LAW REVIEW[1] 20031
March 2020

Sergeant Major Erickson's Long Struggle with the USPS May Be Finally Coming to an End

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

1.1.1.8—USERRA applies to the Federal Government
1.3.1.2—Character and duration of service
1.3.1.3—Timely application for reemployment
1.4—USERRA enforcement

Yes, cases can take a long time.

In Act III, Scene 1 of *Hamlet,* written by William Shakespeare in 1601, Prince Hamlet launched into a litany of all that is wrong with human life, while contemplating suicide. One item on the long list was "the law's delays." That situation has only gotten worse in the intervening 419

---

[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1900 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 1700 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 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also 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 36 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.

years. A good illustration of the delay that is endemic to legal proceedings is the case of Sergeant Major Richard Erickson.[3]

How much military leave is too much?

From July 1953 (when the Korean War ended in a tie) until August 1990 (when Iraq invaded and occupied Kuwait and President George H.W. Bush announced "this shall not stand"), our nation's seven Reserve Components (RC)[4] were considered to be a "strategic reserve" that was only available for World War III, which thankfully never happened. Many domestic and international political considerations supposedly made it "impossible" to call up RC units for anything short of the total war scenario that might start with a massive Warsaw Pact invasion of West Germany.

When President Bush decided that important national interests required our country to use military force to protect Saudi Arabia and liberate Kuwait, he effectively said "I never signed off on that memo" saying that it was impossible to call up the RC for anything short of a total war. That decision started the transformation of the RC to an "operational reserve" that would be called to duty for intermediate military operations like Operation Desert Storm, Operation Enduring Freedom, and Operation Iraqi Freedom. That transformation accelerated after the terrorist attacks of 9/11/2001, the "date which will live in infamy" for our time.

Richard Erickson began his United States Postal Service (USPS) career in 1988, and in 1990 he enlisted in the Army National Guard. Between 1991 and 1995, he was on military duty and away from his USPS job for 22 months. Between 1996 and 2000, he was away from work for service for all but four days. Under section 4312(c) of the Uniformed Services Employment and Reemployment Rights Act (USERRA)[5] there is a five-year cumulative limit on the duration of the period or periods of service that an individual can perform, relating to a specific employer relationship, and still have the right to reemployment. There are also nine exemptions—kinds of service that do not count in exhausting an individual's five-year limit. Please see Law Review

[3] Please see the article about *Erickson v. United States Postal Service,* copied at the bottom of this article. We have discussed this interesting and important case in Law Reviews 09037 (October 2009), 11028 (April 2011), 13021 (January 2013), and 14004 (January 2014).

[4] In ascending order of size, the Reserve Components are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. Erickson is retired from the Army National Guard. The total number of RC personnel is almost equal to the number of personnel on full-time active duty, so the RC amounts to almost half of our nation's pool of trained and available military personnel. More than a million RC personnel have been called to the colors since the terrorist attacks of 9/11/2001.

[5] 38 U.S.C. 4312(c).

16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting an individual's five-year limit.[6]

The USPS fired Erickson for "excessive" military leave.

In January 2000, a USPS labor relations specialist contacted Erickson by telephone to inquire as to when he would be returning to work for the USPS. At the time, Erickson was on active duty in a distant city. He responded to the specialist's inquiry, saying that he would not be returning to the USPS until the end of his current orders in September 2001. During the telephone conversation, he also said that he preferred military service to his USPS work, finding the military service to be more rewarding financially and otherwise.[7]

Based on Erickson's "admissions" during the telephone conversation, the USPS sent Erickson a notice of proposed removal from USPS employment and scheduled a hearing, which he was unable to attend because of his military duties in a distant city. The USPS conducted the hearing without him and fired him for "excessive use of military leave."

Under USERRA, there is no such thing as "excessive" military leave. The law provides:

> In any determination of a person's entitlement to protection under this chapter, the timing, frequency, and duration of the person's training or service, or the nature of such training or service (including voluntary service) in the uniformed services, shall not be a basis for denying protection of this chapter if the service does not exceed the limitations set forth in subsection (c) [the five-year limit, with its exemptions] and the notice requirements established in subsection (a)(1) [prior notice to the employer] and the notification requirements [timely application for reemployment]established in subsection (e) are met.[8]

> USERRA's legislative history explains the purpose and effect of section 4312(h) as follows:

> Section 4312(i) [later renumbered as 4312(h)] is a codification and amplification of *King v. St. Vincent's Hospital,* 112 S. Ct. 570 (1991), which held that there was no limit as to how long a National Guardsman could serve on active duty for training and still have reemployment rights under former section 2024(d) of title 38. This new section makes

[6] I have talked to RC members who have been on active duty for a decade without exceeding the five-year limit because most of the duty they performed was exempt from the limit, but I have also talked to members who think they are within the limit but are in fact beyond it once I review all their orders and count the non-exempt periods.
[7] If Erickson had contacted me at the time, I would have advised him to keep his mouth shut. Under USERRA, he was not required to answer such questions or to predict when he might be returning to his civilian job. *See* 20 C.F.R. 1002.88.
[8] 38 U.S.C. 4312(h).

