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Pension Benefits for Employees Working through Hiring Halls whose Civilian Careers Are Interrupted by Military Service

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About Sam Wright

1.1.1.1—USERRA applies to hiring halls and joint employers
1.1.3.1—USERRA applies to voluntary service
1.3.2.2—Continuous accumulation of seniority-escalator principle
1.3.2.3—Pension credit for service time
1.4—USERRA enforcement
1.8—Relationship between USERRA and other laws/policies
10.1—Supreme Court cases on reemployment

[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2000 "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 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 1800 of the articles.

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***Imel v. Laborers Pension Trust Fund,* 904 F.2d 1327 (9th Cir.), *cert. denied,* 498 U.S. 939 (1990).[3]**

This case was decided 31 years ago, and four years before the Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) in 1994. The case is still relevant because it is mentioned favorably in USERRA's legislative history.[4] The case was decided by a three-judge panel of the United States Court of Appeals for the 9th Circuit.[5]

Facts and decision of the district court

The Laborers Pension Trust Fund (the defendant and appellant) was established in 1963 by two groups of contractors (two chapters of the Associated General Contractors of America) and the Northern California District Council of Laborers. Under the Fund's pension plan, individual contractors make contributions for each hour worked by covered employees. To qualify for a pension, the employee must earn a minimum amount of industry service-year credits. Credit is given for work done during the years 1937-1962, before the Fund was created. Credit is earned for each incident of employment with any covered contractor within the industry, even though the employment may have been of short duration or for different contractors. The amount of a covered employee's retirement pension is based upon the number of credits the employee has earned.

The Plan was amended by the trustees on October 18, 1977, retroactive to June 1, 1976, to provide that a person returning from compulsory military service[6] would receive credit for his period of military service if he "was employed in a permanent position[7] . . . immediately prior to such military service and was reemployed by the employer for whom he was working immediately prior to his entry into such military service." Plan, Article 6, § 6.02a.

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[3] *Cert. denied* means that the Supreme Court denied certiorari (discretionary review). The Supreme Court denies certiorari in more than 99% of the cases where it is sought. To grant certiorari, at least four Justices must vote for it in a conference to consider certiorari petitions. The denial of certiorari does not necessary mean that the Supreme Court agrees with the Court of Appeals decision, but it means that the decision of the Court of Appeals is final, and the case is over.

[4] *See* Report of the Committee on Veterans' Affairs, House of Representatives, House Report No. 103-65, Part 1, April 28, 1993. The report can be found in Appendix D-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The favorable mention of *Imel* can be found on page 798 of the 2020 edition of the *Manual. See also* Report of the Committee on Veterans' Affairs, U.S. Senate, Senate Report No. 103-158. The report can be found in Appendix D-2 of the *Manual,* and the favorable mention of *Imel* can be found on page 878 of the 2020 edition.

[5] The 9th Circuit is the federal appellate court that sits in San Francisco and hears appeals from district courts in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, the Northern Marianas Islands, Oregon, and Washington.

[6] The plaintiff's military service was compulsory—he was drafted in 1953. But the reemployment statute has always applied to *voluntary as well as involuntary* military service. *See* Law Review 30 (October 2001).

[7] Under the VRRA, the returning veteran was not required to prove that his or her pre-service position was "permanent"—only "other than temporary." There is a big difference. It is like the difference between telling your wife that she is "beautiful" and telling her that she is "other than ugly."

Marion J. Imel worked in the Northern California construction industry for over twenty-five years. He joined the Union in 1951 and was dispatched from the Union hiring hall to various contractors consistently until his retirement in 1979. His general pattern was to work for several weeks, or months, on a project until he was laid off or until the project was finished, then to be put on the out-of-work list for a few days (up to one month) until a new project was available. His employment was interrupted by his compulsory military service in the Korean War, from March 6, 1953 to March 5, 1955. Upon his return, Imel worked for a contractor covered by the Fund, but this contractor was not the same contractor he had worked for immediately prior to his military service.

The district court found that the Union operated a *de facto* "hiring hall" for the industry in Northern California during the relevant period. The Union controlled the dispatch of employees to the pension-covered jobs throughout the industry. "Use of that practice essentially guaranteed that as long as plaintiff sought work by registering at the Union hall he would be dispatched to jobs covered by the pension plan here in dispute." *Imel v. Laborers Pension Trust Fund*, No. S-83-1406EJG, mem. op. at 13 (E.D.Ca., Oct. 25, 1988). The Union hiring hall process "was treated as mandatory for obtaining work." *Id.* at 14. The district court also found that "there is a reasonable certainty that plaintiff's pension benefits would have continued to accrue in full" absent military service. *Id.* at 17.

