LAW REVIEW 16050[1]
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DOJ Wins USERRA Case

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Update on Sam Wright

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Pfunk v. Cohere Communications LLC, 73 F. Supp. 3d 175 (S.D.N.Y. 2014).[3]

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[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1500 "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. 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. For six years (2009-15), I was 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. On 10/13/1994, President Bill Clinton signed into law Public Law 103-353, the Uniformed Services Employment and Reemployment Rights Act (USERRA), as a complete rewrite of the Veterans' Reemployment Rights Act (VRRA), which dates from 1940. I have been dealing with the VRRA and USERRA 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 interagency task force work product that President George H.W. Bush presented to Congress, as his proposal, in February 1991. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice at Tully Rinckey PLLC, and as SMLC Director. After ROA disestablished the SMLC last year, I returned to Tully Rinckey PLLC, this time in an "of counsel" role. To arrange for a consultation with me or another Tully Rinckey PLLC attorney, please call Ms. JoAnne Perniciaro (the firm's Client Relations Director) at (518) 640-3538. Please mention Captain Wright when you call.

[3] This is a May 28, 2014 decision and opinion by Judge Paul A. Engelmayer of the United States District Court for the Southern District of New York. The citation means that you can find this decision in Volume 73 of *Federal Supplement Third Series,* and the decision starts on page 175. I wrote about this case, at its outset, in Law Review

The facts of the case

This is an important case arising under the Uniformed Services Employment and Reemployment Rights Act (USERRA).[4] This case is important because it illustrates many important legal issues under USERRA.

William J. Pfunk, the plaintiff, joined the United States Army Reserve (USAR) in December 2006, just over five years after the terrorist attacks of September 11, 2001, the "date which will live in infamy" for our time. He was on active duty for seven months, from July 2007 to February 2008, for military basic training and infantry training. He was involuntarily called to active duty for 13 months (July 2008 to August 2009), and he spent most of that time in Iraq. After he returned from the Iraq deployment, he was a traditional USAR soldier, performing inactive duty training (drills) on weekends and annual training.

Pfunk went to work for Cohere Communications LLC[5] on November 8, 2011. Initially, he was paid at the rate of $50 per day. He asked for a raise, and his compensation was changed to $15 per hour. He worked for the company for only 21 weeks, until he was fired on April 9, 2012. During his brief employment at Cohere, he was also enrolled as a student at Hunter College in New York City.[6] On average, he worked for the company for 28.8 hours per week.[7]

Shortly after he was fired, Pfunk contacted the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), requesting assistance with respect to his issues with Cohere. An ESGR volunteer contacted Steven T. Francesco, the owner-operator of Cohere, but Francesco refused to discuss the matter with the ESGR volunteer.

12118 (December 2012). In that article, I praised the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS) and the United States Department of Justice (DOJ) for diligent and timely action in investigating Pfunk's claim that his USERRA rights had been violated, finding his complaint to have merit, and initiating this lawsuit in court.

[4] USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-35).

[5] Cohere is located in Manhattan, just a short subway ride from "Ground Zero" where ten terrorists crashed two airliners into the twin towers of the World Trade Center on September 11, 2001.

[6] His student status in no way detracts from his USERRA rights in his civilian job.

[7] The Uniformed Services Employment and Reemployment Rights Act (USERRA) most definitely applies to persons holding or seeking part-time as well as full-time jobs. The Department of Labor (DOL) USERRA Regulations provide: "USERRA rights are not diminished because an employee holds a temporary, *part-time,* probationary, or seasonal employment position." 20 C.F.R. 1002.41 (emphasis supplied). The citation is to title 20, Code of Federal Regulations, section 1002.41. Section 4331 of USERRA, 38 U.S.C. 4331, gives DOL the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL published proposed USERRA Regulations in the *Federal Register* in September 2004, for notice and comment. After considering the comments received and making a few adjustments, DOL published the final regulations in December 2005.