> clear the Committee's [House Committee on Veterans' Affairs] intent that no "reasonableness" test be applied to determine reemployment rights and that this section prohibits consideration of timing, frequency, or duration of service so long as it does not exceed the cumulative limitations under section 4312(c) and the servicemember has complied with the requirements under sections 4312(a) and (e).[9]

As I explained in Law Review 30 (October 2001), it is for military authorities to decide which RC personnel need to serve or train to serve, and to decide the timing, frequency, and duration of service and training periods. These military decisions must not be second-guessed by civilian employers or the courts.

Yes, USERRA puts a burden on civilian employers, and sometimes on the civilian colleagues of those who answer the country's call. The burden placed on the civilian employers and colleagues of those who serve is tiny as compared to the much greater burden (sometimes the ultimate sacrifice) voluntarily undertaken by those who serve and by their families.

To employers who carp about the burdens they bear, I say:

> Our country is not drafting you, nor is it drafting your children and grandchildren. When you find RC personnel in your workforce or among job applicants, you should cheerfully do all that USERRA requires and more. It has been 47 years since Congress abolished the draft and established the all-volunteer military in 1973. Without a law like USERRA, the services would not be able to recruit and retain the quality and quantity of personnel needed to defend our country. Do not carp about the tiny burdens that you are required to bear. Cheerfully honor and support those who serve in your place, and in the place of your offspring.[10]

Erickson finally left active duty at the end of 2005. Did he have the right to reemployment?

Erickson's active duty orders expired in September 2001, a few days after the terrorist attacks of 9/11/2001. Like thousands of other service members expecting to leave active duty in the fall of 2001, Richard Erickson was retained on active duty because of the new emergency. Erickson finally left active duty on 12/31/2005.

---

[9] House Committee Report, April 28, 1993, H.R. Rep. 103-65 (Part 1), reprinted in Appendix D-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found at pages 774-75 of the 2019 edition of the *Manual.* Please see Law Review 09029 (July 2009) for a detailed discussion of *King v. St. Vincent's Hospital,* 502 U.S. 215 (1991).

[10] Please see Law Review 17055 (June 2017) and Law Review 14080 (July 2014).

As I have explained in Law Review 15116 (December 2015) and many other articles, a person has the right to reemployment after a period of uniformed service if he or she meets five simple conditions:

a. Must have left a job (federal, state, local, or private sector) to perform service in the uniformed services as defined by USERRA.
b. Must have given the employer prior oral or written notice.
c. Must not have exceeded the cumulative five-year limit with respect to that employer relationship.
d. Must not have received a disqualifying bad discharge from the military.[11]
e. Must have made a timely application for reemployment with the pre-service employer after release from the period of service.[12]

It is necessary to meet all five of these conditions to have the right to reemployment under USERRA. Unfortunately, Erickson did not apply for reemployment with the USPS within the 90-day period permitted by law. He apparently did not communicate with the USPS after 12/31/2005 (when he was released from active duty) and 9/28/2006, when he retained private counsel and brought an action against the USPS in the Merit Systems Protection Board (MSPB).[13]

Erickson had two USERRA claims.

Erickson had claims under two separate sections of USERRA. He claimed that he had the right to reemployment in January 2006, after he left active duty, and that denying him reemployment violated section 4312 of USERRA.[14] He also claimed that the USPS decision to fire him on 3/31/2000 violated section 4311 of USERRA, which provides:

> **(a)** 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,

[11] Under section 4304 of USERRA, 38 U.S.C. 4304, a person does not have the right to reemployment if he or she received a punitive discharge by court martial, or if he or she received an "other than honorable" administrative discharge, or if he or she was "dropped from the rolls" of the uniformed service.
[12] After a period of service of 181 days or more, the service member or veteran has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.
[13] It is unclear why Erickson did not communicate promptly with the USPS after 12/31/2005 and apply for reemployment. Perhaps he believed that applying for reemployment would serve no useful purpose because the USPS had fired him on 3/31/2000. If he had contacted me at the time, I would have advised him to apply for reemployment anyway. Please see Law Review 19080 (September 2019).
[14] 38 U.S.C. 4312.

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.

(b) 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, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c) An employer shall be considered to have engaged in actions prohibited—

(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

(2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.[15]

As I explain below, Erickson lost on his first claim, because he failed to make a timely application for reemployment, but he succeeded in his second claim, because the USPS decision to fire him on 3/31/2000 denied him "retention in employment" and was motivated by his performance of uniformed service and obligation to perform future service.

