**LAW REVIEW 17073**[1]
**July 2017 (updated April 2018)**

# New Case about USERRA and Disabled Veterans

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

1.1.1.7—USERRA applies to state and local governments
1.1.3.1—USERRA applies to voluntary service
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***Butts v. Prince William County School Board,* 844 F.3d 424 (4th Cir. 2016), *certiorari applied for* April 18, 2017.**[3]

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1500 "Law Review" articles about military voting rights, reemployment rights, and other military-legal topics, along with a detailed Subject Index, 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. I have dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 35 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. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). 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), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org or by telephone at 800-809-9448, ext. 730. I will provide up to one hour of information without charge. If you need more than that, I will charge a very reasonable hourly rate. If you need a lawyer, I can suggest several well-qualified USERRA lawyers.

[3] This is a recent decision of the United States Court of Appeals for the 4th Circuit, the federal appellate court that sits in Richmond, Virginia and hears appeals from district courts in Maryland, North Carolina, South Carolina, Virginia, and West Virginia. The citation means that you can find this decision in Volume 844 of *Federal Reporter Third Series,* starting on page 424.

**Introduction**

In the early to middle 1990s, Dianne L. Butts was on active duty in the Army as a junior officer and then she signed up for the "Troops to Teachers" program. She left active duty in 1996 and became a fifth-grade teacher in Prince William County, Virginia (in the DC metropolitan area).[4] After she left active duty, she affiliated with the Army Reserve as a traditional reservist.[5]

She was a full-time teacher and a part-time Army Reservist until 2004, when she left her teaching job to return to active duty. It is unclear whether she volunteered or whether she was involuntarily called to active duty with her Army Reserve unit. The Uniformed Services Employment and Reemployment Rights Act (USERRA) applies equally to voluntary and involuntary service, and of course all military service in our country has been essentially voluntary since 1973, when Congress abolished the draft.[6]

While on active duty, she deployed to Southwest Asia and apparently participated in or witnessed some very traumatizing events. She left active duty in 2008 and applied for reemployment with the school system. It is apparently clear beyond question that she met the five conditions for reemployment under USERRA.[7]

The school board was apparently reluctant initially to reemploy Ms. Butts. A volunteer ombudsman for the Department of Defense organization called "Employer Support of the Guard and Reserve" (ESGR) contacted the school board and explained that Ms. Butts had the right to reemployment under USERRA, and the board reemployed her.

Under section 4313(a)[8] of USERRA, Ms. Butts was entitled to reemployment in the position of employment that she *would have attained if she had been continuously employed* by the school district during the four years (2004-08) that she was away from work for active duty. Under section 4316(a),[9] she was entitled, upon her reemployment, to seniority credit for the eight

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[4] Marine Corps Base Quantico is in Prince William County.

[5] The facts set forth in this article come from the 4th Circuit decision. I have no independent knowledge of the facts.

[6] Please see Law Review 17050 (May 2017).

[7] As I have explained in Law Review 15116 (December 2015) and many other articles, a person must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary service in the uniformed services and must have given the employer prior oral or written notice. The person must not have exceeded the five-year cumulative limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which he or she seeks reemployment. There are nine exemptions—kinds of service that do not count toward exhausting the individual's limit. Please see Law Review 16043 (May 2016). The person must have been released from the period of service without having received a disqualifying bad discharge from the military, like a punitive discharge (by court martial) or an other-than-honorable administrative discharge. Finally, the person must have made a timely application for reemployment after release from the period of service. After a period of service of 181 days or more, the person has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

[8] 38 U.S.C. 4313(a).

[9] 38 U.S.C. 4316(a).

years that she worked for the school district (1996-2004) before she was recalled to active duty plus the additional seniority that she would have earned if she had remained continuously employed by the school district instead of returning to active duty in 2004. Under section 4318,[10] she was entitled to pension credit as if she had been continuously employed during the entire 1996-2008 period. The school board was initially reluctant to treat Ms. Butts as a teacher with 12 years of district service, rather than a rookie, in 2008, but the board came into compliance with USERRA after ESGR intervened on her behalf.