Pfunk then contacted the Veterans' Employment and Training Service of the United States Department of Labor (DOL-
VETS), which conducted an investigation and found Pfunk's USERRA claims to have merit. DOL-VETS urged Francesco to come into compliance with USERRA by reinstating Pfunk to his job and compensating him for the pay that he lost because of the unlawful firing, but Francesco refused to do that. At Pfunk's request, DOL-VETS referred the case file to the United States Department of Justice (DOJ), in accordance with section 4323(a) of USERRA.[8] DOJ agreed with DOL-VETS that the case was meritorious, and DOJ filed suit, on behalf of Pfunk, in the United States District Court for the Southern District of New York, on December 10, 2012.[9]

On April 4, 2012, Pfunk received a text message from a senior noncommissioned officer (NCO) in his USAR unit, asking Pfunk to serve as the "sponsor" for another USAR soldier at the "Best Warrior Competition"[10] to be held at Fort Indiantown Gap, Pennsylvania, starting on Monday, April 9, 2012. Both the participants in the competition and their "sponsors" received official USAR orders for this competition, and such participation constituted "service in the uniformed services" as defined by section 4303(13)[11] of USERRA).

The senior NCO gave Pfunk very little advance notice of this request because he was asking Pfunk to serve as a last-minute replacement for another USAR soldier who had volunteered to serve as a "sponsor" but then had to back out at the last moment for reasons that are not explained in the court decision. Pfunk responded to the senior NCO, saying that he would be willing to serve as "sponsor" if the USAR unit could provide him military orders for the event.[12]

When Pfunk contacted his USAR unit to request orders for the competition, the initial answer was that no such orders could be provided because of the shortness of the time before the

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[8] 38 U.S.C. 4323(a).

[9] In accordance with section 4323(a) of USERRA, the named plaintiff in the lawsuit is Pfunk, not the Secretary of Labor or the United States. That section provides that the named plaintiff will be the United States if the defendant employer is a state government agency. In all other cases, the named plaintiff is the individual veteran or service member, although the United States is providing free legal representation, through DOJ. DOJ filed suit against Cohere Communications LLC and also against Francesco personally. 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). Francesco is a defendant in this case and is subject to both injunctive and monetary relief that the court may order.

[10] This competition may sound like "fun and games" but it has a serious purpose, to encourage USAR soldiers to learn the skills that they will need when mobilized and to improve and maintain their physical fitness.

[11] 38 U.S.C. 4303(13).

[12] It is fortunate that Pfunk insisted on receiving official USAR orders as a condition precedent to his agreeing to participate in the competition as a "sponsor" because USERRA's definition of "service in the uniformed services" [38 U.S.C. 4303(13)] requires that participation be "under competent authority." If Pfunk had agreed to participate without any orders or USAR compensation, his participation would at least arguably not qualify as "service in the uniformed services" and USERRA would not protect his right to absent himself from his civilian job for this purpose. Please see Law Review 16021 (April 2016).

competition was scheduled to begin. Because of the need for Pfunk's participation as "sponsor," the senior NCO was able to expedite the orders request process, and Pfunk received his orders on Sunday. He immediately informed Francesco by e-mail that he would not be at work on Monday or that week, because of his military duty. Francesco went ballistic about the shortness of the notice and fired Pfunk the very next day. This lawsuit resulted.

Pfunk was an employee, not an intern.

Like other federal employment laws,[13] USERRA applies to the relationship between an employer and an employee or applicant for employment. USERRA and these other laws do not apply to the relationship between a business entity and a partner, independent contractor, or intern. Business entities are tempted to try to limit their legal liabilities by characterizing individuals as members of these exempt categories, but this is not just a matter of the label. Determining whether an individual is an employee is a mixed question of fact and law and often a controversial issue for judges to address.[14]

In his multiple conversations with DOL-VETS investigator Anthony Alicea, who conducted the DOL-VETS investigation of Pfunk's USERRA claim, and later during this lawsuit, Steven Francesco (owner-operator of Cohere Communications) repeatedly asserted that USERRA did not apply because Pfunk was an "intern" and not an employee of Cohere. For example, in an e-mail to Alicea Francesco stated: "I have 22 employees who will swear an affidavit of Mr. Pfunk's intern status."