It should be emphasized that Erickson's claim for the denial of retention in employment is separate from and not dependent on his claim for reemployment. Even if he was not entitled to reemployment in early 2006 because he was beyond the five-year limit or because his application for reemployment was untimely, he was nonetheless entitled to apply for vacant federal positions at the USPS or other federal agencies, and discriminating against him in initial

[15] 38 U.S.C. 4311 (emphasis supplied).

employment violates section 4311. Even to this day, 20 years after he was fired, he is being discriminated against by the USPS and other agencies.

The USAJobs website, operated by the United States Office of Personnel Management (OPM), is universally used by persons seeking federal civilian jobs. Whenever Erickson applies for a vacant federal job, he never gets to second base with his application. Any federal agency receiving an application from Erickson will plug in Erickson's Social Security number into the OPM system, and the system will show that Erickson was fired by the USPS on 3/31/2000. Thus, Erickson will not be given the opportunity to appear for an interview, and his application will be summarily dismissed.

Erickson initiates an action before the MSPB.

As Colonel Paul Conrad and I explained in Law Review 67 (March-April 2003), the Merit Systems Protection Board (MSPB) adjudicates claims that federal executive agencies have violated USERRA. USERRA did not create the MSPB—it was created by the Civil Service Reform Act of 1978. USERRA, enacted in 1994, gave the MSPB additional responsibilities and jurisdiction.

MSPB cases, including USERRA cases, are adjudicated initially by Administrative Judges (AJs) of the MSPB. The losing party, either the individual appellant or the federal agency, can appeal the AJ's decision to the MSPB itself. If the individual loses at the MSPB level, he or she can appeal to the United States Court of Appeals for the Federal Circuit.[16] If the agency loses at the MSPB level, it cannot appeal to the Federal Circuit.[17]

The MSPB consists of a Chairman and a Vice Chairman, of the President's political party, and a Member, of the other major party. Each of them must be nominated by the President and confirmed by the Senate. They serve staggered seven-year terms. If a confirmed member has completed his or her term and a replacement has not been confirmed, the confirmed member can remain in office for an overtime period that can last for an additional year.

It requires at least two MSPB members to decide a case. As I have explained in Law Review 19098 (October 2019), the MSPB has been without a quorum since January 2017 and has been without any members since March 2019. The confirmed members left office in 2015, 2017, and 2019, when their terms and their overtime periods expired. President Trump has nominated a Chairman, a Vice Chairman, and a Member, but the Senate has not acted on these nominations. There is no reason to believe that this problem will be resolved anytime soon, but the MSPB was fully staffed when Erickson initiated his action in 2006.

[16] The Federal Circuit is a federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from the MSPB.
[17] 38 U.S.C. 4324(d)(1).

Erickson initiated his MSPB action on 9/28/2006. The assigned AJ conducted a hearing and made findings of fact and conclusions of law. The AJ found that Erickson had not exceeded the five-year limit as of 3/31/2000, when he was fired, because some of his service did not count toward the five-year limit under section 4312(c).[18] The AJ also found that the USPS had violated section 4311 by firing Erickson because the firing was motivated solely by Erickson's military service. But the AJ also found that Erickson was not entitled to relief because he had "abandoned" his USPS career.[19]

Erickson appealed to the MSPB itself, and the MSPB affirmed the AJ's result but not the reasoning. Two MSPB members participated, and they unanimously held that Erickson was not entitled to reemployment in 2006 because he had exceeded the five-year limit and because he did not make a timely application for reemployment after he was released from active duty on 12/31/2005. They rejected Erickson's claim under section 4311, holding that the USPS decision to fire him was based on his *absence from work, not his uniformed service.*[20]

Erickson's first appeal to the Federal Circuit—*Erickson I*

Erickson filed a timely appeal to the United States Court of Appeals for the Federal Circuit. As with all federal appellate cases, the case was initially heard by a panel of three judges. The three judges are normally appellate judges of that circuit, but on occasion judges of other federal courts serve by designation. In this case, the three judges were William Curtis Bryson, Arthur Joseph Gajarsa, and Amy J. St. Eve. Judge Bryson and Judge Gajarsa were active judges of the Federal Circuit at the time but have since taken senior status. Judge St. Eve was at the time a judge of the United States District Court for the Northern District of Illinois. She has since been nominated and confirmed as a judge of the United States Court of Appeals for the Seventh Circuit.[21] Judge Bryson wrote the opinion and the other two judges joined in a unanimous panel decision.

The Federal Circuit affirmed the MSPB decision that Erickson was not entitled to reemployment in 2006 because he did not apply for reemployment with the USPS within 90 days after he was released from active duty on 12/31/2005.[22] Turning to Erickson's claim under section 4311, the

---

[18] 38 U.S.C. 4312(c).

[19] As I explained in Law Review 14005 (January 2014), the "abandonment" doctrine is fundamentally inconsistent with the text and legislative history of USERRA.

[20] *Erickson v. United States Postal Service,* 108 M.S.P.R. 494 (MSPB April 4, 2008).

