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USERRA's Escalator Can Descend as well as Ascend.
By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.2—USERRA forbids discrimination.
1.3.2.2—Continuous accumulation of seniority-escalator principle.
1.3.2.2—Pension credit for service time.
1.8—Relationship between USERRA and other laws/policies.

Q: I am a Chief Petty Officer (E-7) in the Coast Guard Reserve and a life member of the Reserve Organization of America.[3] For many years, I

[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 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 1800 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.

[3] At its September 2018 annual convention, the Reserve Officers Association amended its Constitution to make all service members (E-1 through O-10) eligible for membership and adopted a new "doing business as" (DBA) name: Reserve Organization of America. The full name of the organization is now the Reserve Officers Association DBA the Reserve Organization of America. The point of the name change is to emphasize that our organization represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most

have read with great interest your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

On the civilian side, I work for a commercial fishing company that operates in the North Atlantic. Because of climate change and decades of overfishing, the lawful quotas on fishing have been greatly reduced, and this has reduced the profitability of the company that I work for and other companies in this industry.

I am currently on a one-year period of voluntary active duty, from 10/1/2023 until 9/30/2024. In anticipation of my upcoming release date, I contacted the personnel office of my employer to remind them that I will be leaving active duty at the end of September and that I plan to return to work in early October. The company's personnel director informed me by telephone, with a follow-up letter, that because of the company's difficult financial situation the company recently reduced its number of employees by 1/3, from 99 to 66. She told me that my position was among the 33 positions abolished and that there is no job for me when I leave active duty in a few weeks.

I have read and reread your Law Review 15116 (December 2015). I am confident that I have met or will soon meet the five USERRA conditions for reemployment. In September 2023, I left my job to go on active duty, and I gave the company both oral and written notice. I

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senior officers. Our nation has seven Reserve Components. In ascending order of size, they 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. The number of service members in these seven components is almost equal to the number of personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more dependent than ever before on the Reserve Components for national defense readiness. More than a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

believe that my current year of active duty is exempt from the computation of USERRA's five-year limit on the cumulative duration of service periods relating to a specific employer relationship, but even if this year counts, I am well within the five-year limit. I have served honorably and will continue to do so, and I fully expect to leave active duty on 9/30/2024 without a disqualifying bad discharge from the Coast Guard. I understand that I have 90 days to apply for reemployment, after I leave active duty, because my active duty period has been longer than 180 days, but I intend to apply for reemployment immediately after I leave active duty.

If I meet the five USERRA conditions, am I entitled to reemployment although 33 company employees have been laid off during the year that I have been on active duty?

Answer, bottom line up front

USERRA does not protect you from a bad thing, like a layoff or furlough,[4] that *clearly would have happened anyway, even if you had not been away from work for uniformed service.* USERRA's "escalator" can descend as well as ascend. If the company can establish that your job *would have been abolished anyway even if you had not been on active duty at the time, you do not have the right to reemployment in an active position.* If other employees who were laid off during the time that you were away from your job for uniformed service received severance pay or supplemental unemployment benefits, you are

[4] In the railroad and airline industries, the term "furlough" is used. In other industries the term "layoff" is used. Being furloughed or laid off is not the same thing as being fired. When you are fired, your relationship with the employer is severed, generally because the employer is dissatisfied with your work. You can be furloughed or laid off because poor business conditions mean the company needs and can afford to pay fewer employees. An employee who has been furloughed or laid off is still considered to have an employer-employee relationship with the employer, although the employee is not being paid. If an employee has been furloughed or laid off, there is at least a possibility that he or she will be recalled to work when business conditions improve.

entitled to those benefits when you leave active duty and apply for reemployment.

Explanation

As I have explained in Law Review 15067 (August 2015), Congress enacted USERRA and President Bill Clinton signed it into law on 10/13/1994.[5] USERRA was 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 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."[6]

The escalator principle is codified in sections 4313(a) and 4316(a) of USERRA.[7] After a period of service lasting more than 90 days, the returning service member or veteran who meets the five USERRA conditions is entitled to be reemployed as follows."

> …in the position of employment in which the person *would have been employed* if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform.[8]

Section 4316(a) provides:

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[5] Public Law 103-353. USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. §§ 4301-35).
[6] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946).
[7] 38 U.S.C. §§ 4313(a), 4316(a).
[8] 38 U.S.C. § 4313(a)(2)(A) (emphasis supplied).

