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USERRA, the Escalator Principle, and the Lack of a Present Vacancy at the Appropriate Level

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Update on Sam Wright

1.2—USERRA forbids discrimination
1.3.1.2—Character and duration of service
1.3.2.2—Continuous accumulation of seniority-escalator principle
1.3.2.3—Pension credit for service time
1.3.2.4—Status of the returning veteran
1.3.2.8—Training or retraining of the returning veteran
1.8—Relationship between USERRA and other laws/policies

Q: I am a Major in the Marine Corps Reserve (USMCR) and a life member of the Reserve Officers Association (ROA). I have read with great interest some of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).[3]

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[1] Please see 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 1976 University of Houston Law School, LLM 1980 Georgetown University Law Center. 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, and for six years (2009-15) 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. Although I am no longer employed by ROA, I have continued the work of the SMLC on a part-time voluntary basis. You can reach me through ROA at (800) 809-9448, extension 730, or. SWright@roa.org.

[3] As I explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA (Public Law 103-353, 108 Stat. 3168) 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 USERRA was a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (Public Law 76-783, 54 Stat. 885), the law that led to the drafting of more than ten million young men (including my late father) for World War II. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). 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 proposed VRRA rewrite 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 (DOD) 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, and as the Director of the Service Members Law Center (SMLC) from 2009 to 2015. Please see Law Review 15052 (June 2015) concerning the accomplishments of the SMLC.

In the spring of 2007, I applied for a job at a major insurance company—let's call it the Rock Solid Insurance Company (RSIC). I was interviewed twice, and I thought that it was likely that the company would soon be making me a job offer, but the company had not yet done so. Then, in May 2007, the USMCR notified me that I was being involuntarily recalled to active duty for deployment to Iraq, as part of the "surge."

I notified the RSIC recruiter immediately of this news. The company graciously offered me a job anyway, knowing that I would be leaving for military service shortly after my start date. I started a new job at RSIC in June 2007 and just one month later I left the job for military service. My initial involuntary call-up was for seven months, but I volunteered to remain on active duty past that point. I notified RSIC that my active duty had been extended.

I left active duty after two years of continuous service, in July 2009. I immediately contacted RSIC and applied for reemployment. I was reemployed, but I question whether I was properly accorded all that I was entitled to under the "escalator principle" that you have addressed in many of your articles.

In June 2011 I returned to active duty, this time voluntarily, for a new international crisis. I remained on active duty for five years and two months, until August 2016, when I left active duty and immediately applied for reemployment at RSIC. I am back at work promptly after my application, but this time it is clear that I have fallen behind my RSIC colleagues who have been continuously employed during the seven years plus that I have been away from RSIC for military service.

Please address how the escalator principle applies to my situation at RSIC.

USERRA forbids discrimination *in initial hiring*

A: I will address the escalator principle momentarily, but first let me point out that it was not by "grace" or the "goodness of the company's heart" that you were hired in June 2007 despite the fact that you and the company knew that you were about to be called to the colors by the USMCR. Thirty years ago, in 1986, Congress amended the VRRA to make it unlawful for employers (federal, state, local, and private sector) to discriminate *in initial employment,* as well as to discriminate against those who were already employed.[4] Under section 4311(a) of USERRA,[5] discrimination in initial employment is unlawful. If the company had denied you initial employment in June 2007 based on your imminent call to active duty a month later, that would have been a violation of USERRA.[6]

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[4] Firing an employee, or denying him or her a promotion or incident or advantage of employment, based on obligations as a member of a Reserve Component of the armed forces has been unlawful since 1968.

[5] 38 U.S.C. 4311(a). USERRA was enacted in 1994, as a rewrite of the VRRA.

[6] *See McLain v. City of Somerville,* 424 F. Supp. 2d 329 (D. Mass. 2006); *Beattie v. Trump Shuttle,* 758 F. Supp. 30 (D.D.C. 1991).

You were entitled to reemployment in 2009 and again in 2016 because you met the five USERRA conditions, including the five-year limit.