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

[22] The Federal Circuit panel found that it did not need to reach or decide the question of whether Erickson was within or beyond the five-year limit when he left active duty on 12/31/2005. The service member or veteran must meet five conditions to have the right to reemployment under USERRA. Since Erickson did not make a timely

Federal Circuit panel firmly rejected the MSPB's attempt to make a distinction between discrimination based on military service and discrimination based on absence from work necessitated by military service. In his scholarly decision, Judge Bryson wrote:

> In its notice of removal, the Postal Service stated that the sole reason for removing Mr. Erickson from his position was his excessive use of military leave. The full Board acknowledged that "on its face" that admitted purpose would seem to constitute direct evidence of discrimination under USERRA. Nonetheless, the Board found that Mr. Erickson had failed to show that his military service was a motivating factor for the agency's action because the "real reason" for his removal was his absence from work--regardless of whether that absence was caused by his military obligation.
>
> *We reject that argument. An employer cannot escape liability under USERRA by claiming that it was merely discriminating against an employee on the basis of his absence when that absence was for military service*. As other courts have held, military service is a motivating factor for an adverse employment action if the employer "relied on, took into account, considered, or conditioned its decision" on the employee's military-related absence or obligation. *Petty v. Metro. Gov't of Nashville-Davidson County*, 538 F.3d 431, 446 (6th Cir. 2008), quoting *Coffman v. Chugach Support Servs*., 411 F.3d 1231, 1238 (11th Cir. 2005); *see Robinson v. Morris Moore Chevrolet-Buick, Inc*., 974 F. Supp. 571, 576 (E.D. Tex. 1997), citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241-42, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989). *The most significant--and predictable--consequence of reserve service with respect to the employer is that the employee is absent to perform that service. To permit an employer to fire an employee because of his military absence would eviscerate the protections afforded by USERRA, the overarching goal of which is to prevent those who serve in the uniformed services from being disadvantaged by virtue of performing their military obligations. See* 38 U.S.C. §4301(a); *see also* S. Rep. No. 90-1477, at 2 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 3421, 3421 (stating that the precursor to section 4311 was enacted in response to the "increasing problem" of discrimination against reservists who were discharged or denied benefits because of their obligation to attend military drills or training exercises).
>
> In upholding the agency's action as nondiscriminatory, the Board relied on the fact that an agency is otherwise entitled to remove an employee for prolonged non-military leaves of absence. But as we held in the case of the precursor to section 4311, "an employer can not treat employees on military duty like those on non-military leave of absence." *Allen v. U.S. Postal Serv*., 142 F.3d 1444, 1447 (Fed. Cir. 1998), citing *Carlson v. N.H. Dep't of Safety*, 609 F.2d 1024, 1027 (1st Cir. 1979) ("The mandated standard of comparison is not . . . to those coworkers away on non-military leave of absence.") (internal quotation marks omitted). Thus, the fact that the Postal Service could have lawfully removed Mr. Erickson if his absence had not been service related does not excuse its action in this case.

---

application for reemployment, it is irrelevant whether he is within or beyond the five-year limit when exempt periods of service are eliminated from the computation.

Mr. Erickson was absent from work because of his military service, and USERRA protects against removal for that reason.[23]

The agency's explanation that firing Mr. Erickson was necessary in order to fill his position in the Postal Service is similarly without merit. The Supreme Court rejected that argument in *Monroe v. Standard Oil Co*., 452 U.S. 549, 101 S. Ct. 2510, 69 L. Ed. 2d 226 (1981), its first decision construing the antecedent to USERRA's nondiscrimination provision. The Court wrote:

> [T]he nondiscrimination requirements of [the statute] impose substantial obligations upon employers. The frequent absences from work of an employee-reservist may affect productivity and cause considerable inconvenience to an employer who must find alternative means to get necessary work done. Yet Congress has provided . . . that employers may not rid themselves of such inconveniences and productivity losses by discharging or otherwise disadvantaging employee-reservists solely because of their military obligations.

Monroe, 452 U.S. at 565.

Congress enacted USERRA in part to make clear that discrimination in employment occurs when a person's military service is "a motivating factor," and not to require, as *Monroe* had suggested, that military service be the sole motivating factor for the adverse employment action. H.R. Rep. No. 103-65, at 24, *as reprinted in* 1994 U.S.C.C.A.N. at 2457; *see Sheehan*, 240 F.3d at 1012-13. That change broadened the employment protections afforded to reservists, *see Sheehan* 240 F.3d at 1013; it did not alter *Monroe's* unambiguous instruction that discharging an employee because of his military-related absence constitutes unlawful discrimination. The fact that the Postal Service may have wanted to fill Mr. Erickson's position (presumably with an employee who was not performing military service) cannot shield it from liability for removing him from his position based on his military-related absence.[24]

Thus, the Federal Circuit affirmed the MSPB decision that Erickson was not entitled to reemployment in 2006 because he failed to make a timely application for reemployment. The Federal Circuit reversed the MSPB decision that the firing on 3/31/2000 did not violate section 4311 of USERRA. The Federal Circuit remanded the case to the MSPB to determine whether Erickson had waived his USERRA rights.

