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Affirmative Defenses under USERRA

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Update on Sam Wright

1.3.1.4—USERRA affirmative defenses
1.8—Relationship between USERRA and other laws/policies

Q: What is an affirmative defense? Does the Uniformed Services Employment and Reemployment Rights Act (USERRA) give the employer any affirmative defenses to the obligation to reemploy?

A: The term "affirmative defense" has been defined as follows:

> In code pleading. New matter constituting a defense; new matter which, assuming the complaint to be true, constitutes a defense to it.[3]

For purposes of this article, let us assume that Mary Jones (a Coast Guard Reservist) left her job at Daddy Warbucks International (DWI) for a year of active duty and has now returned. Jones

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[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find almost 1500 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other 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. I am the author of more than 1300 of the articles.

[2] BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. From 2009 to 2015, I served as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA. Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. I have dealt with USERRA (enacted in 1994) and the predecessor reemployment statute (enacted in 1940) for 34 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 proposed recodification of the 1940 reemployment statute that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed Public Law 103-353, USERRA, and that version was 85% the same as the Webman-Wright draft. I have also dealt with the old and new reemployment statute as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called 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 (TR). After ROA disestablished the SMLC last year, I returned to TR, this time in an "of counsel" role. To arrange for a consultation with me or another TR attorney, please call Ms. JoAnne Perniciaro (the firm's Director of Client Relations) at (518) 640-3538. Please mention Captain Wright when you call.

[3] *Black's Law Dictionary,* Revised Fourth Edition, page 82.

has met USERRA's five conditions for reemployment.[4] Although Jones meets the five USERRA conditions, DWI asserts that it is not required to reemploy her, based on an affirmative defense.

USERRA provides only three affirmative defenses.

Section 4312(d) of USERRA provides:

> (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,
> (B) any accommodation, training, or effort referred to in subsection (a)(2), (a)(3), or (b)(2)(B) of section 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.[5]

First, it should be emphasized that the affirmative defense referred to in section 4312(d)(1)(B) (undue hardship) *only applies in cases where the returning service member is demanding an*

[4] As I have described in Law Review 15116 (December 2015) and many other articles, to have the right to reemployment the person must have left a civilian job (federal, state, local, or private sector) for the purpose of performing service in the uniformed services and must have given the employer prior oral or written notice. The person must not have exceeded USERRA's five-year cumulative limit on the duration of the period or periods of uniformed service. (Nine exemptions apply—kinds of service that do not count toward exhausting the limit.) The person must have been released from the period of service without having received a disqualifying bad discharge from the military. After release from the period of service, the person must have made a timely application for reemployment with the pre-service employer.

[5] 38 U.S.C. 4312(d) (emphasis supplied).

accommodation for a service-connected disability or is not qualified for the position without substantial additional training. That is not Jones' situation.

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA in 1994 as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA's 1994 legislative history addresses the affirmative defenses under section 4312(d) as follows:

> The *only other exceptions to the unqualified right to reemployment* would be the provisions in subsection (d), which provide that the employer need not reemploy the person if the employer's circumstances has so changed as to make it impossible or unreasonable to reemploy or, in the case of a person not qualified after reasonable [employer] efforts [to qualify the person], if reemployment would create an undue hardship.
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> The very limited exception of unreasonable or impossible, which is in the nature of an affirmative defense, and for which the employer has the burden of proof (*see Watkins Motor Lines, Inc. v. deGalliford,* 167 F.2d 274, 275 (5th Cir. 1948); *Davis v. Halifax County School System,* 508 F. Supp. 966, 969 (E.D.N.C. 1981)), is only applicable "where reinstatement would require creation of a useless job or where there has been a reduction in the work force that reasonably would have included the veteran." *Davis, supra,* 508 F. Supp. at 968. "It is also not sufficient excuse that another person has been hired to fill the position vacated by the veteran nor that no opening exists at the time of application." *Davis, supra. See also Fitz v. Board of Education of Port Huron,* 662 F. Supp. 1011, 1015 (E.D. Mich. 1985), *affirmed,* 802 F.2d 457 (6th Cir. 1986); *Anthony v. Basic American Foods,* 600 F. Supp. 352, 357 (N.D. Cal. 1984); *Goggin v. Lincoln St. Louis,* 702 F.2d 698, 709 (8th Cir. 1983).
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> The other limited exception, undue hardship, is also in the nature of an affirmative defense, for which the employer also has the burden of proof, *and applies only where a person is not qualified for a position due to disability or other bona fide reason* after reasonable efforts have been undertaken to qualify the person. The issue of whether attempts to qualify a person become an undue hardship is to be dealt with in accordance with the factors set out in section 4303(15)(B) of this chapter.[6]