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA and President Bill Clinton signed it into law on October 13, 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA's legislative history indicates that courts should look to the Fair Labor Standards Act (FLSA) and its case law in determining employee status for purposes of USERRA coverage.[15]

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[13] Other federal employment laws include the Fair Labor Standards Act (mandating that employers pay at least the minimum wage and pay time-and-a-half for overtime), Title VII of the Civil Rights Act of 1964 (forbidding discrimination in employment on the basis of race, color, sex, religion, or national origin), the Age Discrimination in Employment Act (forbidding discrimination in employment on the basis of age, with respect to employees or applicants who are at least 40), and the Americans with Disabilities Act (requiring employers to make reasonable accommodations for employees and applicants who are disabled, including but not limited to disabled veterans.

[14] For example, I invite the reader's attention to Law Review 15021 (February 2015), concerning the case of *Evans v. MassMutual Financial Group,* 856 F. Supp. 2d 606 (W.D.N.Y. 2012). MassMutual claimed that it had no obligation to reemploy Major (now Lieutenant Colonel) Andrae Evans after he returned from active duty because Evans was (the company claimed) an independent contractor and not an employee when he was called to the colors. The court determined that Evans was an employee for USERRA purposes, although he was an independent contractor for other legal purposes.

[15] *See* Committee Report, United States House of Representatives Committee on Veterans' Affairs,, April 28, 1993, H.R. Rep. No. 103-65, Part 1. You can find this report reprinted in Appendix B-1 of the 2016 edition of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. Appendix B-1 starts on page 630 of the 2016 edition. The specific

In his scholarly opinion, Judge Engelmayer cited and followed a Department of Labor Wage & Hour Division "fact sheet" about applying the FLSA to "interns" employed by for-profit businesses. Accordingly, Judge Engelmayer looked to six questions in determining whether Pfunk was an employee of Cohere or an intern:

1. The internship, although it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment.
2. The internship experience is for the benefit of the intern.
3. The intern does not displace regular employees but operates under the close supervision of existing staff.
4. The employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion its activities may actually be impeded.
5. The intern is not necessarily entitled to a job at the conclusion of the internship.
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

Affirmative answers to these questions show intern status, while negative answers show employee status. It is not necessary to show negative answers to all six questions to show that the person is an employee and not an intern, but in this case Judge Engelmayer found that all six factors showed that Pfunk was an employee and not an intern.[16]

In a civil case, there is an often lengthy and contentious process called "discovery." The plaintiff can obtain documents, testimony, and other evidence from the defendant, and the defendant can likewise obtain evidence from the plaintiff. When discovery has been completed, a party can file a motion for summary judgment. The moving party will try to show the judge that there is no evidence (beyond a "mere scintilla") in support of the non-moving party's claim or position—that no reasonable jury could find for the non-moving party. The judge should grant the motion if he or she finds that no reasonable jury could find for the non-moving party. To avoid summary judgment, or to overturn on appeal a summary judgment, the non-moving party only needs to show that there was some evidence in the record from which a reasonable jury could find for the non-moving party.

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language I am referring to is on page 661. The committee report cites with approval *Brock v. Mr. W Fireworks, Inc.,* 814 F.2d 1042 (5th Cir. 1987). In that case, the United States Court of Appeals for the Fifth Circuit held that the individuals who operated fireworks stands and sold fireworks for the defendant company were employees for FLSA purposes and not independent contractors. The appellate court applied the liberal "economic reality" test in holding these individuals to be employees.

[16] For example, the judge referred to an e-mail (in the case record) in which Francesco had referred to Pfunk as an integral part of a team of Cohere employees who were engaged in an activity intended to generate profit for Cohere.