MSPB proceedings after *Erickson I*

---

[24] *Erickson v. United States Postal Service,* 571 F.3d 1364, 1368-69 (Fed. Cir. 2009) (emphasis supplied).

On January 7, 2010, the MSPB (all three members concurring) held that Erickson was not entitled to relief under USERRA because he had abandoned his USPS career in favor of full-time Army service. The Board explained its decision as follows:

> Our reviewing court has held that, because the reemployment provisions of USERRA, which may include discrimination claims under 38 U.S.C. § 4311, apply only to noncareer military service, an employee can waive his USERRA rights by abandoning his civilian career in favor of one in the military. *Woodman v. Office of Personnel Management*, 258 F.3d 1372, 1377-78 (Fed. Cir. 2001). In determining whether an employee has done so, the key inquiry is whether he intended to pursue a military career. *Moravec v. Office of Personnel Management*, 393 F.3d 1263, 1267-68 (Fed. Cir. 2004); *Dowling v. Office of Personnel Management*, 393 F.3d 1260, 1262 (Fed. Cir. 2004). Among the factors that may contribute to a finding of abandonment are lengthy and continuous service in the active guard reserve and multiple requests for service extensions. *See Woodman*, 258 F.3d at 1378-79 (finding that an employee who served continuously as a full-time member in the active guard reserve for 14 years and sought multiple service extensions intended to make permanent a career in the military). At the time of his removal, the only alleged USERRA violation still at issue, the appellant was serving his fifth consecutive voluntary reenlistment, and had been serving full-time in the active guard reserve for 6 of the past 10 years, the last 4 years continuously. *Erickson*, 108 M.S.P.R. 494, P 6.
>
> Although the appellant's continuous full-time military service at the time of the alleged USERRA violation was not as lengthy as that of the employee in *Woodman*, there are other circumstances present here that weigh in favor of a finding that the appellant intended to abandon his civilian career. We find the appellant's expressed preference for military over civilian service especially significant in this regard. *See Gadue v. Office of Personnel Management*, 96 M.S.P.R. 285, P 14 (2004) (finding abandonment where, inter alia, employee testified that he chose to enter on active guard duty because the position to which he was to be assigned "looked a lot better" and because of the "promotion possibilities" it offered). In addition, we find that the appellant's failure to respond to the notice of proposed removal, or to grieve or file a chapter 75 appeal of the removal action, weighs in favor of a finding that he intended to abandon his civilian career. *See Moravec*, 393 F.3d at 1268 (noting petitioner's failure to object to his separation from civilian service).
>
> When considered in isolation, the individual factors described above could be regarded as insufficient to support a finding that the appellant waived his USERRA rights. However, in our view, the circumstances presented in this case, considered together, are comparable to those our reviewing court has found sufficient to constitute a waiver of USERRA employment rights. *See Woodman*, 258 F.3d at 1374-79; *Gadue*, 96 M.S.P.R. 285, P 17.

> Accordingly, we DENY the appellant's request for relief under USERRA.[25]

Erickson appeals to the Federal Circuit again—*Erickson II*

Erickson filed a timely appeal of the unfavorable MSPB decision on remand, and the Federal Circuit was required to hear this case again. Two of the three judges who decided *Erickson I* in 2009 served on the panel again in 2011 for *Erickson II.* The third judge was Judge Richard Linn, an active judge of the Federal Circuit in 2011.[26] Judge Bryson again wrote the decision and was joined by his two colleagues for a unanimous panel decision, vacating the MSPB decision that Erickson had waived his USERRA rights and remanding the case to the MSPB yet again. In his scholarly opinion, Judge Bryson wrote:

> Mr. Erickson argues that substantial evidence does not support the Board's finding that he abandoned his civilian career and therefore waived his USERRA protections. We agree.
>
> We addressed the waiver doctrine, as applied to veterans' reemployment rights, in *Woodman v. Office of Personnel Management*, 258 F.3d. 1372 (Fed. Cir. 2001). Although that case was decided under USERRA's predecessor statute, the Veterans' Reemployment Rights Act of 1974, both statutes draw the same distinction between career and noncareer service. *See id*. at 1372. In *Woodman*, a civilian employee had left his civilian position in order to serve on active duty with the National Guard and had served for 14 years in that capacity. During that period, he "actively sought service extensions" and ultimately served long enough that he was eligible for retirement from the military. *Id*. at 1378. The Board held that the employee's actions justified an inference that he had abandoned his civilian job in favor of a career in the military. This court upheld that determination. We explained that the employee's actions "created a de facto resignation by indicating to [his employer] that he never intended to return to his civilian position." *Id*. at 1379.
>
> In *Moravec v. Office of Personnel Management*, 393 F.3d 1263 (Fed. Cir. 2004), and *Dowling v. Office of Personnel Management*, 393 F.3d 1260 (Fed. Cir. 2004), a pair of cases decided on the same day, we applied the waiver doctrine to federal employees' claims that their years of active duty service with the National Guard should count toward their years of federal service when computing their Civil Service Retirement Service annuity. In each case, the employee had held a civilian position with either the Army or the National Guard. Prior to beginning active duty service with the National Guard, each employee formally separated from his civilian position instead of asking to be placed on leave-without-pay status. Upon separation, each employee withdrew his personal contributions to his civilian retirement account. Following his separation from his civilian position, Mr. Moravec served for 16 years on active duty before rejoining the civilian