> A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.[9]

It has always been the case that the "escalator" can descend as well as ascend. Indeed, *Fishgold* was a case about a descending escalator. The pertinent section of the Department of Labor (DOL) USERRA regulation is as follows:

> **Can the application of the escalator principle result in adverse consequences when the employee is reemployed?**

> **Yes.** The Act does not prohibit lawful adverse job consequences that result from the employee's restoration on the seniority ladder. Depending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated. For example, if an employee's seniority or job classification would have resulted in the employee being laid off during the period of service, and the layoff continued after the date of reemployment, reemployment would reinstate the employee to layoff status. Similarly, the status of the reemployment position requires the employer to assess what would have happened to such factors as the employee's opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if

[9] 38 U.S.C. § 4316(a).

> he or she had remained continuously employed. The reemployment position may involve transfer to another shift or location, more or less strenuous working conditions, or changed opportunities for advancement, depending upon the application of the escalator principle.[10]

Q: The company's General Counsel has said that USERRA and the escalator principle apply only to unionized companies. The company has always been non-union. None of the employees are in bargaining units represented by unions. There are no collective bargaining agreements (CBAs) between the company and unions. What do you say about the General Counsel's assertion?

A: The General Counsel is wrong and should know better. In 2011, the United States District Court for the District of Puerto Rico held that USERRA's escalator principle applied only to automatic promotions under a CBA between a union and an employer, not to discretionary promotions in a non-union situation.[11] The service member and plaintiff appealed to the United States Court of Appeals for the First Circuit.[12] On appeal, the 1st Circuit firmly reversed the District Court's stingy interpretation of USERRA, holding:

> The district court held that Rivera's attempt to invoke the escalator principle was improper because "[a]n escalator position is a promotion that is based solely on employee seniority. . . . [and] does not include an appointment to a position that is not automatic, but instead depends on the employee's fitness and ability and the employer's exercise of discretion." Dist. Ct. Op. at

[10] 20 C.F.R. § 1002.194 (bold question and bold "yes" in original).
[11] *Rivera-Melendez v. Pfizer Pharmaceutical, Inc.,* 2011 U.S. Dist. LEXIS 121841 (D.P.R. October 21, 2011).
[12] The 1st Circuit is the federal appellate court that sits in Boston and hears appeals from district courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.

17-18 (citation omitted) (internal quotation marks omitted). In concluding that the escalator principle and the reasonable certainty test do not apply to non-automatic promotions, the district court relied primarily upon McKinney v. Missouri-Kansas-Texas Railroad Co., 357 U.S. 265, 78 S. Ct. 1222, 2 L. Ed. 2d 1305 (1958), a case in which the Supreme Court interpreted the Universal Military Training and Service Act of 1951. There the Court held that a returning veteran seeking reemployment "is not entitled to demand that he be assigned a position higher than that he formerly held when promotion to such a position depends, not simply on seniority or some other form of automatic progression, but on the exercise of discretion by the employer." Id. at 272. Accordingly, the district court found that "the purpose of the escalator principle is to 'assure that those changes and advancements that would necessarily have occurred simply by virtue of continued employment will not be denied the veteran because of his absence in the military service,'" Dist. Ct. Op. at 18 (quoting McKinney, 357 U.S. at 272) (emphasis added), and that the principle therefore had no applicability to the facts of Rivera's case.

In citing the precedential authority of McKinney, the district court failed to consider the subsequently decided Supreme Court case of Tilton v. Missouri Pacific Railroad Co., 376 U.S. 169, 84 S. Ct. 595, 11 L. Ed. 2d 590 (1964). In Tilton, reemployed veterans claimed that they were deprived of seniority rights to which they were entitled under the Universal Military Training and Service Act when their employer assigned them seniority based upon the date that they returned from military service and completed the training necessary to advance to the higher position, rather than the date that they would have completed the training if they had not been called into service. Id. at 173-74. The Eighth Circuit had relied upon McKinney to deny the claims, as the promotion at

issue "was subject to certain contingencies or 'variables'" and therefore was not automatic. Id. at 178-79. The Supreme Court reversed, finding that McKinney "did not adopt a rule of absolute foreseeability," id. at 179, and that "[t]o exact such certainty as a condition for ensuring a veteran's seniority rights would render these statutorily protected rights without real meaning," id. at 180. The Court concluded that Congress intended a reemployed veteran . . . to enjoy the seniority status which he would have acquired by virtue of continued employment but for his absence in military service. This requirement is met if, as a matter of foresight, it was reasonably certain that advancement would have occurred, and if, as a matter of hindsight, it did in fact occur. Id. at 181.