After Ms. Butts returned to her teaching job in 2008, the school board had serious issues with her performance. The 4th Circuit decision states:

> Appellant Dianne L. Butts ("Appellant") is a veteran whom the Prince William County School Board ("the Board") employed as a fifth-grade teacher from 1996 to 2004. In 2004, Appellant, who was an Army Reservist, was deployed to Kuwait. After returning from deployment in 2008, Appellant sought reemployment with the Board pursuant to the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301 ("USERRA"). The Board reemployed Appellant, but issues with her performance quickly arose. Repeated efforts to correct Appellant's deficient performance were unsuccessful, and the Board ultimately terminated her on June 15, 2011. The Board later discovered that Appellant was disabled due to post-traumatic stress disorder ("PTSD").
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> Appellant then sued the Board, claiming she was improperly reemployed in violation of Section 4313 of USERRA because her mental state rendered her unqualified, and the Board's allegedly hostile work environment triggered or exacerbated her disability. The district court granted summary judgment to the Board.
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> *Because Section 4313 of USERRA cannot serve as a basis for claims involving acts occurring after reemployment*, and because Appellant has no available remedies, we affirm.
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> Appellant previously served as an active duty officer in the United States Army. After transitioning to the United States Army Reserve, Appellant sought employment through the Department of Defense's Troops to Teachers Program, which assists service members to become public school teachers. Appellant possesses a Master's Degree in Education and obtained certification from the Virginia Department of Education to teach grades three through six. The Board employed Appellant as a fifth-grade teacher from 1996 until 2004; during that time, her teaching reviews were generally favorable.
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> Appellant returned to active duty in 2004, and was subsequently deployed to Kuwait until 2008. During her deployment, the Board granted Appellant a military leave of absence. But, rather than continuing to extend her leave, Appellant informed the Board

[10] 38 U.S.C. 4318.

she intended to resign from her teaching position at the end of the 2006-2007 school year.

In 2008, Appellant was honorably discharged from her military service. Shortly after her discharge, Appellant was briefly hospitalized for adjustment disorder with depressed mood, which she attributed to witnessing several suicides during her deployment. Later that same year, Appellant contacted the Board about reemployment. Because she had previously resigned and did not, at least initially, seek reemployment under USERRA, the Board told Appellant to submit an online application, which she did. The Board then hired her as a fifth-grade substitute teacher at Fitzgerald Elementary School ("Fitzgerald"), intending to permanently assign Appellant to Fitzgerald for the 2008-2009 school year.

Appellant taught at Fitzgerald for less than one week before issues with her performance arose, such as taking leave without following school policy, undermining superiors, and speaking "to the students in a disrespectful or harsh manner and refus[ing] to teach pursuant to [the Board's] lesson guides or established practices, leading to confusion among students assigned to her class." J.A. 66. Based on Appellant's poor performance and conduct, the Board declined "to move forward with an offer of employment" at Fitzgerald for the 2008-2009 school year. Id.

Appellant subsequently contacted an ombudsman for the Department of Defense, who reached out to the Board and clarified that Appellant sought reemployment pursuant to USERRA. The Board then hired Appellant under a one-year contract as a fifth- grade teacher for the 2008-2009 school year, and reinstated her "with the same salary and benefits to which she would have been entitled" but for her deployment. J.A. 67.[11] The Board also paid Appellant her entire salary for the 2008-2009 school year, credited her for all accrued leave, and provided her with 46 months of retirement service.

But after Appellant began teaching in 2009, her performance issues persisted. The school principal noted that Appellant refused to consider other "teachers' suggestions" for teaching styles and lesson plans, and "conveyed that she knew what she was doing and would teach the students the way she chose," even though her teaching methods were ineffective. J.A. 130. In fact, students returned "to their regular classrooms even more confused," and as a result, "were unable to complete their homework" and were "essentially regressing." Id. As a result, the Board reassigned Appellant to a fourth-grade class at another school for the 2009-2010 school year. But she complained about teaching fourth grade rather than fifth grade and insisted she was qualified to teach fifth grade.