As I have explained in Law Review 15116 (December 2015) and other articles, you are entitled to reemployment after a period of uniformed service if you meet five simple conditions:

a. You left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services, as defined by USERRA. You clearly did this in July 2007 and again in June 2011.
b. You gave the employer prior oral or written notice. You clearly gave such notice for both periods of uniformed service.
c. You have not exceeded the cumulative five-year limit, with respect to the period or periods of uniformed service relating to the employer relationship for which you seek reemployment. I will discuss this condition in detail below.
d. You were released from the period of service without having received a disqualifying bad discharge from the military. You are still a member of the USMCR, so it is clear that you have not received a disqualifying bad discharge.
e. After release from the period of service, you made a timely application for reemployment.[7]

I invite your attention to Law Review 16043 (May 2016), concerning USERRA's five-year limit. There are nine exemptions—kinds of service that do not count toward exhausting your limit. At your request, I have reviewed all of your orders for all of your military periods since June 2007, when you began your RSIC career. I find that you have used only one year of your five-year limit with respect to your employer relationship with RSIC. All of your other periods are exempt from the computation of the five-year limit. You still have four years of "head room" in your five-year limit with RSIC.

The escalator principle

The Supreme Court enunciated the escalator principle in its first case construing the 1940 reemployment statute. The Court held: "The returning veteran does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war."[8]

The escalator principle is codified in sections 4313(a)(2)(A),[9] 4316(a),[10] and 4318[11] of USERRA. Section 4313(a)(2)(A) provides that a person who is returning from a period of service of 91 days or more and who meets the five USERRA conditions is entitled to be reemployed:

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[7] After a period of service of 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service. It is clear that you applied for reemployment well within the 90-day deadline, in 2009 and again in 2016.

[8] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946). Please see Law Review 0803 (January 2008) for a detailed discussion of *Fishgold* and its implications.

[9] 38 U.S.C. 4313(a)(2)(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.[12]

Section 4316(a) provides:

> A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits *that such person would have attained if the person had remained continuously employed.*[13]

Upon reemployment, you are entitled to a promotion if it is *reasonably certain* that you would have received the promotion if you had been continuously employed. You need not prove that it was absolutely certain that you would have been promoted, only reasonably certain. In Law Review 16026 (April 2016), I discuss the "reasonable certainty" test in considerable detail.

Q: After I asserted my USERRA rights, RSIC's Personnel Department referred the issue to the company's General Counsel—let's call him I.R. Atbar, Esq. Mr. Atbar prepared a memorandum in which he asserted that the escalator principle applies only to "automatic" promotions based solely on time, as under a collective bargaining agreement between a company and a union. For this proposition, Mr. Atbar cited *Rivera-Melendez v. Pfizer Pharmaceutical, Inc.,* 2011 U.S. Dist. LEXIS 130238 (D. Puerto Rico Nov. 9, 2011). What do you say about that?

A: In my first semester of law school, in the fall of 1973, I was taught that one must never cite a court case without first checking to see if the case was reversed or modified on appeal. Mr. Atbar has apparently forgotten that lesson. In the case Mr. Atbar cited, the plaintiff (Mr. Rivera-Melendez) appealed from the District of Puerto Rico to the United States Court of Appeals for the First Circuit,[14] and the First Circuit reversed the District Court on this very issue.[15]

In its scholarly decision, the First Circuit held:

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[10] 38 U.S.C. 4316(a).

[11] 38 U.S.C. 4318. Please see Law Review 16038 (May 2016) for a detailed discussion of the application of section 4318 to defined contribution pension plans, like the RSIC plan.

[12] 38 U.S.C. 4313(a)(2)(A) (emphasis supplied).

[13] 38 U.S.C. 4316(a) (emphasis supplied).

[14] The First Circuit is the federal appellate court that sits in Boston and hears appeals from district courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.

[15] *Rivera-Melendez v. Pfizer Pharmaceuticals LLC,* 730 F.3d 49 (1st Cir. 2013). I discuss this case in detail in Law Review 13127 (September 2013).