Read together, McKinney and Tilton suggest that the appropriate inquiry in determining the proper reemployment position for a returning servicemember is not whether an advancement or promotion was automatic, but rather whether it was reasonably certain that the returning servicemember would have attained the higher position but for his absence due to military service. The Department [of Labor] has certainly adopted this construction of the regulations and the relevant precedents. See 70 Fed. Reg. 75,246-01, 75,272 (stating that "general principles regarding the application of the escalator provision . . . require that a service member receive a missed promotion upon reemployment if there is a reasonable certainty that the promotion would have been granted" (citing Tilton, 376 U.S. at 177; McKinney, 357 U.S. at 274)); see also 20 C.F.R. § 1002.191. We accord this interpretation substantial deference. See Massachusetts v. U.S. Nuclear Regulatory Comm'n, 708 F.3d 63, 73 (1st Cir. 2013) (citing Auer v. Robbins, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997)).

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

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

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

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

Because the district court erred in finding that the escalator principle and the reasonable certainty test apply only to automatic promotions, and because the court did not apply those legal concepts to Rivera's claim, the district court's grant of summary judgment cannot stand. The court's analysis of Rivera's claim to the API Team Leader position was premised on its fundamental misapprehension of the correct legal standard, which in turn compromised its view of the evidence. We prefer to have the district court decide in the first instance if the summary judgment record reveals genuine issues of material fact on the question of whether it is reasonably certain that Rivera would have been promoted to the API Team Leader position if his work at Pfizer had not been interrupted by military service. We therefore remand to the district court for reconsideration of the motion for summary judgment in light of the correct legal standard.[13]

[13] *Rivera-Melendez v. Pfizer Pharmaceuticals LLC,* 730 F.3d 49, 56-58 (1st Cir. 2013).

Thus, USERRA and the escalator principle apply to both unionized and non-unionized employers. As of the end of 2019, only 6.2% of private sector employees in our country are unionized.[14] If USERRA only applied to unionized employers, this law would be essentially worthless to most National Guard and Reserve members.

It is true that in a unionized situation it is usually much easier to determine what *would have happened* to the service member if he or she had remained in the civilian job instead of leaving the job for uniformed service. For example, let us assume that Joe Smith is a pilot for Very Big Air Line (VBAL), a major airline with a unionized pilot workforce. At airlines like VBAL, furloughs (when necessary) are based strictly on seniority. The most junior pilots are the first to be furloughed and the last to be recalled from furlough.

At a unionized airline, each pilot has a seniority number, based on the pilot's date of hire. Let us assume that Joe's number is 4200. Mary Jones was hired one day before Joe, and her number is 4199. Bob Williams was hired one day after Joe, and his number is 4201. If Mary and Bob were furloughed during the period that Joe was on active duty, it can be inferred that Joe also would have been furloughed.

In a non-union situation, it is much more difficult to determine what *would have happened* to the service member's job, but that does not mean that the escalator principle does not apply.

[14] *See* https://www.marketwatch.com/story/share-of-union-workers-in-the-us-falls-to-a-record-low-in-2019-2020-01-22.

Q: Let us assume that I leave active duty on 9/30/2024, as scheduled, and apply for reemployment shortly thereafter, and let us assume that I meet the five USERRA conditions for reemployment. In that situation, am I entitled to reemployment in an active job? Or am I only entitled to "reinstatement" on the layoff list?

Who has the burden of proof? Am I required to prove that I would have been among the employees not laid off? Or is the company required to prove that I would have been among those laid off?

A: Those are excellent questions, and there are no clear answers. But I would argue that you are entitled to reemployment in an active job unless the company can *prove* that it is more likely than not that you would have been laid off.

Q: At this company, there is no union, and layoffs (when necessary) are not governed by seniority. Among the 33 employees who were laid off recently, some had been working for the company for decades and were approaching retirement age, while others had only been working for the company for a few months. Among the 99 employees, only three (me and two others) were actively participating in the Reserve or National Guard. All three of the employees who participated in the Reserve Components were among the 33 employees laid off recently.

During the 15 years that I have been working for this company, I have received a lot of grief from my immediate supervisor and from the company's personnel department about my Coast Guard Reserve service and about my absences from work that were necessitated by that service, although all these absences were protected by USERRA. I

have spoken to my two colleagues who also serve in the Reserve Components. They told me that they have also been harassed by the company for their Reserve Component service.

