D. Pa. 1983), *affirmed,* 732 F.2d 147 (3rd Cir. 1984).
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> Section 4313(a)(4) would require the reemployment of returning servicepersons who are not found qualified for their "escalator" positions for any reason other than disability, regardless of length of service, but who can qualify for a lesser position in terms of status and pay. This provision is primarily intended to deal with employees who return to technologically advanced situations for which they cannot qualify, but who can perform in another position not necessarily in their "escalator" line. They too would receive full company seniority for all purposes in the new position.[16]

Under the VRRA, the returning veteran was required to prove as an eligibility criterion for reemployment that "I am still qualified to perform the position that I would have attained if I had been continuously employed." Under USERRA, the burden of proof has shifted to the employer, as an affirmative defense. The employer must prove that "this returning veteran is not qualified for the position that he or she would have attained if continuously employed even if I (the employer) make reasonable effort to help the person qualify." This is a heavy burden of proof for the employer. And even if the employer can meet this burden for the "escalator" position, the returning veteran is nonetheless entitled to the position that he or she left[17] or another position in the employer's organization.

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[16] House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2463-65 (emphasis supplied).

[17] The idea is that the position that the individual left in order to perform uniformed service may be of lesser status and pay but also less challenging and technologically advanced that the escalator position.

Having said all that, let me quickly add that the bizarre letter that Preda sent to Nissho's president three weeks after enlisting in the Army was a terrible mistake.

When you leave a job for a short or long period of uniformed service, you should treat your employer politely and respectfully *even if you think that it is most unlikely that you will want to return to that employer at the end of your period of service.* If your intent is not to return to that employer after service, you should keep that intent to yourself. Do not burn any bridges that you may later want or need to recross.