The district court held that Rivera's attempt to invoke the escalator principle was improper because "[a]n escalator position is a promotion that is based solely on employee seniority. . . . [and] does not include an appointment to a position that is not automatic, but instead depends on the employee's fitness and ability and the employer's exercise of discretion." Dist. Ct. Op. at 17-18 (citation omitted) (internal quotation marks omitted). In concluding that the escalator principle and the reasonable certainty test do not apply to non-automatic promotions, the district court relied primarily upon *McKinney v. Missouri-Kansas-Texas Railway,* 357 U.S. 265 (1958), a case in which the Supreme Court interpreted the Universal Military Training and Service Act of 1951. There the Court held that a returning veteran seeking reemployment "is not entitled to demand that he be assigned a position higher than that he formerly held when promotion to such a position depends, not simply on seniority or some other form of automatic progression, but on the exercise of discretion by the employer." *Id.* at 272. Accordingly, the district court found that "the purpose of the escalator principle is to 'assure that those changes and advancements that would necessarily have occurred simply by virtue of continued employment will not be denied the veteran because of his absence in the military service,'" Dist. Ct. Op. at 18 (quoting *McKinney*, 357 U.S. at 272) (emphasis added), and that the principle therefore had no applicability to the facts of Rivera's case.

In citing the precedential authority of *McKinney*, the district court failed to consider the subsequently decided Supreme Court case of *Tilton v. Missouri Pacific Railroad Co*., 376 U.S. 169 (1964). In *Tilton*, reemployed veterans claimed that they were deprived of seniority rights to which they were entitled under the Universal Military Training and Service Act when their employer assigned them seniority based upon the date that they returned from military service and completed the training necessary to advance to the higher position, rather than the date that they would have completed the training if they had not been called into service. *Id*. at 173-74. The Eighth Circuit had relied upon *McKinney* to deny the claims, as the promotion at issue 'was subject to certain contingencies or 'variables'" and therefore was not automatic. *Id*. at 178-79. The Supreme Court reversed, finding that *McKinney* "did not adopt a rule of absolute foreseeability,' *id*. at 179, and that "[t]o expect such certainty as a condition for insuring a veteran's seniority rights would render these statutorily protected rights without real meaning," *id*. at 180. The Court concluded that Congress intended a reemployed veteran . . . to enjoy the seniority status which he would have acquired by virtue of continued employment but for his absence in military service. This requirement is met if, as a matter of foresight, it was reasonably certain that advancement would have occurred, and if, as a matter of hindsight, it did in fact occur. *Id*. at 181. Read together, *McKinney* and *Tilton* suggest that the appropriate inquiry in determining the proper reemployment position for a returning servicemember is not whether an advancement or promotion was automatic, but rather whether it was reasonably certain that the returning servicemember would have attained the higher position but for his absence due to military service. The Department has certainly adopted this construction of the regulations and the relevant precedents. See 70 Fed. Reg. 75,246-01, 75,272 (stating

that "general principles regarding the application of the escalator provision . . . require that a service member receive a missed promotion upon reemployment if there is a reasonable certainty that the promotion would have been granted" (citing *Tilton*, 376 U.S. at 177; *McKinney*, 357 U.S. at 274)); see also 20 C.F.R. § 1002.191. We accord this interpretation substantial deference. *See Massachusetts v. U.S. Nuclear Regulatory Commission*, 708 F.3d 63, 73 (1st Cir. 2013) (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

The district court also misinterpreted the regulations governing USERRA. For instance, the court cited 20 C.F.R. § 1002.191 for the proposition that the escalator principle 'is intended to provide the employee with any seniority-based promotions that he would have obtained 'with reasonable certainty' had he not left his job to serve in the armed forces.' Dist. Ct. Op. at 17 (emphasis added). However, nothing in section 1002.191 suggests that the escalator principle is limited to "seniority-based promotions." Furthermore, the next section states that "[i]n all cases, the starting point for determining the proper reemployment position is the escalator position." 20 C.F.R. § 1002.192 (emphasis added).