Despite Appellant's performance issues, the Board implemented an action plan in an attempt to help Appellant succeed. Pursuant to that action plan, the Board provided Appellant a mentor, instructional resources, and opportunities to meet with education

[11] This "J.A." cite is to the Joint Appendix of the proceedings in the district court.

specialists. However, Appellant did not comply with the action plan, and parents started to file complaints raising concerns about Appellant's "quality of instruction and [her] treatment of students assigned to her classroom." J.A. 70. The Board informed Appellant that she needed to improve or face possible discharge. Expecting that Appellant could improve, the Board planned to employ her through the 2010-2011 school year, and provided Appellant a second, more formal improvement plan, with which Appellant also did not comply.

On October 10, 2010, Appellant requested long term sick leave to recover from stress, anxiety, and depression attributed to her military service. This request for sick leave was the first time the Board learned of any possible mental health condition. The Board approved Appellant's request, and she remained on paid sick leave until May 2011, when she transitioned to leave under the Family and Medical Leave Act.

Ultimately, based on Appellant's persistent performance issues and failure to comply with the improvement plans, the Associate Superintendent informed Appellant that she would be recommended for dismissal to the Board. The Associate Superintendent informed Appellant of the dismissal recommendation by mail on May 9, 2011, and provided her instructions for filing a grievance. Appellant had 15 days to file a grievance, but did not do so until 30 days later, on June 8, 2011. Appellant attached a note with her untimely grievance, indicating for the first time that she (1) suffered from PTSD; (2) was currently incapacitated; and (3) would be unable to work for at least two years. The Board denied the grievance as time barred. Finally, on June 15, 2011, the Board terminated Appellant's employment.

During her period of sick leave prior to her termination, Appellant sought benefits from both the Department of Veterans Affairs and the Social Security Administration. On June 3, 2011, the Department of Veterans Affairs determined she was disabled due to service-related PTSD, effective November 30, 2010. On November 21, 2012, the Social Security Administration likewise deemed Appellant disabled and unable to work in any occupation since October 28, 2010. Appellant filed a pro se complaint in the Court of Federal Claims in 2014, alleging violations of the Civil Rights Act, Americans with Disabilities Act ("ADA"), and USERRA. The case was subsequently transferred to the Eastern District of Virginia. Appellant later obtained counsel, and narrowed her case to a single improper reemployment claim under Section 4313 of USERRA. Appellant alleged that her reemployment worsened her "minor psychiatric symptoms related to her military service," and "[t]hat worsening eventually culminated in a diagnosis of full post-traumatic stress disorder." J.A. 54-55. Appellant sought an injunction requiring the Board to comply with USERRA, and compensatory and liquidated damages for lost wages and benefits.[12]

**Status of this case**

[12] *Butts,* 844 F.3d at 426-29 (emphasis supplied).

After Ms. Butts' case was transferred from the United States Court of Federal Claims to the United States District Court for the Eastern District of Virginia, and after she obtained a lawyer to represent her, Ms. Butts and the Board engaged in discovery—interrogatories, depositions, document production demands, etc. At the end of the discovery process, the Board filed a motion for summary judgment, in accordance with Rule 56 of the Federal Rules of Civil Procedure (FRCP).

Under Rule 56, a district judge is to grant a summary judgment motion only if he or she can say, after a careful review of the evidence, that there is *no evidence* (beyond a "mere scintilla") in support of the non-moving party's claim or defense and that the moving party is entitled to judgment as a matter of law. In granting a motion for summary judgment, the district judge is saying that no reasonable jury could find for the non-moving party. Granting a motion for summary judgment means that the case is over, unless the appellate court overturns the summary judgment, and if that happens the case returns to the district court for trial.

Judge Leonie M. Brinkema of the Eastern District of Virginia granted the Board's summary judgment motion, and Ms. Butts appealed to the 4th Circuit. In accordance with the Federal Rules of Appellate Procedure, the case was assigned to a panel of three 4th Circuit judges. In this case, the panel consisted of Judge Roger Gregory,[13] Judge Allyson Kay Duncan,[14] and Judge Stephanie D. Thacker.[15] Judge Thacker wrote the decision, and the other two judges joined in a unanimous panel decision.