The district court found that Imel's position was not temporary, because he "had a reasonable expectation that, but for the brief interruption during which he served in the military, he would have continued to work in [the Northern California construction] industry under the multi-employer pension plan." *Id.* at 22. The district court gave Imel credit for his two years of military service in computing his pension benefits. Imel's future pension payments were adjusted to reflect this credit, and the Fund was required to pay Imel a lump sum for total back-due benefits, plus prejudgment interest. The Fund appealed. In a split panel decision (2-1), the 9th Circuit affirmed the district court's decision.

Pension benefits under the VRRA

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA in 1994 as a long-overdue update and rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. In its first case construing the 1940 reemployment statute, 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 that he would have occupied had he kept his position continuously during the war."[8]

[8] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946). The citation means that you can find this case in Volume 328 of *United States Reports,* starting on page 275. The specific language quoted can be found at the bottom on page 284 and the top of page 285. I discuss *Fishgold* in detail in Law Review 0803 (January 2008).

The VRRA does not mention pension entitlements, but in 1977 the Supreme Court applied the escalator principle to pension benefits under a defined benefit plan, holding that the returning veteran who met the conditions for reemployment was entitled to be treated as though he had remained continuously employed in the civilian job during the time he was away from work for military service, for purposes of computing pension benefits after retirement.[9]

Imel was not credited for the two years (1953-55) that he was away from his civilian employment through the hiring hall, in computing his pension benefits. He claimed that he was entitled to that credit under the VRRA and the *Alabama Power Company* precedent. He complained to the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). That agency investigated his complaint and found it to have merit and then brought suit on Imel's behalf in the United States District Court for the Eastern District of California, which ruled for Imel in a bench trial (no jury).

Issues

Was Imel's pre-service job "other than temporary?"

Under the VRRA, it was necessary for the veteran to prove, as an eligibility criterion for reemployment, that he or she had left an *other than temporary* civilian job to perform military service.[10] Imel's assignments through the hiring hall lasted for periods varying from a few days to several months, for major construction projects. The pension fund argued that Imel's pre-service employment was "temporary" and that the VRRA therefore did not apply. The District Court and the Court of Appeals held that the focus should be on Imel's 25-year career working through the hiring hall, not the duration of a specific job assignment, and that his pre-service employment situation was other than temporary.

Does it matter that the first construction company that Imel worked for in 1955, after he returned from the Army, was different from the last company he worked for in 1953, before he was drafted?

Imel and his colleagues worked through a hiring hall operated by their union. The hiring hall assigned workers to all the construction companies that used the hiring hall. The first company where Imel worked in 1955 was not the same as the last company where he worked in 1953—it would have been a huge coincidence if it had been the same company. The pension fund argued that Imel was not entitled to pension credit under the VRRA because he did not return to his pre-service employer after he was honorably discharged from the Army in 1955. The District Court and the Court of Appeals held that Imel's employer was the entire Northern

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

[10] Under USERRA, there is no such eligibility criterion, but there is an affirmative defense that is somewhat similar. The employer is not required to reemploy the veteran if the employer can establish, by a preponderance of the evidence, that "the employment from which the person leaves to serve in the uniformed services is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period." 38 U.S.C. 4312(d)(1)(C).

California construction industry and the hiring hall and that Imel had indeed returned to his pre-service employer after release from military service.

The 9th Circuit decision

The 9th Circuit majority decision contains the following instructive paragraphs:

> The Fund argues that the district court did not have jurisdiction because section 2022 only creates a right of action against an "employer," and the Fund did not employ Imel.
>
> Imel and the Labor Department contend that the Northern California construction industry was Imel's employer. They argue that because of the circumstances prevalent in that industry, it is difficult to name one party which served as Imel's employer in the literal sense of the word. They assert that Imel had an employer-type relationship with a number of "employers." First, they point out that Imel was paid and supervised by the individual contractors covered by the Union hiring hall. Second, he was hired by, directed by, and responsible for reporting to the Union. Third, the Fund recorded and administered all pension benefits. All three of these circumstances are traditionally "employer" functions, say Imel and the Labor Department, and thus in the Northern California construction industry, no one entity controls the employee in all aspects of the employment relationship.
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> Essentially, the Fund's argument is that we ought to give the word "employer," as used in the statute, its plain meaning. As the Second Circuit described this argument in *Korea Shipping Corp. v. New York Shipping Ass'n*, 880 F.2d 1531, 1532 (2d Cir. 1989), the Fund "argue[s] in effect that the [district court's] wholly different reading of the word 'employer' reinforces the notion that words don't mean what they say but only, as Alice tells us, what we say they mean." *Id.* (citing L. CARROLL, ALICE'S ADVENTURES IN WONDERLAND (London 1865)).
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> Having stated the argument, the Second Circuit answered it: it is the task of judges to start with the language of a statute and to reach a judgment that applies that language to a particular set of circumstances in a manner consistent with the statute's stated objectives. The fallacy in the [defendants'] argument is their failure to recognize that in construing a statute, the task of the courts is to interpret the words of the statute in light of the purposes that animated the lawmakers in enacting it. *Id.* at 1537 (holding that common law or dictionary meaning of term "employer" is inappropriate in the context of a remedial and protective statute).
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> We agree with the view taken by the Second Circuit. A narrow reading of the word "employer" as used in the Act is inconsistent with the statute as a whole. The purpose of the Act is to ensure that the veteran "who was called to the colors not be penalized on his return by reason of his absence from his civilian job." *Fishgold*, 328 U.S. at 284. The Act is

to be liberally construed in light of this purpose. *See Coffy*, 447 U.S. at 196; *Alabama Power Co. v. Davis*, 431 U.S. 581, 584, 52 L. Ed. 2d 595, 97 S. Ct. 2002 (1977); *Fishgold*, 328 U.S. at 285; *Lang v. Great Falls School Dist. No. 1 & A*, 842 F.2d 1046, 1048 (9th Cir. 1988); *Earls v. Atchison, Topeka & Santa Fe Ry.*, 532 F.2d 133, 136 (9th Cir. 1976). Congress has manifested extreme solicitude for the returning veteran, *Carter v. United States*, 132 U.S. App. D.C. 303, 407 F.2d 1238, 1251 (D.C. Cir. 1968) (supp. op.), and "made clear that claims under the Act are to be governed by principles of equity." *Lang*, 842 F.2d at 1051.

The Supreme Court has instructed us "to construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." *Fishgold*, 328 U.S. at 285. Consistent with this teaching, we have taken the position that we will not "place undue emphasis on the parties' imprecise 'labels and definitions' to define 'rights guaranteed by the Act.'" *Lang*, 842 F.2d at 1050 (quoting *Smith v. Industrial Employers & Distributors Ass'n*, 546 F.2d 314, 317 (9th Cir.), *cert. denied*, 431 U.S. 965, 53 L. Ed. 2d 1061, 97 S. Ct. 2921 (1977)). Our commitment to a liberal interpretation of the Act extends even to the question of jurisdiction. *Tsang v. Kan*, 173 F.2d 204, 205 (9th Cir.), *cert. denied*, 337 U.S. 939, 93 L. Ed. 1744, 69 S. Ct. 1515 (1949) (despite generally strict construction of jurisdiction); *see also Feore v. North Shore Bus Co.*, 161 F.2d 552, 553-54 (2d Cir. 1947) (finding jurisdiction to award back pay when reinstatement not sought, although the statute only provided for such awards "as an incident" to reinstatement).

Other courts have exercised jurisdiction over a pension fund, alone, despite the Act's language in section 2021 creating rights against an "employer," and despite the reference to "employer" in the jurisdictional grant of section 2022. *See, e.g., Voliva v. Seafarers Int'l Union of N. Am.*, 680 F. Supp. 216 (E.D.Va.), *aff'd*, 858 F.2d 195 (4th Cir. 1988) (all defendants except the pension plan dismissed early in the *Akers v. Arnett*, 597 F. Supp. 557 (S.D.Tex. 1983), *aff'd*, 748 F.2d 283 (5th Cir. 1984) (suit against trustees of longshoremen's association pension fund); *United States ex rel. Reilly v. New England Teamsters & Trucking Indus. Pension Fund*, 737 F.2d 1274 (2d Cir. 1984) (district court held that the pension fund was the employer; defendant fund did not argue this issue on appeal).

In *Grzyb v. The New River Co.*, 793 F.2d 590 (4th Cir. 1986), the employer was joined as a defendant and then the claim against it was dismissed because of laches. Despite the lack of the "employer" as a continuing party, the *Grzyb* court held that the pension plan incorrectly denied past military service time credit and affirmed judgment against the plan alone.