In this case, the defendants (Cohere and Francesco) filed a motion for summary judgment on the "intern" issue—arguing that the evidence showed beyond dispute that Pfunk was an intern and not an employee. Pfunk (represented by DOJ) filed a cross motion for summary judgment, arguing that the evidence showed beyond dispute that Pfunk was an employee and not an intern. Judge Engelmayer denied the defendants' motion and granted the plaintiff's motion.

USERRA applies to voluntary as well as involuntary military service.

Francesco argued that Pfunk did not have rights under USERRA because he volunteered for the military duty in question. The voluntary nature of the duty in no way detracts from Pfunk's USERRA rights. USERRA defines "service in the uniformed services" as follows: "The term 'service in the uniformed services' means the performance of duty *on a voluntary or involuntary basis* in a uniformed service under competent authority."[17] In a larger sense, all military service is voluntary because no one has been drafted by our government since Congress abolished the draft and established the All-Volunteer Military almost two generations ago, in 1973.

Military service protected by USERRA is not limited to the traditional model of "one weekend per month and two weeks in the summer."

In an e-mail to Pfunk, Francesco wrote: "From what I know about reserve duty, the obligation is one weekend per month and two weeks in the summer. Military orders never come as a surprise—unless a time of war." Francesco's statement only shows his own ignorance, an ignorance that is shared by all too many civilian employers.

Francesco's statement was somewhat accurate between July 1953 (the end of the Korean War) and August 1990 (when Iraq invaded Kuwait and President George H.W. Bush called up Reserve Component units as part of his forceful response). After August 1990, and especially after September 2001, the "strategic reserve" (available only for World War III, which thankfully never happened) has morphed into the "operational reserve" (available for call-up for intermediate military contingencies like Iraq and Afghanistan). The protections of USERRA and the VRRA are not and never have been limited to the minimal role of the National Guard and Reserve during the period between 1953 and 1990.[18]

Pfunk gave sufficient advance notice to his employer.

On Sunday, April 12, 2012, Pfunk learned that he had orders to perform USAR duty at Fort Indiantown Gap, Pennsylvania, starting the very next day and extending for that week. Pfunk

[17] 38 U.S.C. 4303(13) (emphasis supplied).
[18] Please see Law Review 13099 (July 2013). The article is titled "This Is Not Your Father's National Guard."

immediately gave notice to his employer (Cohere), by means of an e-mail to Francesco. It is clear that it was the lateness of the notice that caused Francesco to go ballistic and fire Pfunk the very next day, but under the circumstances of this case the notice that Pfunk provided was sufficient. Pfunk could not give his employer any more notice than the Army had given Pfunk.

USERRA establishes five conditions that an individual must meet to have the right to reemployment following a period of service in the uniformed services. One of the conditions is as follows:

> [T]he person (or an appropriate officer of the uniformed service in which such service is performed) has given advance written or verbal notice of such service to such person's employer.[19]

USERRA also contains an exception to the prior notice requirement, as follows:

> No notice is required under subsection (a)(1) if the giving of such notice is precluded by military necessity or, under all the relevant circumstances, the giving of such notice is otherwise impossible or unreasonable. A determination of military necessity for the purposes of this subsection shall be made pursuant to regulations prescribed by the Secretary of Defense and shall not be subject to judicial review.[20]

Section 4312(a)(1) does not require that any specific amount of advance notice be given to the civilian employer. USERRA's legislative history addresses the advance notice requirement as follows:

> The Committee [House Committee on Veterans' Affairs] believes that the employee should make every effort, *when possible,* to give timely notice. The issue of timely notice should be addressed on a case-by-case basis. *In the event that an employee is notified by military authorities at the last minute of impending military duty, resulting short notice given to the employer should be considered timely.* On the other hand, last-minute notice, which could have been given earlier by the employee but was unjustifiably not given, and which causes severe disruption to the employer's operation, should be viewed unfavorably. Lack of a timely notification which does not result in harm to the employer should not be a sufficient basis to deny reemployment rights.[21]

The DOL USERRA Regulations address the issue of the amount of advance notice as follows:

> Although USERRA does not specify how far in advance notice must be given to the employer, an employee should provide notice as far in advance as is reasonable under

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[19] 38 U.S.C. 4312(a)(1).
[20] 38 U.S.C. 4312(b).
[21] House Committee Report, April 28, 1993 (H.R. Rep. No. 103-65, part 1) (emphasis supplied), reprinted in Appendix B-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found at pages 668-69 of the 2016 edition of the Piscitelli-Still book.