I think that it is not a coincidence that the 33 positions abolished recently included the three positions held by employees who were active participants in the Reserve Components. What do you think about this?

A: I do not doubt that the company's difficult financial situation necessitated abolishing 33 positions, but if the company considered the inconvenience caused by an employee's Reserve Component service in identifying you and your two colleagues for inclusion in this mass layoff, that would violate section 4311 of USERRA, which prohibits discrimination in employment based on membership in a uniformed service, application to join a uniformed service, performance of service, or application or obligation to perform future service.

Section 4311 of USERRA

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA in 1994 as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. Under the VRRA, a person who was drafted or who voluntarily enlisted in the armed forces was entitled to reemployment in the pre-service civilian job after honorable service. In 1955 and 1960, Congress expanded the VRRA to apply also to initial active duty training, active duty for training, and inactive duty training performed by Reserve and National Guard members.

When leaving a job for service and returning to the job became a recurring phenomenon rather than a once-in-a-lifetime experience, Congress amended the VRRA in 1968, adding a provision making it unlawful for an employer to fire a Reserve Component service member or to deny such a person promotions or "incidents or advantages of employment" based on "any obligation as a member of a Reserve Component of the Armed Forces." In 1986, Congress amended this provision to forbid discrimination in hiring.

The VRRA only forbade discrimination based on "any obligation as a member of a Reserve Component of the armed forces." USERRA's anti-discrimination provision is much broader. It forbids the denial of initial employment, retention in employment, promotion, or a benefit of employment based on membership in a uniformed service, application to join a uniformed service, performance of service, or application or obligation to perform service.[15]

Just prior to the enactment of USERRA in 1994, the pertinent section of the VRRA read as follows:

> Any person who seeks or holds a position described in clause (A) [a position with the United States Government, any territory or possession of the United States or a political subdivision of a territory or possession, or the Government of the District of Columbia] or (B) [a state, a political subdivision of a state, or a private employer] of subsection (a) of this section shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment *because of any*

[15] 38 U.S.C. § 4311(a). *See generally* Law Review 17016 (March 2017) for a detailed discussion of the Supreme Court and Court of Appeals case law applying section 4311.

obligation as a member of a Reserve component of the Armed Forces.[16]

USERRA (enacted in 1994) contains a much broader and stronger anti-discrimination provision, as follows:

§ 4311.Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

(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, 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--

[16] 38 U.S.C. § 4321(b)(3) (1988 edition of the United States Code) (emphasis supplied).

    - **(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.[17]

Section 4321(b)(3) of the VRRA forbade discrimination by employers only if such discrimination was "because of any obligation as a member of a Reserve component of the Armed Forces." Section 4311 of USERRA forbids discrimination based on any one of the following statuses or activities:

a. Membership in a uniformed service.[18]

[17] 38 U.S.C. § 4311 (emphasis supplied).

[18] As defined by USERRA, the uniformed services include the Army, Navy, Marine Corps, Air Force, Space Force, and Coast Guard, as well as the commissioned corps of the Public Health Service (PHS) and the commissioned corps of

b. Application to join a uniformed service.
c. Performing uniformed service.
d. Having performed uniformed service in the past.
e. Application to perform uniformed service.
f. Obligation to perform uniformed service.
g. Having taken an action to enforce a USERRA protection for any person.
h. Having testified or otherwise made a statement in or in connection with a USERRA proceeding.
i. Having assisted or otherwise participated in a USERRA investigation.
j. Having exercised a USERRA right.

Under section 4311(c) of USERRA,[19] it is not necessary to prove that one of the protected statuses or activities was *the reason* for the firing, denial of initial employment, or denial of a promotion or a benefit of employment. It is sufficient to prove that one of the protected activities or statuses was *a motivating factor* in the employer's decision. If the plaintiff proves that his or her uniformed service was a *motivating factor* in the employer's decision*,* the *burden of proof shifts to the employer to prove (not just say) that it would have made the same decision in the absence of the protected status or activity.*

USERRA's legislative history explains section 4311 as follows:

> Current law [the VRRA] protects Reserve and National Guard personnel from termination from their civilian employment or other forms of discrimination based on their military obligations. Section 4311(a) would reenact the current prohibition against discrimination which includes discrimination against applicants for

the National Oceanic & Atmospheric Administration. 38 U.S.C. § 4303(16). USERRA also applies to Federal Emergency Management Agency (FEMA) reservists, Urban Search & Rescue personnel, and appointees in the National Disaster Medical System.