In the final appellate step available to her, Ms. Butts filed a petition for certiorari in the United States Supreme Court on April 18, 2017. Certiorari will be granted if four or more of the nine Justices vote for it, in a conference held to decide on certiorari petitions. Certiorari is granted in only about one percent of the cases where it is sought. If certiorari is denied, the Court of Appeals decision becomes final. If certiorari is granted, the case is set for review by the Supreme Court. In that case, there are new briefs and a new oral argument, followed by a Supreme Court decision.

The nine Justices will consider the *Butts* case, along with hundreds of other cases, in a conference to be held on September 25, 2017. In the aftermath of that conference, it is likely that an announcement will be made that certiorari has been granted or denied in this case. We will keep the readers informed of developments in this interesting and important case.

I have decided to write a new "Law Review" about the *Butts* case because it is an important recent case about the rights of returning disabled veterans under USERRA and because it illustrates the interplay among various USERRA sections and the interplay between USERRA and other federal laws and legal doctrines.

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[13] Judge Gregory was appointed to the 4th Circuit by President Bill Clinton, on a recess appointment, in late 2000. In 2001, President George W. Bush appointed him and the Senate confirmed him. He is now the Chief Judge of the 4th Circuit.

[14] Judge Duncan was appointed by President George W. Bush and confirmed by the Senate in 2003.

[15] Judge Thacker was appointed by President Barack Obama and confirmed by the Senate in 2012.

**This case was properly filed in federal district court.**

As originally enacted in 1994, USERRA permitted an individual claiming USERRA rights to sue a state (like a private employer) in federal district court. In 1998, the 7th Circuit[16] held that USERRA was unconstitutional insofar as it permitted an individual to sue a state in federal court.[17] As I have explained in Law Review 16124 (December 2016) and several other articles, the doctrine of sovereign immunity and the 11th Amendment of the United States Constitution immensely complicate enforcing USERRA against state government employers, but political subdivisions of states[18] do not share in the state's immunity against federal court lawsuits under the 11th Amendment.[19]

Congress amended USERRA in 1998, in response to the *Velasquez* ruling. One of the 1998 amendments added a new final subsection to section 4323 of USERRA, as follows: "In this section [for purposes of USERRA enforcement], the term 'private employer' includes a political subdivision of a State."[20] Section 4323(i) clearly means that a USERRA plaintiff, like Ms. Butts, can sue a political subdivision (like Prince William County) in federal court, just like suing a private employer. [21] This case was properly brought in the United States District Court for the Eastern District of Virginia.[22]

**Ms. Butts' 2006 resignation letter, while she was on active duty, did not defeat her right to reemployment under USERRA.**

The employee who will be away from his or her civilian job for uniformed service is required to give prior oral or written notice to the civilian employer,[23] unless giving prior notice is precluded by military necessity or otherwise impossible or unreasonable.[24] When the employee's period of uniformed service is extended beyond the time originally contemplated, the employee is not required to notify the employer of the extension,[25] although keeping the employer advised is certainly advisable.

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[16] The 7th Circuit is the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.

[17] *Velasquez v. Frapwell,* 160 F.3d 389 (7th Cir. 1998).

[18] Political subdivisions include counties, cities, school districts, and other units of local government.

[19] *See Weaver v. Madison City Board of Education,* 771 F.3d 748 (11th Cir. 2014); *Sandoval v. City of Chicago,* 560 F.3d 707 (7th Cir.), *cert. denied,* 558 U.S. 874 (2009).

[20] 38 U.S.C. 4323(i).

[21] Prince William County apparently did not claim 11th Amendment immunity in either the district court or the 4th Circuit, and the 4th Circuit decision does not discuss this issue.

[22] The case of *Huff v. Office of the Sheriff,* 2013 U.S. Dist. LEXIS 161954 (W.D. Va. Nov. 13, 2013), 2014 U.S. Dist. LEXIS 12800 (W.D. Va. Jan. 31, 2014) is distinguishable because, at least in Virginia, the Sheriff is an official of the state government, not the county government, although the Sheriff's area of responsibility and authority may be limited to a single county. I discuss the *Huff* case in detail in Law Review 13156 (November 2013).