In considering the proper application of § 2022, it is important to note, first, that there is substantial case law to the effect that the remedies provided in the Veterans Act are equitable in nature. Second, there is a strong public policy against the forfeiture of pension benefits . . . and turning specifically to the provisions of the Veterans Act, strong

authority that the Act is to be treated liberally, so as to benefit those who have served in the armed forces. *Id.* at 592 (citations omitted).

The First Circuit has taken a somewhat hybrid approach to how the term "employer" should be treated in the Act. In *Bunnell v. New Eng. Teamsters & Trucking Indus. Pension Fund*, 655 F.2d 451 (1st Cir. 1981), *cert. denied*, 455 U.S. 908, 71 L. Ed. 2d 446, 102 S. Ct. 1253 (1982), the district court had held that the fund was the employer for purpose of the Act, although not in the traditional sense. *Bunnell*, 486 F. Supp. 714, 718 (D.Mass. 1980). The First Circuit affirmed but stated that it was "not concerned" with whether the pension fund could be defined as an employer. *Bunnell*, 655 F.2d at 452.

> Where, however [the employer] contracted for Fund to assume obligations for its employees' past services that treated returned veterans less favorably than its other employees, [the employer] directly violated the Act. It must equally be a violation for Fund to participate and apply [the employer's] contributions to inure to the benefit of nonveteran employees and discriminate against veterans. The First Circuit had "no difficulty in fashioning this remedy, or in the concept that suit may be brought directly against the Fund." *Id.* at 453 (citing the Ninth Circuit decision in *Smith*).

In view of the remedial nature of the Act, the Supreme Court's teaching that the Act should be given "as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits," *Fishgold*, 328 U.S. at 285, this circuit's commitment to a liberal interpretation of the Act consistent with *Fishgold*, and decisions from other circuits which have reached the same result, we hold that the district court had jurisdiction over Imel's suit against the Fund.

The Employer as a "Necessary Party"

The Fund also argues that Imel's suit against it is fatally flawed because Imel's employer is a "necessary party," and no employer was sued.

The last sentence of section 2022 of the Act provides: "In any such action only the employer shall be deemed a necessary party respondent." Act, § 2022.[11] This language was included to simplify the procedure for veterans asserting claims. *Bunnell*, 486 F. Supp. at 720. "If those parties [unions, other employees and other parties] had been *necessary*, individual veterans would have been greatly discouraged from asserting meritorious claims by the cumbersomeness and expense of litigation." *Id.*

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[11] USERRA has a similar provision: “In any action under this chapter, only an employer or a potential employer, as the case may be, shall be a necessary party defendant.” 38 U.S.C. 4323(g). USERRA’s definition of “employer” includes: “a person, institution, organization, or other entity to whom the employer has delegated employment-related responsibilities.” 38 U.S.C. 4303(4)(A)(i). The definition of “employer” also provides: “Except as an actual employer of employees, an employee pension plan described in section 3(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(2)) shall be deemed to be an employer only with respect to the obligation to provide benefits described in section 4318.” 38 U.S.C. 4304(C).

Here, the Fund is the only party with a significant interest in the proceeding, it is the party who will provide any relief, and in light of the objectives of the Act it is the only appropriate party for Imel to hale into court in this litigation. *See* 1963 Fund Plan, Art. VII, § 1 ("no Individual Employer has any liability, directly or indirectly, to provide the benefits established by this Plan beyond the obligation of the Individual Employer to make contributions as stipulated in the Collective Bargaining Agreement"). To mechanically *require* the addition of individual construction industry contractors for whom Imel worked "would be, in many cases, to convert what was intended as a favor into a burden." *Tsang*, 173 F.2d at 206 (italics deleted) (quoting *Ames v. Kansas*, 111 U.S. 449, 464, 28 L. Ed. 482, 4 S. Ct. 437 (1884)). "The remedy was intended to be simple and prompt." *United States ex rel. Deavers v. Missouri, K. & T.R. Co.*, 171 F.2d 961, 963 (5th Cir.), *cert. denied*, 337 U.S. 958, 93 L. Ed. 1757, 69 S. Ct. 1533 (1949); *see Donner v. Levine*, 232 F.2d 185, 187 (2d Cir. 1956).

We conclude that Imel may maintain his suit against the Fund notwithstanding the absence of any of Imel's construction contractor employers as a party in the litigation.