[19] 38 U.S.C. § 4311(c).

employment (*see Beattie v. The Trump Shuttle, Inc.,* 758 F. Supp. 30 (D.D.C. 1991), current employees who are active or inactive members of Reserve or National Guard units, current employees who seek to join Reserve or National Guard units (*see Boyle v. Burke,* 925 F.2d 497 (1st Cir. 1991), or employees who have a military obligation in the future such as a person who enlists in the Delayed Entry Program which does not require leaving the job for several months. *See Trulson v. Trane Co.,* 738 F.2d 770, 775 (7th Cir. 1984). The Committee [House Committee on Veterans' Affairs] intends that these anti-discrimination provisions be broadly construed and strictly enforced. The definition of employee, which also includes former employees, would protect those persons who were formerly employed by an employer and who have had adverse action taken against them by the former employer since leaving the former employment.

If the employee is unlawfully discharged under the terms of this section prior to leaving for military service, such as under the Delayed Entry Program, that employee would be entitled to reinstatement for the remainder of the time the employee would have continued to work plus lost wages. Such a claim can be pursued before or during the employee's military service, even if only for lost wages.

Section 4311(b) [now 4311(c), as amended in 1996] would reaffirm that the standard of proof in a discrimination or retaliation case is the so-called "but for" test and that the burden of proof is on the employer, once a prima facie case is established. This provision is simply a reaffirmation of the original intent of Congress when it enacted current section 2021(b)(3) [later renumbered 4321(b)(3)] of title 38, in 1968. *See* Hearings on H.R. 11509 Before Subcommittee No. 3 of the House Committee on Armed Services, 89th Cong., 1st Session at 5320 (February 23,

1966). In 1986, when Congress amended section 2021(b)(3) to prohibit initial hiring discrimination against Reserve and National Guard members, Congressman G.V. Montgomery (sponsor of the legislation and Chairman of the House Committee on Veterans' Affairs) explained that, in accordance with the 1968 legislative intent cited above, the courts in these discrimination cases should use the burden of proof analysis adopted by the National Labor Relations Board and approved by the Supreme Court under the National Labor Relations Act. *See* 132 Cong. Rec. 29226 (October 7, 1986) (statement of Cong. Montgomery) citing *National Labor Relations Board v. Transportation Management Corp.,* 462 U.S. 393 (1983).

This standard and burden of proof is applicable to all cases brought under this section regardless of the date of accrual of the cause of action. To the extent that courts have relied on dicta from the Supreme Court's decision in *Monroe v. Standard Oil Co.,* 452 U.S. 549, 559 (1981), that a violation can occur only if the military obligation is the sole factor (*see Sawyer v. Swift & Co.,* 836 F.2d 1257, 1261 (10th Cir. 1988), those decisions have misinterpreted the original legislative intent and history of 38 U.S.C. 2021(b)(3) and are rejected on that basis.[20]

USERRA Regulations

Two sections of the Department of Labor (DOL) USERRA Regulations address how to prove a violation of section 4311:

[20] House Committee Report, April 28, 1993 (H.R. Rep. No. 103-65, Part 1), reprinted in Appendix D-1 of *The USERRA Manual* by Kathryn Piscitelli and Edward Still. The quoted paragraphs can be found on pages 695-96 of the 2023 edition of the *Manual.*

§ 1002.22 Who has the burden of proving discrimination or retaliation in violation of USERRA?

The individual has the burden of proving that a status or activity protected by USERRA was one of the reasons that the employer took action against him or her, in order to establish that the action was discrimination or retaliation in violation of USERRA. If the individual succeeds in proving that the status or activity protected by USERRA was one of the reasons the employer took action against him or her, the employer has the burden to prove the affirmative defense that it would have taken the action anyway.[21]

§ 1002.23 What must the individual show to carry the burden of proving that the employer discriminated or retaliated against him or her?

- **(a)** In order to prove that the employer discriminated or retaliated against the individual, he or she must first show that the employer's action was motivated by one or more of the following:
    - **(1)** Membership or application for membership in a uniformed service;
    - **(2)** Performance of service, application for service, or obligation for service in a uniformed service;
    - **(3)** Action taken to enforce a protection afforded any person under USERRA;
    - **(4)** Testimony or statement made in or in connection with a USERRA proceeding;
    - **(5)** Assistance or participation in a USERRA investigation; or,
    - **(6)** Exercise of a right provided for by USERRA.

[21] 20 C.F.R. § 1002.22 (bold question in original).