[23] 38 U.S.C. 4312(a)(1).

[24] 38 U.S.C. 4312(b).

[25] *See Sutton v. City of Chesapeake,* 713 F. Supp. 2d 547, 551 (E.D. Va. 2010).

The pertinent section of the Department of Labor (DOL) USERRA Regulation provides as follows about the effect of an employee statement, before or during the period of service, about intent not to return to the civilian job:

> **§ 1002.88 Is the employee required to tell his or her civilian employer that he or she intends to seek reemployment after completing uniformed service before the employee leaves to perform service in the uniformed services?**
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> No. When the employee leaves the employment position to begin a period of service, he or she is not required to tell the civilian employer that he or she intends to seek reemployment after completing uniformed service. *Even if the employee tells the employer before entering or completing uniformed service that he or she does not intend to seek reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment after completing service.* The employee is not required to decide in advance of leaving the civilian employment position whether he or she will seek reemployment after completing uniformed service.[26]

Ms. Butts' 2006 statement that she was resigning and would not return to her teaching job did not defeat her right to reemployment. Having said that, let me quickly add that if she had consulted me in 2006 I would have advised her not to send such a resignation letter.

> **Contrary to the 4th Circuit's holding, Ms. Butts' rights under section 4313 of USERRA did not end immediately after she was reemployed.**

The 4th Circuit decision includes the following sentence: "Because *Section 4313 of USERRA cannot serve as a basis for claims involving acts occurring after reemployment*, and because Appellant has no available remedies, we affirm [the district court's granting of summary judgment for the Defendant]."[27] I strongly disagree with the holding that section 4313 does not apply to employer actions after reemployment and the implication that any provision of USERRA only applies at the moment of reemployment.

As I have explained in Law Review 15067 (August 2015) and many other articles, Congress enacted USERRA and President Bill Clinton signed it into law on October 13, 1994.[28] USERRA was a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted on September 16, 1940, as part of the Selective Training and Service Act (STSA).[29] There have been 16 United States Supreme Court decisions under the VRRA and one (so far) under USERRA.[30]

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[26] 20 C.F.R. 1002.88 (bold question in original, emphasis by italics supplied).
[27] *Butts,* 844 F.3d at 426 (emphasis supplied).
[28] Public Law 103-353, 108 Stat. 3162.
[29] Public Law 76-783, 54 Stat. 885. The STSA is the law that led to the drafting of more than ten million young men, including my late father, for World War II.
[30] Please see Category 10.1 in our Law Review Subject Index. You will find a case note about each of these 17 decisions.

In its first case construing the VRRA, the Supreme Court held: "This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need."[31] USERRA's legislative history makes clear that the VRRA case law remains relevant in construing USERRA:

> The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protection against employment-related discrimination, and the protection of certain other rights and benefits have been eminently successful for over fifty years. Therefore, the Committee [House Committee on Veterans' Affairs] wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act, remains in full force and effect in interpreting these provisions. *This is particularly true of the basic principle established by the Supreme Court that the Act is to be "liberally construed. Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946); *Alabama Power Co. v. Davis,* 431 U.S. 581, 584 (1977).[32]

Construing any provision of USERRA to make it apply only at reemployment is fundamentally inconsistent with the command by Congress and the Supreme Court that the reemployment statute is to be liberally construed for the benefit of service members and veterans. This stingy interpretation is not supported by the text and legislative history of USERRA and the Supreme Court case law.

In its fourth case construing the VRRA, the Supreme Court firmly rejected the argument that the veteran's VRRA rights expire one year after he or she has been back at the civilian job.[33] The Court held:

> The instant cases take us one step further. In them, we hold that the expiration of the year [since reemployment] did not terminate the veteran's right to the seniority to which he was entitled by virtue of the Act's treatment of him as though he had remained continuously in his civilian employment, nor did it open the door to discrimination against him, as a veteran. Section 8(c) of the Act requires that the veteran shall be restored to his position "without loss of seniority …" He therefore assumes, upon his reemployment, the seniority he would have had if he had remained in his civilian employment. His seniority status secured by this statutory wording

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[31] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946). I discuss the *Fishgold* case in detail in Law Review 0803 (January 2008).