Imel's Return to Employment

The Fund argues that even if Imel may maintain his suit against the Fund and may do so without including any construction contractor employer as a defendant, he still loses because he did not return to work for the same construction contractor he had worked for immediately prior to entering military service. We disagree. Imel returned to the appropriate party - he went through the same Union hiring hall procedure as he did before his military service and was assigned to a contractor later covered under the pension plan for seniority credit. Imel had no control over where he was sent to work. Moreover, the district court found that benefits under the Plan were designed to reward an employee according to his length of service within the industry itself and not with any single contractor. This finding is consistent with the Fund's own documentation. The 1963 Fund Plan specifically provides: "During the periods between August 1, 1937 and August 1, 1962, an Employee shall be entitled to Past Service Credit for each Plan year, or a portion thereof, he was employed in the Building and Construction Industry." 1963 Fund Plan, Art. IV, § 2(a).

The district court's focus on the industry as an employing unit is also supported by section 2021(a)(B)(ii) of the Act. That section provides that successors in interest must afford a veteran the same rights as their predecessors. Act, § 2021(a)(B)(ii). This language of the Act reflects Congress' desire for a broad right to reemployment and seniority, not limited by technical changes in corporate form or reorganization. In the Northern California construction industry, the multi-employer group is made up of changing employer members: contractors enter and leave the area and go in and out of business. Nonetheless, the multi-employer group is a consistent entity, bound by its collective

bargaining agreements with the Union and its participation in the trust which created the Fund.

The Fund argues that the district court's decision creates a huge financial burden on the Fund and the construction industry because it requires that pension credits be given to all persons returning from compulsory military service who return to the Northern California construction industry, without regard to whether they return to the same employer for whom they worked immediately preceding their military service. We reject this economic argument. The Act's "very important but limited purpose is to assure that those changes and advancements in status that would necessarily have occurred simply by virtue of continued employment will not be denied the veteran because of his absence in the military service." *McKinney v. Missouri-Kan. Tex.R.R. Co.*, 357 U.S. 265, 272, 2 L. Ed. 2d 1305, 78 S. Ct. 1222 (1958).

As the district court found, Imel had been continually employed in the construction industry at the time he was called to military service. Had it not been for military service, he would have continued in that employment, and indeed he returned to that employment upon his military discharge. Had it not been for his military service, Imel would have received seniority credit which others who continued their employment in the Northern California construction industry received. The district court's holding, which we affirm, may increase the financial burden upon the Fund, and as a result, the burden upon the Northern California construction industry. But this result is compelled by the Act. Imel's rights as a returning serviceman may not be subordinated to the Fund's and the construction industry's financial interests.

We conclude that by returning to work in the Northern California construction industry following his discharge from military service, Imel returned to the same "employer" for purposes of the Act.

The Employment Position Imel Left

Finally, the Fund argues that Imel failed to satisfy the requirement of section 2021(a) of the Act which provides that in order to be protected by the Act's seniority provisions, the returning veteran must show that he left a position, other than a temporary position, for military service. The Fund points out that Imel's employment by his last construction contractor preceding his military service was only casual, and the project he was working on for that contractor was of only limited duration. Thus, it is contended, Imel held only a temporary position when he was called into the service. We disagree.

The test for whether a position is other than temporary and subject to the Act "is whether the veteran, prior to his entry into military service, had a reasonable expectation, in light of all of the circumstances of his employment, that his employment would continue for a significant or indefinite period." *Stevens v. Tennessee Valley Auth.*, 687 F.2d 158, 161 (6th Cir. 1982). Thus, for example, a seasonal employee may have a

> reasonable expectation of reemployment on the same seasonal terms. *See Stevens*, 687 F.2d at 162; *United States v. North Am. Creameries, Inc.*, 70 F. Supp. 36, 38 (D.N.D. 1947).
>
> Here, the district court found that Imel "had a reasonable expectation that, but for the brief interruption during which he served in the military, he would have continued to work in the [Northern California] construction industry under the multi-employer pension plan in question and accordingly would have continued earning pension credits."*Imel*, mem. op. at 22. This finding is not clearly erroneous. It establishes the basis for concluding that Imel's pre-service employment was not of a temporary nature. His employment was in the Northern California construction industry working for construction contractors in the multi-employer group; and he was continuously so employed for more than twenty-five years, except for the two years he spent in military service during the Korean War.
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> The district court's judgment is AFFIRMED.[12]

Conclusion

Imel was decided four years before Congress enacted USERRA in 1994, but the case remains a strong precedent that will help returning service members and veterans in the 21st Century. USERRA's legislative history includes the following paragraph:

> 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).[13]

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[12] *Imel,* 904 F.2d at 1330-1334.

[13] House Committee Report, April 28, 1993, H.R. Rep. No. 193-65 (Part 1). The report is reprinted in Appendix D-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found at pages 795-796 of the 2020 edition of the *Manual.*

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