- **(b)** If the individual proves that the employer's action was based on one of the prohibited motives listed in paragraph (a) of this section, the employer has the burden to prove the affirmative defense that the action would have been taken anyway absent the USERRA-protected status or activity.[22]

Q: I have worked for this company for 15 years, and I have been contributing to the company's pension plan each pay period, and the company has been matching my contributions. It would be a financial disaster for me if I lost all my retirement equity and had to start over, at age 48, in setting aside money for my retirement.

Assuming I meet the five USERRA conditions in October 2024, what am I entitled to with respect to my company pension?

A: If you meet the five USERRA conditions, you must be treated, for civilian pension purposes, essentially *as if you had been continuously employed in the civilian job during the entire time that you were away from work for uniformed service.* Section 4318 of USERRA provides as follows:

> (a)
>
> (1)
>
> (A) Except as provided in subparagraph (B), in the case of a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974) or a right provided under any Federal or State law governing pension benefits for governmental employees, the right to pension benefits of a

[22] 20 C.F.R. § 1002.23 (bold question in original).

person reemployed under this chapter shall be determined under this section.

(B) In the case of benefits under the Thrift Savings Plan, the rights of a person reemployed under this chapter shall be those rights provided in section 8432b of title 5. The first sentence of this subparagraph shall not be construed to affect any other right or benefit under this chapter.

(2)

(A) A person reemployed under this chapter shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services.

(B) Each period served by a person in the uniformed services shall, upon reemployment under this chapter, be deemed to constitute service with the employer or employers maintaining the plan for the purpose of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan.

(b)

(1) An employer reemploying a person under this chapter shall, with respect to a period of service described in subsection (a)(2)(B), be liable to an employee pension benefit plan for funding any obligation of the plan to provide the benefits described in subsection (a)(2) and shall allocate the amount of any

employer contribution for the person in the same manner and to the same extent the allocation occurs for other employees during the period of service. For purposes of determining the amount of such liability and any obligation of the plan, earnings and

forfeitures shall not be included. For purposes of determining the amount of such liability and for purposes of section 515 of the Employee Retirement Income Security Act of 1974 or any similar Federal or State law governing pension benefits for governmental employees, service in the uniformed services that is deemed under subsection (a) to be service with the employer shall be deemed to be service with the employer under the terms of the plan or any applicable collective bargaining agreement. In the case of a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability of the plan described in this paragraph shall be allocated—

(A) by the plan in such manner as the sponsor maintaining the plan shall provide; or

(B) if the sponsor does not provide—

(i) to the last employer employing the person before the period served by the person in the uniformed services, or

(ii) if such last employer is no longer functional, to the plan.

(2) A person reemployed under this chapter shall be entitled to accrued benefits pursuant to subsection (a) that are contingent on the making of, or derived from, employee contributions or elective deferrals (as defined in section 402(g)(3) of the Internal Revenue Code of 1986) only to the extent the person makes payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of service described in subsection (a)(2)(B). Any payment to the plan described in this paragraph shall be

made during the period beginning with the date of reemployment and whose duration is three times the period of the person's service in the uniformed services, such payment period not to exceed five years.

(3) For purposes of computing an employer's liability under paragraph (1) or the employee's contributions under paragraph (2), the employee's compensation during the period of service described in subsection (a)(2)(B) shall be computed—

(A) at the rate the employee would have received but for the period of service described in subsection (a)(2)(B), or

(B) in the case that the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).

(c) Any employer who reemploys a person under this chapter and who is an employer contributing to a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter, shall, within 30 days after the date of such reemployment, provide information, in writing, of such reemployment to the administrator of such plan.[23]

Q: I understand that there is an important distinction between *defined benefit* pension plans and *defined contribution plans.* What is the difference? What kind of plan is my employer's plan? Does section 4318 of USERRA apply to both kinds of pension plans?

[23] 38 U.S.C. § 4318.

A: Section 4318 applies to both kinds of pension plans, but not the same way. We need to figure out whether your employer's plan is a defined benefit plan or a defined contribution plan.

A defined benefit plan is a traditional pension plan, where the monthly pension check in retirement is determined based upon a formula. For example, the formula may include the number of years of employment for the employer and the employee's highest annual compensation from the employer or the average of the employee's highest three years, which will usually but not always be the final three years before retirement.

A defined contribution plan is different. In a defined contribution plan, the employer is not defining or guaranteeing that the employee will receive a specific amount per month in retirement. Rather, the employer is defining how much it will contribute to the employee's individual retirement account. The amount contributed by the employer, and sometimes also by the employee, and the rate of return on the investments over the employee's working career determines how much money is available to fund benefits during the employee's retirement years.