[32] House Committee Report, April 28, 1993, H.R. Rep. 103-65, Part 1 (emphasis supplied). You can find this committee report in Appendix B-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found at pages 683-84 of the 2017 edition of the *Manual.* For more information about *The USERRA Manual,* please see Law Review 17068 (June 2017).

[33] *Oakley v. Louisville & Nashville Railroad Co.,* 338 U.S. 278 (1949). I discuss *Oakley* in detail in Law Review 0823 (May 2008).

> continues beyond the first year of his reemployment, subject to the advantages and limitations applicable to other employees.[34]

In its tenth case construing the VRRA,[35] the Supreme Court applied the VRRA to events that occurred more than 15 years after the plaintiffs returned from military service and were reemployed. Mr. Accardi and the other five named plaintiffs were hired as firemen on steam-powered tugboats[36] of the Pennsylvania Railroad in 1941 or 1942 and left their jobs soon thereafter when called to the colors for World War II.[37] All six named plaintiffs served honorably in the military and were reemployed by the company after the war ended in 1945.

In the 1950s, diesel tugboats replaced steam-powered tugboats, thus rendering the fireman position redundant. The company sought to eliminate the fireman position and lay off all the men holding that position. A long and bitter strike ensued, as the union sought to preserve the jobs of the firemen.

The strike was settled in 1960. Under the settlement, all firemen with 20 years or more of seniority remained on the payroll as firemen if they chose to do so. Firemen with less than 20 years of seniority, and those who had more seniority but chose to leave, received severance payments computed on a formula that included the individual's number of years of seniority as a fireman.

Mr. Accardi and the other five named plaintiffs received severance payments that did not include credit for the months that they worked for the railroad before their military service or the months when they were away from work for World War II service. For each named plaintiff, the severance amount was $1,242.60 less than it would have been if these pre-military and during-military periods had been included in the computation. The Supreme Court held that each named plaintiff was entitled to credit for these periods under the "escalator principle."[38] It did not matter that the severance pay system was not established until 15 years after the named plaintiffs returned to their civilian jobs.

In its 13th case applying the VRRA,[39] the Supreme Court applied the VRRA to a computation that was made 26 years after the individual returned to his civilian job after military service. Raymond E. Davis worked for the Alabama Power Company for his entire career (8/16/1936 to 6/1/1971) except for the 30 months when he served our country in uniform during World War II (March 1943 to September 1945). On July 1, 1944, while Davis was on active duty, the

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[34] *Oakley,* 338 U.S. at 284.

[35] *Accardi v. Pennsylvania Railroad Co.,* 383 U.S. 225 (1966).

[36] The fireman was the crew member who shoveled coal onto the fire that powered the tugboat. A steam-powered tugboat had a crew of three.

[37] Some were drafted and some enlisted voluntarily. Like USERRA, the VRRA applied equally to voluntary and involuntary military service.

[38] In its first case construing the VRRA, the Supreme Court enunciated the escalator principle when it 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." *Fishgold,* 328 U.S. at 284-85.

[39] *Alabama Power Co. v. Davis,* 431 U.S. 581 (1977). I discuss this case in detail in Law Review 09015 (April 2009).

company established a defined benefit pension plan. Employees of the company who were on the payroll on July 1, 1944 were given pension credit for their periods of company service prior to that date. Davis was not on the payroll on that date because he was on active duty at the time.

When Davis retired from the company in June 1971, he was given credit for Alabama Power Company service from September 1945 (when he returned to work after the war) until June 1971 (when he retired). He was not given credit for the period of almost seven years (August 1936 to March 1943) when he worked for the company, before he left the job for service, nor was he credited for the 30 months of active military service that interrupted his career with the company. The Supreme Court unanimously held that the escalator principle required that he be credited for that time, and that credit added $18 per month to his pension check, from June 1971 through the end of his life.