The court also cited section 1002.213 in support of its conclusion that "[a]n escalator position is a promotion that is based solely on employee seniority." Although sections 1002.210 through 213 specifically address "seniority rights and benefits," and make clear that the reasonable certainty test and escalator principle apply to promotions that are based on seniority, these sections do not limit the application of the reasonable certainty test and the escalator principle to seniority-based promotions.

Finally, the district court misinterpreted the Department of Labor's commentary on the proposed regulations. In its order on Rivera's motion for reconsideration, the court stated that "[t]he commentary merely emphasizes . . . that the final rule is designed to avoid relying on whether or not the employer has labeled the position as 'discretionary.' However, the commentary does much more than that: it unambiguously states that '[s]ections 1002.191 and 1002.192 . . . incorporate the reasonable certainty test as it applies to discretionary and non-discretionary promotions.' 70 *Fed. Reg.* 75,246-01, 75,271.

Pfizer attempts to save the district court from its error, stating that, despite its broad language, the district court actually applied the reasonable certainty test and determined as a matter of law that it was not reasonably certain that Rivera would have attained the API Team Leader position. That position has no grounding in the district court's analysis. In its decision on Pfizer's motion for summary judgment, the district court emphasized throughout that any promotion to the API Team Leader position was non-automatic, and therefore not subject to the escalator principle and the reasonable certainty test. There was a similar emphasis in the district court's decision on Rivera's motion for reconsideration. The court only engaged the evidence in the summary judgment record to determine that the promotion was in fact discretionary.

> Because the district court erred in finding that the escalator principle and the reasonable certainty test apply only to automatic promotions, and because the court did not apply those legal concepts to Rivera's claim, the district court's grant of summary judgment cannot stand. The court's analysis of Rivera's claim to the API Team Leader position was premised on its fundamental misapprehension of the correct legal standard, which in turn compromised its view of the evidence. We prefer to have the district court decide in the first instance if the summary judgment record reveals genuine issues of material fact on the question of whether it is reasonably certain that Rivera would have been promoted to the API Team Leader position if his work at Pfizer had not been interrupted by military service. We therefore remand to the district court for reconsideration of the motion for summary judgment in light of the correct legal standard.[16]

It is clear that the escalator principle is not limited to "automatic" promotions. Upon your reemployment at RSIC, you are entitled to a promotion if you can show that it is "reasonably certain" that you would have received the promotion if you had been continuously employed.

The 1st Circuit decision in *Rivera-Melendez* is very important because in the 21st Century "automatic" promotions are rare in the private sector. Automatic promotions based solely on time on the job are largely limited to unionized situations, wherein a union was able to negotiate a collective bargaining agreement providing for such promotions. When the Supreme Court decided *Fishgold* in 1946, more than half of all private sector employees were represented by labor unions. Today, that percentage is only 6.5%. If the escalator principle only applies in unionized situations, the principle would be largely irrelevant in the 21st Century workforce.

Q: How am I to demonstrate that it is "reasonably certain" that I would have been promoted if I had remained continuously employed at RSIC during the 2011-2016 period when I was away from work for active duty?

A: The DOL USERRA Regulation provides:

> **1002.213 How can the employee demonstrate a reasonable certainty that he or she would have received the seniority right or benefit if he or she had remained continuously employed during the period of service?**
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> A reasonable certainty is a high probability that the employee would have received the seniority or seniority-based right or benefit if he or she had been continuously employed. The employee does not have to establish that he or she would have received the benefit as an absolute certainty. The employee can demonstrate a reasonable certainty that he or she would have received the seniority right or benefit by showing

[16] *Rivera-Melendez,* 730 F.3d at 56-58 (internal footnotes and page numbers omitted).