[25] *Erickson v. United States Postal Service,* 2010 MSPB 4,P8-P10, 113 MSPR 41, 44-45, 2010 MSPB LEXIS 94, 6-9 (MSPB January 7, 2010).

[26] Judge Linn took senior status in 2012.

workforce. Following his separation from civilian service, Mr. Dowling served for 12 years on active military duty. Each of them returned to work for his previous civilian employer after leaving active duty service. The Board determined that both employees had abandoned their civilian careers, and this court affirmed that determination. Because both Mr. Moravec and Mr. Dowling had abandoned their civilian careers, the years they spent with the National Guard were not creditable toward their civilian retirement accounts. *Moravec*, 393 F.3d at 1266-68; *Dowling*, 393 F.3d at 1263-64.

The reemployment provisions of section 4312 of USERRA apply only if the period of cumulative military service (excluding exempted periods) does not exceed five years. 38 U.S.C. § 4312(a)(2). In *Erickson I*, we held that the five-year cap for reemployment in section 4312 also applies to section 4311's antidiscrimination provision in situations such as Mr. Erickson's. We explained that the five-year limit applies where "the alleged discrimination consists of the employee's removal because of his military-related absence; otherwise, the five-year limit on an employer's obligation to rehire an employee who left work to serve in the military would be meaningless." 571 F.3d at 1369.

Importantly, Mr. Erickson's period of military service did not exceed the five-year limit, taking into account the statutory exclusions. *See Erickson I*, 571 F.3d at 1369-70. The Postal Service, however, apparently believed that his military service had exceeded the five-year period and predicated his removal on that assumption. Thus, the Postal Service's stated reason for removing Mr. Erickson—excessive use of military leave—was improper. *Id*. By statute, he was entitled to retain his USERRA antidiscrimination and reemployment rights until the period of his military service exceeded the five-year cap. To be sure, even when an employee falls within the five-year period in which he would otherwise retain his USERRA rights, he may abandon his civilian career and the accompanying USERRA protections. *See Moravec*, 393 F.3d at 1269. In that setting, however, abandonment can be found only if the circumstances demonstrate a clear intention on the employee's part to abandon his civilian career in favor of a career in the military.

In this case, the Board relied on three pieces of evidence to support its finding of abandonment: the length of the period that Mr. Erickson was away from his civilian position, his failure to contest his separation at the time he received the notice, and his expressed dissatisfaction with the Postal Service as compared to the military. When considered against the totality of the circumstances of this case, however, that evidence does not provide substantial support for the Board's conclusion that Mr. Erickson manifested a clear intention to abandon his civilian position with the Postal Service.

As we explained in *Woodman*, the duration of an employee's military service is frequently relevant to the abandonment inquiry. The inquiry is a factual one, and there is no minimum period of military service that will trigger an assumption that the employee has decided to abandon his civilian position and thus waive his USERRA rights. The employee in *Woodman* was in military service and away from his civilian position for 14 consecutive years. 258 F.3d at 1374. The employees in *Moravec* and *Dowling* were absent for 16 and

12 years, respectively. *See Dowling*, 393 F.3d at 1261; *Moravec*, 393 F.3d at 1265. Mr. Erickson was absent for nearly four consecutive years at one point and approximately two years at another point. Mr. Erickson's period of military service was considerably shorter than the periods held to support a finding of abandonment in *Woodman, Moravec*, and *Dowling*. Moreover, and importantly, Mr. Erickson's absence did not exceed the five-year statutory limit (taking exempted periods into account) at the time of his removal. Because the five-year period provides a distinct termination point for USERRA's reemployment rights, the enactment of that statutory period makes it reasonable to assume that, absent clear evidence to the contrary, employees who have not exceeded that period do not intend to abandon their civilian positions.