> the circumstances. In regulations promulgated by the Department of Defense under USERRA, 32 C.F.R. 104.6(a)(2)(i)(B), the Defense Department "strongly recommends that advance notice to civilian employers be provided at least 30 days prior to departure for uniformed service *when it is feasible to do so.*"[22]

Under the circumstances of this case, Pfunk gave his employer as much advance notice as possible. It was unlawful for Francesco and Cohere to fire him or deny him reemployment based on the shortness of the notice.

> **When giving notice to Cohere on April 8, Pfunk was not required to provide any documentation.**

In an e-mail to Alicea, Francesco wrote:

> Our policy is clear—if military orders exist that he [Pfunk] would have to provide them for review prior to his last-minute notice.

Francesco's statement is wrong as a matter of law. Under no circumstances is the service member required to provide documentation when giving the employer notice of impending service. The service member is required to give the employer (upon the employer's request) such documentation as is readily available *when applying for reemployment, after a period of service of at least 31 days.*[23] In this case, Pfunk's period of service was well short of the 31-day threshold, so there was no documentation requirement at the end of the period of service either.

In any case, Pfunk did have written orders in hand when he gave Francesco notice on Sunday, April 8, 2012. Pfunk offered to provide a copy of the orders to Francesco, but Francesco refused the offer.

> **Francesco and Cohere violated section 4311(a) by firing Pfunk.**

USERRA provides:

> 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.[24]

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[22] 20 C.F.R. 1002.85(d) (emphasis supplied).
[23] Please see Law Review 16027 (April 2016).
[24] 38 U.S.C. 4311(a) (emphasis supplied).

Under section 4311(c),[25] Pfunk is not required to prove that Cohere fired him *solely because* of his performance of uniformed service and resulting absence from his civilian job. Pfunk only needs to prove that his performance of service was *a motivating factor* in the employer's decision to fire. If Pfunk proves motivating factor, the decision to fire was unlawful unless the employer can *prove* (not just say) that it would have fired Pfunk anyway, for lawful reasons unrelated to his military service.

USERRA's legislative history addresses the intent of the "motivating factor" language as follows:

> 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 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 and history of 38 U.S.C. 2021(b)(3) and are rejected on that basis.[26]

In its leading case involving section 4311(a), the Federal Circuit[27] held:

> The factual question of discriminatory motivation or intent may be proven by either direct or circumstantial evidence. *See FPC Holdings, Inc.,* 64 F.3d at 942 ("Motive may be demonstrated by circumstantial as well as direct evidence and is a factual issue which the expertise of the Board [NLRB] is peculiarly suited to determine."); *Matson Terminals,* 114 F.3d at 303-04; *see also Kumferman v. Department of the Navy,* 785 F.2d 286, 290 (Fed. Cir. 1986) (intent is a question of fact to be found by the MSPB). Circumstantial evidence will often be a factor in these cases, for discrimination is seldom open or notorious. Discriminatory motivation under the USERRA may be reasonably inferred from a variety of factors, including proximity in time between the employee's military activity and the adverse employment action, inconsistencies between the proffered reason and other actions of the employer, an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses. *Cf. W.F. Bolin Co. v. National Labor Relations Board,* 70 F.3d 863, 871 (6th Cir. 1995). In determining whether the employee has proven that his protected status was part of the motivation for the agency's [employer's] conduct, all record evidence may be considered, including the agency's explanation for the actions taken.[28]

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[25] 38 U.S.C. 4311(c).

[26] House Committee Report No. 103-65, part 1, reprinted in *The USERRA Manual* at page 666 of the 2016 edition.

[27] The Federal Circuit is the specialized federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from the Merit Systems Protection Board (MSPB).