> **Ms. Butts had rights as a disabled veteran when she returned to work in 2008, but she waived those rights by failing to notify the employer of her disability and failing to request an accommodation for the disability.**

Section 4313(a)(3) of USERRA applies to the situation of a returning veteran who meets the five USERRA conditions but returns to work with a temporary or permanent disability incurred or aggravated during the relevant period of service:

> **(3)** In the case of a person who has a disability incurred in, or aggravated during, such service, 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--
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> - **(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
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> - **(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.[40]

Two sections of the Department of Labor (DOL) USERRA Regulations elaborate on the rights of the returning disabled veteran and the obligations of the employer in this situation, as follows:

> **§ 1002.225 Is the employee entitled to any specific reemployment benefits if he or she has a disability that was incurred in, or aggravated during, the period of service?**

[40] 38 U.S.C. 4313(a)(3)

- Yes**.** A disabled service member is entitled, to the same extent as any other individual, to the escalator position he or she would have attained but for uniformed service. If the employee has a disability incurred in, or aggravated during, the period of service in the uniformed services, the employer must make reasonable efforts to accommodate that disability and to help the employee become qualified to perform the duties of his or her reemployment position. If the employee is not qualified for reemployment in the escalator position because of a disability after reasonable efforts by the employer to accommodate the disability and to help the employee to become qualified, the employee must be reemployed in a position according to the following priority. The employer must make reasonable efforts to accommodate the employee's disability and to help him or her to become qualified to perform the duties of one of these positions:
    - **(a)** A position that is equivalent in seniority, status, and pay to the escalator position; or,
    - **(b)** A position that is the nearest approximation to the equivalent position, consistent with the circumstances of the employee's case, in terms of seniority, status, and pay. A position that is the nearest approximation to the equivalent position may be a higher or lower position, depending on the circumstances.[41]

**§ 1002.226 If the employee has a disability that was incurred in, or aggravated during, the period of service, what efforts must the employer make to help him or her become qualified for the reemployment position?**

- **(a)** USERRA requires that the employee be qualified for the reemployment position regardless of any disability. The employer must make reasonable efforts to help the employee to become qualified to perform the duties of this position. *The employer is not required to reemploy the employee on his or her return from service if he or she cannot, after reasonable efforts by the employer, qualify for the appropriate reemployment position.*

- **(b)** "Qualified" has the same meaning here as in § 1002.198.[42]

Please note that the employer is only required to make *reasonable* efforts to help the returning veteran with a disability to qualify for the position that he or she would have attained if he or she had remained continuously employed or for another position in the employer's organization. Section 4303 of USERRA defines 16 terms used in this law. The term "reasonable efforts" is defined as follows: "The term 'reasonable efforts', in the case of actions required of an employer under this chapter, means actions, including training provided by an employer, that do not place an undue hardship on the employer."[43]

USERRA defines the term "undue hardship" as follows:

[41] 20 C.F.R. 1002.225 (bold question in original).
[42] 20 C.F.R. 1002.226 (bold question in original, emphasis by italics supplied).
[43] 38 U.S.C. 4303(10).

**(15)** The term "undue hardship", in the case of actions taken by an employer, means actions requiring significant difficulty or expense, when considered in light of--

- **(A)** the nature and cost of the action needed under this chapter;

- **(B)** the overall financial resources of the facility or facilities involved in the provision of the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;

- **(C)** the overall financial resources of the employer; the overall size of the business of an employer with respect to the number of its employees; the number, type, and location of its facilities; and

- **(D)** the type of operation or operations of the employer, including the composition, structure, and functions of the work force of such employer; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer.[44]

The 4th Circuit held, I believe correctly, that Ms. Butts waived her rights as a disabled veteran, under USERRA, by failing to notify the employer of her disability and by failing to request an accommodation for that disability at the time she was reemployed. It seems unlikely that Congress contemplated imposing on the employer the burden of guessing as to a returning veteran's disability, especially when the disability is not open and obvious, and then formulating an accommodation for that disability.