In finding that he intended to abandon his civilian career, the Board also relied on Mr. Erickson's failure to contest his removal for a period of six years. USERRA provides a window of time during which noncareer servicemembers must assert their section 4312 reemployment rights. 38 U.S.C. § 4312(e)(1). By contrast, there is no statutory timeframe during which a section 4311 discrimination claim must be asserted, and there is no statute of limitations on filing a USERRA complaint or claim. *Id*. § 4327(b). Congress thus plainly chose not to place a limit on the period within which a noncareer servicemember would be permitted to assert a claim under section 4311. Because an employee who is in military service retains his USERRA antidiscrimination rights despite the passage of time, an employee's failure to promptly challenge an adverse action by his employer should not be given undue weight in the abandonment inquiry. While an extensive delay in bringing a USERRA claim might offer some support for a conclusion that the employee has abandoned his USERRA rights, *see Moravec*, 393 F.3d at 1268 (employee failed to contest his separation for 12 years), that factor is not entitled to substantial weight in this case, particularly in light of the fact that during most of the intervening period, Mr. Erickson was on active duty in an overseas military deployment.

Finally, the Board found Mr. Erickson's "expressed preference for military over civilian service especially significant" to its determination that he abandoned his career with the Postal Service. 113 M.S.P.R. at 44. While an employee's unequivocal statement that he intends to leave his civilian job permanently is perhaps the best evidence of an intention to abandon a civilian career (and thus waive USERRA's protections), Mr. Erickson's remarks fall far short of such an unequivocal expression of intent. His statement that he liked the military and did not like the way employees were treated in the Postal Service cannot be regarded as equivalent to an expression of intention to resign from his civilian position. That is particularly so in light of his testimony, not discredited by the Board, that when Ms. Warner asked him why he did not resign his position with the Postal Service, he replied that he believed his "job was at the post office."

Apart from the considerable difference in the length of Mr. Erickson's absence from his Postal Service position as compared with the length of the employees' absence in *Moravec, Dowling*, or *Woodman*, there were other factors in those cases that strongly supported the Board's finding of abandonment. The employees in both *Moravec* and

> *Dowling* formally resigned their civilian positions and withdrew their personal retirement contributions when they left their civilian jobs. *Moravec*, 393 F.3d at 1268; *Dowling*, 393 F.3d at 1263. The employee in *Woodman* manifested his election of a military career by remaining in active military service until he was eligible for full military retirement benefits. *Woodman*, 258 F.3d at 1378. None of those factors was present in Mr. Erickson's case. In sum, while it was legitimate for the Board to consider evidence such as Mr. Erickson's failure to contest his removal immediately and his remarks to Ms. Warner, that evidence, viewed in context, is not sufficient to justify an inference that Mr. Erickson intended to abandon his civilian career. That is the case particularly in light of the fact that, at the time of his removal, he had not exceeded the five-year period set forth in USERRA during which an employee is entitled to continue in military service without losing his USERRA reemployment rights. We therefore vacate the Board's determination that Mr. Erickson abandoned his civilian career in favor of a career in military service, and we remand to the Board for further proceedings on Mr. Erickson's USERRA discrimination claim.[27]

MSPB proceedings after *Erickson II*

On 12/14/2012, MSPB AJ ordered the USPS to do the following:

> I **ORDER** the agency to cancel the removal, reinstate the appellant retroactive to the date of removal, and to compensate the appellant for any loss of wages or benefits suffered no later than 60 calendar days after the date this initial decision becomes final. I **ORDER** the appellant to cooperate in good faith with the agency's efforts to compute the amount of lost wages and benefits due and to provide all necessary information requested by the agency to help it comply.
>
> If there is a dispute about the amount of lost wages and benefits due, I **ORDER** the agency to pay appellant by check or through electronic funds transfer for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount.
>
> I **ORDER** the agency to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant must ask the agency about its efforts to comply before filing a petition for enforcement with this office.[28]

Despite Judge Klein's explicit and understandable order more than seven years ago, the USPS has not yet reinstated Erickson to his USPS job and has not yet paid him any back pay.

---

[27] *Erickson v. United States Postal Service,* 636 F.3d 1353, 1356-59 (Fed. Cir. 2011).

[28] *Erickson v. United States Postal Service,* 2012 MSPB LEXIS 7368, 6-7 (MSPB December 14, 2012) (bold print and capitalization in original).

On 12/31/2013, the three MSPB members unanimously affirmed the decision of AJ Gary Wade Klein and ordered the USPS to comply, as follows:

> We ORDER the agency to cancel the removal action and restore the appellant retroactive to the date of his removal. *See Kerr*, 726 F.2d 730. The agency must complete this action no later than 20 days after the date of this decision.
>
> We also ORDER the agency to pay the appellant the correct amount of wages and benefits lost as a result of the removal action, as required under 38 U.S.C. § 4324(c)(2). We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.
>
> We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).
>
> No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).[29]

Again, the USPS officials ignored their clear legal obligations and flouted the MSPB order. To this day, Erickson has not been reinstated to his USPS job, nor has he been paid back pay.