[28] *Sheehan v. Department of the Navy,* 240 F.3d 1009, 1013 (Fed. Cir. 2001).

Francesco and Cohere filed a motion for summary judgment on the section 4311(a) issue, and Pfunk filed a cross motion for summary judgment. In his scholarly opinion, Judge Engelmayer held that there was plenty of evidence to support a reasonable jury verdict for Pfunk on this issue, and he correctly denied the employer's motion for summary judgment. The judge also denied Pfunk's motion for summary judgment on this issue, although he clearly believed that Pfunk had the better argument. Judge Engelmayer wrote:

> On balance, the evidence on these issues favors Pfunk. But on summary judgment it is not the Court's role to make credibility determinations or to choose between two conclusions which each have sufficient evidence to support a jury verdict.[29]

> **Francesco and Cohere violated section 4311(b) by threatening to retaliate against Pfunk for complaining to DOL-VETS.**

Section 4311(b) of USERRA provides:

> 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 …*[30]

When Pfunk informed Francesco of his (Pfunk's) impending military duty, Francesco responded by firing Pfunk. In an e-mail, Pfunk pointed out that firing him for performing military duty constituted a violation of USERRA, and Pfunk expressed the intent to file a formal USERRA complaint with DOL-VETS. Francesco responded with a blatant threat:

> You are welcome to pursue any course of action you deem appropriate—but if you want a war I can impact your life more than screw with mine.

By threatening to retaliate against Pfunk for complaining to DOL-VETS, Francesco committed an egregious violation of section 4311(b).

> **Francesco and Cohere violated sections 4312 and 4313 by refusing to reemploy Pfunk when he reported back after this period of uniformed service.**

As I have explained in Law Review 15116 (December 2015) and many other articles, a service member or veteran is entitled to reemployment after a period of service if he or she meets five simple conditions:

1. Left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services.
2. Gave the employer prior oral or written notice.

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[29] *Pfunk,* 73 F. Supp. 3d at 191.

[30] 38 U.S.C. 4311(b) (emphasis supplied).

3. Did not exceed the five-year limit on the period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment.
4. Was released from the period of service without having received a disqualifying bad discharge from the military.
5. Made a timely attempt to return to work or application for reemployment.

It is clear beyond question that Pfunk met these five conditions. He left his job for the purpose of performing uniformed service, and he gave prior notice to the employer on Sunday, April 12, 2012, one day before the period of service began. Although the notice was short, he was unable to give more notice because the Army only gave him one day of notice. He obviously did not exceed the five-year limit, because he had only been working for Cohere for 21 weeks at the time he left for service, and the period of service only lasted a few days. He did not receive a disqualifying bad discharge from the Army. Indeed, he has not been discharged at all, as he is still participating in the USAR.

After a period of service of fewer than 31 days, the service member is required to report for work "not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of service to the person's residence."[31] After Pfunk completed his period of service at Fort Indiantown Gap, Pennsylvania and returned to his home in New York, he attempted to report back to work at Cohere, but Francesco denied him access to the facility. Pfunk met the conditions, and the employer was legally required to reinstate him promptly to his job.

It is fortunate that Pfunk went through the motions of attempting to return to work, although he knew that Francesco would not reinstate him. In a case like this, there is an overlap between section 4311 (which forbids discrimination) and sections 4312 and 4313 (which require the employer to reemploy the returning service member). In a discrimination case, it is necessary to get inside the employer's head—it is necessary to prove that the service member's service or obligation to perform service was a motivating factor in the employer's decision to fire. In a reemployment case, it is only necessary to prove that the service member meets five simple, objective conditions. Typically, reemployment cases are easier to prove.

Francesco and Cohere violated USERRA willfully, and double damages should be awarded.

[31] 38 U.S.C. 4312(e)(1)(A)(i). If the person is unable to return at that time, because of factors beyond the person's control, the person is required to report back to work as soon as possible thereafter. 38 U.S.C. 4312(e)(1)(A)(ii).