In a defined contribution plan, unlike a defined benefit plan, each employee (once vested) owns his or her own retirement account.[24] The funds are invested, usually in an intelligent and diversified way, and the money is there for the employee's retirement, even if the employer goes the way of Studebaker and Montgomery Ward.

[24] The vesting period is usually five years.

In a defined benefit plan, like a defined contribution plan, money is invested each year to support the payment of the defined benefits when employees retire. If the money invested and the return on investment are not sufficient to pay the promised benefits, the employer must pay more into the pension plan to pay the promised benefits, but if the employer's pension obligations have been discharged in bankruptcy, or if the company has gone out of existence, those additional benefits will not be forthcoming.

In a defined benefit plan, section 4318 of USERRA[25] requires the employer and the pension plan to treat the returning service member or veteran *as if he or she had been continuously employed,* in determining *when* the employee is eligible to receive the pension benefits and also in determining the *amount* of each monthly pension check.

For example, let us say that Mary Williams works for Daddy Warbucks Industries (DWI) for 35 years, from 10/1/1985 until 9/30/2020. Under the collective bargaining agreement between DWI and the union representing DWI employees, there is a defined benefit pension plan that pays benefits to employees based on the number of years of DWI employment and the average of the high-three years of DWI compensation. Mary's high-three years of DWI were her last three years before retirement. During those years, she earned $98,000; $100,000; and $102,000, for an average of $100,000 per year. Applying the formula to Mary's situation means that she is entitled to a pension of $12,000 per month or $48,000 per year.

[25] 38 U.S.C. § 4318.

During Mary's 35-year DWI career, she also served a 25-year career in the Army Reserve, retiring as a Lieutenant Colonel. During the years that she was working for DWI, she performed a cumulative total of four years of uniformed service. This includes a two-year recall to active duty, from 10/1/2001 until 9/30/2003. Her drill weekends and annual training tours add up to the other two years of service. Mary met the five USERRA conditions for each period of uniformed service.

Mary is entitled to be treated as if she had been continuously employed at DWI during each period of uniformed service. She must also be treated as continuously employed during the *entire period of absence from the civilian job* that was necessitated by each period of service, including the time that she was away from work immediately before and immediately after each period of service.[26] Thus, Mary has 35 years of DWI service, including credit for the periods when she was away from work for service.

Alex Barnes works for another company—let's call it Adams Bullock & Charles or ABC. ABC has a defined contribution pension plan. Each individual employee is permitted to contribute between 1% and 5% of his or her ABC earnings each pay period to the employee's pension plan account, and the company matches these employee contributions. The The vesting period is five years. Alex was hired by ABC in October 2013, and then works for three years, until October 2016. Alex was away from his ABC job for three years, from October 2016 until 2019, when he was released from active duty and returned to work for ABC. Alex met the five USERRA conditions, including leaving the job to serve, prior notice to the employer, honorable service, not exceeding the five-year limit, and timely application for reemployment.

[26] Please see Law Review 19052 (June 2019).

When he returned to work in October 2019, he should have resumed making employee contributions to his pension account, and ABC should have resumed matching those contributions. When he returned to work, he should have been considered fully vested, because he would have gone over the five-year vesting period if he had been continuously employed.[27]

Upon reemployment, he was entitled to start making make-up contributions to the pension account, to make up for the three years of his military-related absence from work, and he had up to five years (until October 2024), to make up the missed contributions, and ABC is required to match his make-up contributions.[28] Thus, ABC is required to make him whole for what he missed out on in pension benefits, because of his absence from work for uniformed service, except that the company is not required to make him whole for missed earnings and forfeiture distributions during the time he was away from work for service.[29]

Q: I am informed that there is a real danger that the company will file for bankruptcy. How will that affect my reemployment rights?

A: There are two kinds of bankruptcy. Under Chapter 11 of the Bankruptcy Code, the company can seek reorganization. The court could substantially reduce some of the company's financial obligations, including its pension obligations, and try to make it possible for the company to survive, perhaps on a reduced scale. In that situation, you may have the opportunity to return to work for the company, but you

[27] 38 U.S.C. § 4318(a)(2)(B).
[28] 38 U.S.C. § 4318(b)(2).
[29] 38 U.S.C. § 4318(b)(1).

should expect that your rate of compensation will be less and some of the company's pension obligations may be discharged in bankruptcy.