> that other employees with seniority similar to that which the employee would have had if he or she had remained continuously employed received the right or benefit. The employer cannot withhold the right or benefit based on an assumption that a series of unlikely events could have prevented the employee from gaining the right or benefit.[17]

Q: RSIC has a strict policy against employees sharing with other employees, or with anyone else, information about an individual employee's rate of pay, promotion status, performance evaluations, etc. It is a firable offense for an employee to solicit such information from a fellow employee and for another employee to provide such information. With that RSIC policy in mind, how am I supposed to obtain information about the promotions that other RSIC employees (my colleagues) received during the time that I was away from work for service?

A: I strongly advise you *not* to engage in "self-help discovery." Do *not* violate the company rule by soliciting this "personal" information from your colleagues.

If you believe that the company is annoyed with you for asserting your USERRA rights, and if you believe that the company is looking for an excuse to fire you, the *last thing that you should do is to give the employer such an excuse.*

RSIC's position seems to be:

> You just have to trust us. You have to take our word for it that your RSIC colleagues with similar seniority and similar performance evaluations to yours were not promoted during the time that you were away from work for the Marine Corps.

I do not like this "trust us" response. President Ronald Reagan said "trust, but verify" in the context of nuclear arms control negotiations with the Soviet Union.

It may be necessary for you to file suit in federal district court and engage in discovery to obtain the records and evidence from RSIC. I acknowledge that there is a slim possibility that RSIC is telling the truth and that your comparable colleagues were not promoted while you were away from work serving our country in the Marine Corps. If you file suit and then learn in discovery that the evidence does not support your case, it will then be necessary for you and your lawyer to dismiss the case.

I acknowledge that it seems wasteful of judicial resources (the court's time) to file a suit knowing that there is a possibility that you will need to dismiss the suit if you find in discovery that the evidence does not support your case. I believe that the blame for the waste belongs to RSIC, not to you. The company has the evidence, and you do not have it. The company's "you just have to trust us" line is indefensible.

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[17] 20 C.F.R. 1002.213 (bold question in original).

Q: Mr. Atbar says that the company is not required to reemploy me in a higher position than the position I left, based on "reasonable certainty" that I would have been promoted if I had been continuously employed, because the company has no present vacancies at the higher level. What do you have to say about that?

A: *Your right to reemployment at the appropriate level is not dependent upon the existence of a vacancy.* RSIC is required to reemploy you promptly and properly *even if that means displacing a fellow employee* who was hired or promoted during your absence.

I invite your attention to *Nichols v. Department of Veterans Affairs*, 11 F.3d 160 (Fed. Cir. 1993). In that case, the Federal Circuit[18] overruled a Merit Systems Protection Board (MSPB) decision for the Department of Veterans Affairs and against a veteran.

Henry P. Nichols was the GS-13 "Chief, Chaplain Services" at the Brockton/West Roxbury VA Medical Center. Nichols gave advance notice and left his civilian job to serve a three-year active duty tour in the Air Force, from February 1989 to February 1992. After Nichols left, the department appointed another chaplain (Walsh) to the position on a permanent basis. In October 1991, four months before his scheduled release from active duty, Nichols wrote to the department to inform it of his intention to leave active duty in February 1992 and to seek restoration to his position at Brockton, Massachusetts.

The Federal Circuit rejected the department's arguments that it was not required to displace Walsh in order to reemploy Nichols, holding:

> The department first argues that, in this case, Nichols' former position was "unavailable" because it was occupied by another, and thus it was within the department's discretion to place Nichols in an equivalent position. This is incorrect. Nichols' former position is not unavailable because it still exists, even if occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. "Employers must tailor their workforces to accommodate returning veterans' statutory rights to reemployment. Although such arrangements may produce temporary work dislocations for nonveteran employees, those hardships fall within the contemplation of the Act, which is to be construed liberally to benefit those who 'left private life to serve their country.' *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946)." *Goggin v. Lincoln St. Louis,* 702 F.2d 698, 704 (8th Cir. 1983). Although occupied by Walsh, Nichols' former position is not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him.[19]

[18] The Federal Circuit is a specialized federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from MSPB decisions.
[19] *Nichols,* 11 F.3d at 163.