Under the VRRA, the returning veteran was required to establish as an eligibility requirement for reemployment that his or her pre-service civilian position was "other than temporary."

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[6] House Report No. 103-65, 1994 *United States Code Congressional & Administrative News (USCCAN)* 2449, 2458 (emphasis supplied).

Under USERRA, it is no longer necessary to establish that eligibility criterion. Instead, section 4312(d)(1)(C) provides an affirmative defense to the employer. If the employer can prove that the pre-service employer relationship was brief and nonrecurrent and that there was no reasonable expectation that the relationship would continue indefinitely or for a significant time, the court will excuse the employer from the obligation to reemploy.

Let us assume that Jones only worked for DWI for four months before she left her job to report to active duty. The focus under section 4312(d)(1)(C) is not on how long Jones had worked for the employer before her employment was interrupted by a period of uniformed service. Rather, the focus is on whether the employment relationship itself was expected to continue indefinitely or for a significant time.

When DWI hired Jones, the company gave her no indication that she was only being hired for a brief period, like a special project. It is clear that the affirmative defense under section 4312(d)(1)(C) is not available to DWI in this case.

The DOL USERRA regulations include a section about the affirmative defenses under section 4312(d), as follows:

> **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 it 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 the 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 becoming qualified* for reemployment would impose an undue hardship, as defined in section 1002.5(n) and discussed in 1002.198, on the employer.
> (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.[7]

USERRA provides for three affirmative defenses. DWI is limited to these three affirmative defenses. Under the doctrine of *expressio unius est exclusio alterius* (to express one is to exclude all the others), expressly listing three affirmative defenses means that *there are no other affirmative defenses.* I have explained the application of the *expressio unius* rule of statutory construction in Law Review 0730 (June 2007) and other articles.

The 6th Circuit has applied the *expressio unius* rule to the interpretation of section 4304 of USERRA.[8] Section 4304 sets forth the kinds of military separations that disqualify a person from reemployment with his or her pre-service employer:

a. A bad conduct discharge.
b. A dishonorable discharge.
c. An administrative discharge labeled "other than honorable."
d. Being dismissed from the service under 10 U.S.C. 1161(a).
e. Being dropped from the rolls under 10 U.S.C. 1161(b).

Petty received a general discharge under honorable conditions after he resigned his commission "for the good of the service" as part of a plea bargain, to avoid a court martial for a serious military offense. This was certainly not the kind of discharge in which Petty could take pride, but it was not one of the disqualifying bad discharges enumerated in section 4304. Applying the *expressio unius* rule, the 6th Circuit held that enumerating the disqualifying bad discharges means that *there are no other disqualifying discharges.*

Section 4304 enumerates five bad discharges that disqualify the returning veteran from the right to reemployment. Enumerating these five disqualifying bad discharges means that there are no other disqualifying bad discharges. Similarly, section 4312(d) enumerates three affirmative defenses that are available to the employer. Enumerating three affirmative defenses means that there are no other affirmative defenses.

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[7] 20 C.F.R. 1002.139 (bold question in original, emphasis by italics supplied).
[8] *See Petty v. Metro Government of Nashville-Davidson County,* 538 F.3d 431 (6th Cir. 2008), *cert. denied,* 556 U.S. 1165 (2009). *See also Petty v. Metro Government of Nashville-Davidson County,* 687 F.3d 710 (6th Cir. 2012).