Ms. Butts claimed that she should have been reemployed in a position with a lesser status than that of fifth grade teacher, because of her disability.[45] But if the Board had reemployed her in a lesser job than the teaching job she left and would have continued to hold, but for her call to the colors, that would have violated USERRA.

Let this case serve as a teaching point. If you are returning to your pre-service job with a disability incurred or aggravated during the most recent period of service, you need to make a timely disclosure to the employer of the disability and you need to have a candid discussion with the employer about the accommodations that you will need to perform the essential functions of that job. If you cannot do that job, even with reasonable accommodations, you need to discuss with the employer other jobs in the employer's organization that you could perform with reasonable accommodations. The need for such disclosures and discussions is particularly acute in a case (like this one) where the disability is not open and obvious.

**Ms. Butts' disability claims with the VA and the Social Security Administration effectively mooted her USERRA claims.**

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[44] 38 U.S.C. 4303(15).

[45] The unstated premise is that a job of lesser status would also involve less stress upon an employee with PTSD. That premise is questionable, in my view. A job of lesser status, like teacher's aide or school crossing guard, would still involve some stress.

During her sick leave, prior to her termination by the Board, Ms. Butts filed disability claims with the United States Department of Veterans Affairs (VA) and with the Social Security Administration (SSA). On June 3, 2011, just days before the Board finally terminated her employment, the VA determined that Ms. Butts was disabled due to service-related PTSD, effective November 30, 2010 (the date of her claim). On November 21, 2012, the SSA determined that Ms. Butts was disabled and unable to work in any occupation, since October 28, 2010.

The 4th Circuit correctly determined that Ms. Butts' VA and SSA claims, and the approval of her claims by those agencies, effectively mooted her USERRA claims. Under the equitable doctrine of estoppel, Ms. Butts is estopped from claiming, to the VA and the SSA, that she is disabled and unable to work, while simultaneously claiming, in her USERRA lawsuit, that she can work and that the employer has a duty to keep her on the payroll.[46]

> **The 4th Circuit correctly held that no remedy was available to Ms. Butts. The 4th Circuit should have affirmed the summary judgment on that basis alone.**

Section 4323 sets forth the remedies that a federal district court can award in a case against a state or local government or private employer, as follows:

> **(1)** 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.[47]

Under section 4323(d)(1)(A), the court can order the employer to come into compliance with USERRA. In this case, that would mean reinstating Ms. Butts to her teaching position or another position with the Board. Such an order is not available in this case, because Ms. Butts is disabled and unable to work, according to the SSA and the VA.

Under section 4323(d)(1)(B), the court can order the employer to compensate the plaintiff for pay and benefits that she lost because of the employer's USERRA violation. In this case, Ms.

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[46] I invite the reader's attention to Law Review 15060 (July 2015). The title of the article is "Beware of Asserting Inconsistent Claims." In a situation like that faced by Ms. Butts in 2008, you need to have a detailed discussion with a knowledgeable attorney and to consider all the possible claims that you might make, and then you need to decide which claims to assert and which claims to abandon. Asserting inconsistent claims is not permissible.

[47] 38 U.S.C. 4323(d)(1).

Butts lost no pay or benefits. The Board kept her on the payroll, with all pay and benefits, until May 2011. She received the pay and benefits, so her claim for such pay and benefits is moot.

Ms. Butts was not entitled to pay and benefits after May 2011, because she was disabled and unable to work, according to the SSA and the VA. Her disability is likely to be permanent.

Under section 4323(d)(1)(C), the court can double the awarded damages, if the court finds that the employer violated USERRA willfully. In this case, there are no damages, so there is nothing to be doubled. Two times nothing is nothing.

**Conclusion**

This is an interesting and complex case with many attendant legal issues. I hope that this detailed exposition of the case is useful to USERRA claimants with service-related disabilities, and to their attorneys.

## UPDATE—APRIL 2018

As I predicted would occur, the United States Supreme Court denied certiorari (discretionary review) in this case. 2017 U.S. LEXIS 4837 (October 2, 2017).