When he returned from active duty, Nichols was reemployed at the VA facility in Brockton, Massachusetts, but not in the "chief" position that he had held previously. The Federal Circuit rejected the department's argument that Nichols' new position was of "like status" to his former position:

> The board [MSPB] erred in its conclusion that the status of Nichols' new position is like that of his former one. The Chief position is one with clear responsibilities. The incumbent is responsible for supervising and managing a staff of chaplains in their "regular chaplain duties." These regular duties are well defined by precedent and guidelines developed over time. In contrast, Nichols' current position carries a broad variety of new responsibilities that are nebulously defined, mostly because of the unique and untested nature of the position itself. Therefore, while, as Chief, Nichols was in a position of clearly understood responsibility and objectives and was familiar with the criteria by which his success was to be judged, his new position lacks any such predictability, and success, or what will be perceived as success, is difficult if not impossible for him to ascertain.
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> Perhaps more important, Nichols' former position was invested with the necessary authority to fulfill its responsibilities. In that position, he was the boss, and supervised a number of staff chaplains. Now he has no staff at all to assist with the wide range of responsibilities assigned. And he must report to and be supervised by the incumbent of the very same position he formerly held, as well as a number of other supervisors. Although the board was impressed with the wide discretion available to Nichols in handling his new responsibilities, lacking staff and reporting to a number of supervisors, it is apparent that he has not been given the necessary authority, indeed any clear authority, to accomplish the goals the department envisions for him. It goes without saying that when one starts out as the boss, but is placed in a position subordinate to the replacement boss, and other new bosses, there is incontestably a loss of authority, and accordingly a diminished status.[20]

USERRA's legislative history also clearly shows that the lack of a present vacancy at the pre-service employer, at the time the veteran returns to work following uniformed service, does not justify or excuse the employer's failure to reemploy the veteran promptly in an appropriate position of employment:

> It is also not [a] 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 [for reemployment]. *Davis v. Halifax County School System,* 508 F. Supp. 966, 969 (E.D. N.C. 1981). *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,*

[20] *Nichols,* 11 F.3d at 163-64.

600 F. Supp. 352, 357 (N.D. Cal. 1984); *Goggin v. Lincoln St. Louis,* 702 F.2d 698, 709 (8th Cir. 1983).[21]

There are circumstances where properly reemploying the returning veteran necessarily means that some other employee will be displaced from his or her favored position or even from employment altogether.[22] This is one of those cases. Because you met the USERRA conditions, RSIC is required to reemploy you promptly in *the position that you would have attained (with reasonable certainty) if you had been continuously employed,* or alternatively in another position for which you are qualified and that is of *like seniority, status, and pay*, even if that means that another employee will lose out.

The focus of USERRA is on the ¾ of 1% of the U.S. population who serve our country in uniform, not the 99.25% who remain at home, enjoying the protection of the tiny band of brothers and sisters who volunteer to serve. It is not a cliché to say that *freedom is not free.* Almost the entire cost is borne by the ¾ of 1% who volunteer to serve. The other 99.25% make no contribution to the defense of our country, beyond the payment of taxes. USERRA protects those who serve, not those who remain at home enjoying the protection of those who serve.

Q: During the last five years, while I have been away from work for active duty in the Marine Corps, there have been a lot of changes in the insurance business, including changes mandated by new laws and regulations. My RSIC colleagues received on-the-clock training from RSIC in all of these changes. I missed that training because I was away from work serving our country in uniform. What does USERRA provide about this circumstance?

A: RSIC is required to help you qualify for the job by providing you on-the-clock training to make up for all of those training sessions that you missed, and it is unlawful for the company to charge you for that training.[23]

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[21] House Committee Report, April 28, 1993 (H.R. Rep. No. 103-65, Part 1), reprinted in Appendix B-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found on page 667 of the 2016 edition of the *Manual.*

[22] Please see Law Review 0829 (June 2008). That article is titled "USERRA Overrides the Interests of the Replacement Employee."

[23] *See* 20 C.F.R. 1002.198(b).