Proceedings about attorney fees

USERRA provides as follows concerning the power of the MSPB to award attorney fees to a USERRA appellant who is represented by private counsel and who prevails:

> If the Board [MSPB] determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board [as opposed to a case brought by the Office of Special Counsel] pursuant to subsection (b) that such person

[29] *Erickson v. United States Postal Service,* 2013 M.S.P.B. 101, P18-P21, 120 M.S.P.R. 468, 475-476, 2013 MSPB LEXIS 6342, 15-17 (M.S.P.B. December 31, 2013).

> is entitled to an order referred to in paragraph (2), the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.[30]

The MSPB awarded attorney fees to Erickson for the representation of Erickson before the MSPB and MSPB AJs, but not for representation before the United States Court of Appeals for the Federal Circuit.

Erickson appeals to the Federal Circuit yet again—*Erickson III*

Erickson appealed to the Federal Circuit the MSPB's denial of his claim for attorney fees for his representation before the Federal Circuit. Unfortunately, the Federal Circuit affirmed the MSPB on this point.[31] I believe that *Erickson III* was wrongly decided, and I filed (on behalf of ROA) an amicus curiae (friend of the court) brief urging the Federal Circuit to grant rehearing en banc.

Unfortunately, the Federal Circuit denied rehearing en banc. Erickson applied to the Supreme Court for certiorari (discretionary review), but the Supreme Court denied the application on 2/23/2015.[32]

MSPB proceedings after *Erickson III*

The MSPB proceedings have ground to a halt, apparently because the Board lost its quorum in January 2017.[33] Although 20 years have passed since he was unlawfully fired on 3/31/2000, he has not yet been permitted to return to work, and he has not yet been paid back pay, which will likely be in seven figures. Moreover, he is entitled, under section 4318 of USERRA, to be treated for federal civilian pension purposes as if he had been continuously employed since he was hired by the USPS in 1988. Sergeant Major Erickson should be permitted to return to work for the USPS for one day or one pay period and then retire with substantial monthly retirement income.

We will keep the readers informed of developments in this interesting and important case.

Kudos to Erickson's attorneys

I congratulate Mathew Tully, Michael Macomber, Steve Herrick, Matthew Estes, Ariel Solomon, and other attorneys at Tully Rinckey PLLC for their imaginative, diligent, and persistent representation of this most deserving service member.

---

[30] 38 U.S.C. 4324(c)(4).
[31] *Erickson v. United States Postal Service,* 759 F.3d 1341 (Fed. Cir. 2014).
[32] *Erickson v. United States Postal Service,* 574 U.S. 1150 (2015).
[33] Please see Law Review 19080 (September 2019).

Lessons learned from this case

1. **Always apply for reemployment**

Erickson could have saved himself a lot of trouble if he had applied for reemployment within 90 days after he was released from active duty on 12/31/2005. You should always apply for reemployment promptly after you leave active duty, even if you think applying serves no useful purpose because the employer has already "fired" you or made clear that it will deny your application for reemployment.

2. **Keep track of your five-year limit, but don't get into an argument with the employer about the five-year limit until you are off active duty and ready to return to work.**

You need to keep track of your own five-year limit. Please see Law Review 16043 (May 2016) for a detailed summary of what counts and what does not count in exhausting your limit. If you need legal advice about exempt periods, do not seek such advice from the employer or the employer's attorney.

Do not get into an argument with your civilian employer about whether a period of service counts or does not count in exhausting the five-year limit. That question may become moot if one of the following things happens:

a. You could remain on active duty voluntarily so long that you are clearly over the five-year limit even if the earlier period is exempt.
b. You could do something stupid and receive a disqualifying bad discharge from the military.
c. You could get a great job offer elsewhere, or you could win the Publisher's Clearinghouse Sweepstakes, and you could decide that you do not want to return to work for your pre-service employer.
d. God forbid, you could die, or you could be so profoundly disabled that returning to work for the pre-service employer is impossible.

3. **Respond politely to employer inquiries about your status and plans but be very careful as to what you say.**

In early 2000, a labor relations specialist for the USPS contacted Erickson by telephone. He could have saved himself a lot of trouble if he had been more circumspect about what he told the employer representative. It was a mistake for him to say that he preferred military service

to USPS employment and that he would not be returning to the USPS if the Army kept continuing his active duty orders. In a situation like this, the less you say the better.

4. **Read our "Law Review" articles about USERRA to understand your rights and what you need to do to exercise and enforce those rights.**

Please go to www.roa.org/lawcenter. You will find more than 2,000 "Law Review" articles about military-legal topics, and the great majority of the articles are about USERRA and related laws. These articles are available for free to all service members and others, but we sure would like to have you as a member of the Reserve Organization of America (ROA). Please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

Read more about this case on MilitaryTimes.com

Please join or support ROA

This article is one of 2000-plus "Law Review" articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Indeed, ROA is the *only* national military organization that exclusively supports America's Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation's seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs $20. Enlisted

personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve.

If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Officers Association
1 Constitution Ave. NE
Washington, DC 20002