USERRA provides as follows concerning the remedies that the court may impose on a defendant if the court finds that the defendant violated USERRA:

> In any action under this section, the court may award relief as follows:
> (A)The court may require the employer to comply with the provisions of this chapter.
> (B)The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.
> (C)*The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.*[32]

Under section 4323(d)(1)(C), the court is to double the damages awarded if the court finds that the employer violated USERRA willfully. In this case, there is ample evidence of willfulness by Francesco and Cohere.

Judge Engelmayer's scholarly opinion includes the following two paragraphs:

> On April 26, 2012, Alicea [the DOL-VETS investigator] spoke to Francesco by phone. Francesco repeated that he believed the case was closed and that he would not allow Pfunk to return to work. He further stated that if he was required to rehire Pfunk he would not pay him and would instead put a chair in the hallway and make Pfunk sit there all day. He added that instead of putting Pfunk in the hallway, he would put him in a bathroom stall. Alicea asked Francesco for the names of the interns at Cohere and the names of employees who had been interns before they were hired as full-time employees. Francesco responded that those requests were on the brink of harassment and that he would now file charges against Pfunk for harassment. Alicea informed Francesco that the requests were not harassment, but rather, part of a federal investigation, and that he could cooperate, or Alicea could close the case and possibly have the case referred to the Department of Justice. Francesco responded, "f..k you" and asked to speak to Alicea's supervisor.
>
> Later that day, April 26, 2012, Alicea arranged for a teleconference between himself, Francesco, VETS Senior Investigator Paul Desmond, and VETS Director Barry Morgan. During this call, Francesco reiterated the points he had previously made to Alicea—i.e., that Pfunk was an intern, that he would not pay Pfunk if forced to reemploy him; and that Pfunk had "volunteered" to go on active duty. Desmond informed Francesco that Pfunk's request to go on active duty orders, or on a voluntary assignment, did not forfeit his rights to protection under USERRA. At that point, Francesco reiterated that he would

[32] 38 U.S.C. 4323(d)(1) (emphasis supplied).

> refuse to pay Pfunk and that he would put a chair in the hallway where Pfunk would sit and do nothing.[33]

It is difficult to imagine clearer evidence of willfulness.

Outcome of this case

Judge Engelmayer granted Pfunk's motion for summary judgment on the "intern" issue but denied the other motions for summary judgment. The case was set for a jury trial just days later. LEXIS (a computerized legal research service) shows no further developments in this case. It is most likely that Francesco came to his senses and offered Pfunk a settlement that Pfunk accepted. If I obtain more information about the outcome, I will do a supplement to this article.

Kudos to Anthony Alicea, DOL-VETS, and DOJ

I congratulate Anthony Alicea, DOL-VETS, and DOJ for their timely and diligent attention to this case and for refusing to knuckle under to Francesco's attempt to bully them into closing the case as "no merit."

Pfunk was fired on April 9, 2012, and he complained almost immediately to DOL-VETS. Alicea arranged for the teleconference with Francesco on April 26, 2012. DOL-VETS concluded its investigation and closed the case, finding merit, on July 3, 2012, and so informed Pfunk. After Pfunk requested referral to DOJ, DOL-VETS transmitted the case file to DOJ in August 2012. DOJ agreed that the case had merit and filed this suit on December 10, 2012, in the United States District Court for the Southern District of New York. Judge Engelmayer released this decision on May 28, 2014. This timeliness is outstanding, especially in a federal court with a very crowded docket, like that of the Southern District of New York.

I have written:

> In most cases, a USERRA claimant is better off with diligent private counsel, like you, rather than DOL-VETS and DOJ, for two reasons. First, you will approach the case as an advocate, not as a neutral investigator. Second, you can consider other legal theories and remedies, beyond USERRA.[34]

I adhere to what I have written about "most cases," but in this case Pfunk was well served by DOL-VETS and DOJ.

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[33] *Pfunk,*73 F. Supp. 3d at 183.
[34] Law Review 1152 (May 2011).