The other kind of bankruptcy is Chapter 7, *liquidation.* Under Chapter 7, the company ceases to operate, and the company's assets are sold to pay off the creditors, usually only pennies on the dollar. If your employer is no longer a going concern, your claim for reemployment is moot. You cannot return to work for a dead company, and you cannot get money by beating a dead horse.

Q: Let us assume that the company ceases to exist as a going concern. What happens to my pension plan?

A: That depends upon whether your pension plan is a defined contribution plan or a defined benefit plan. In this scenario, you are much better off if it is a defined contribution plan. In a defined contribution plan, the pension account in your name belongs to you, and the demise of the company does not result in the end of your pension account. You need to manage and conserve that account.

An excellent law review article by James A. Wooten, published in the *Buffalo Law Review* (University of Buffalo Law School) in November 2001 has been summarized as follows:

> The Studebaker-Packard Corporation occupies a distinctive place in the lore of the Employee Retirement Income Security Act of 1974. No single event is more closely associated with ERISA than the shutdown of the Studebaker plant in South Bend, Indiana. Soon after the plant closed in December 1963, Studebaker terminated the retirement plan for hourly workers, and the plan

> defaulted on its obligations. The plight of Studebaker employees quickly emerged as a symbol of the need for pension reform. This article examines the history of the Studebaker-Packard Corporation to understand why and how the shutdown came to play a role in the political history of ERISA. Briefly, the shutdown played an important role in pension reform because the United Auto Workers union was prepared to take advantage of the political opportunity the shutdown created. By the time the plant closed, the UAW was well aware that "default risk" - the risk that a pension plan will terminate without enough funds to meet its obligations - threatened union members. Studebaker-Packard had terminated the retirement plan for employees of the former Packard Motor Car Company in 1958. Packard workers got even less than their counterparts at Studebaker would receive in 1964. The Packard termination convinced UAW president Walter Reuther that the union needed to protect its members from default risk. In the early 1960s, the UAW devised a remedy - a proposal for "pension reinsurance" - that is a precursor of the termination-insurance program created by Title IV of ERISA. The Studebaker shutdown gave the union an opportunity to move default risk and termination insurance onto the legislative agenda. The success of this effort in agenda-setting indelibly linked Studebaker to the cause of pension reform.[30]

The Studebaker-Packard bankruptcy and other major corporate bankruptcies led Congress to enact the Employee Retirement Income Security Act of 1974 (ERISA). The Department of Labor (DOL) website describes ERISA as follows:

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[30] *See* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=290812.

> The Employee Retirement Income Security Act of 1974 (ERISA) is a federal law that sets minimum standards for most voluntarily established retirement and health plans in private industry to provide protection for individuals in these plans.
>
> ERISA requires plans to provide participants with plan information including important information about plan features and funding; sets minimum standards for participation, vesting, benefit accrual and funding; provides fiduciary responsibilities for those who manage and control plan assets; requires plans to establish a grievance and appeals process for participants to get benefits from their plans; gives participants the right to sue for benefits and breaches of fiduciary duty; and, if a defined benefit plan is terminated, guarantees payment of certain benefits through a federally chartered corporation, known as the Pension Benefit Guaranty Corporation (PBGC).
>
> In general, ERISA does not cover plans established or maintained by governmental entities, churches for their employees, or plans which are maintained solely to comply with applicable workers compensation, unemployment or disability laws. ERISA also does not cover plans maintained outside the United States primarily for the benefit of nonresident aliens or unfunded excess benefit plans.[31]

On its website, the PBGC describes itself as follows:

> The Pension Benefit Guaranty Corporation is a United States federally chartered corporation created by the Employee Retirement Income Security Act of 1974 to encourage the continuation and maintenance of voluntary private defined benefit pension plans, provide timely and uninterrupted payment of

[31] *See* https://www.dol.gov/general/topic/retirement/erisa.

> pension benefits, and keep pension insurance premiums at the lowest level necessary to carry out its operations. Subject to other statutory limitations, PBGC's single-employer insurance program pays pension benefits up to the maximum guaranteed benefit set by law to participants who retire at 65. The benefits payable to insured retirees who start their benefits at ages other than 65 or elect survivor coverage are adjusted to be equivalent in value. The maximum monthly guarantee for the multiemployer program is far lower and more complicated.[32]

In May 2018 *Forbes* reported:

> Chances the union pension guarantee program covering 10 million participants will run out of money by 2025 have risen to over 90%, the Pension Benefit Guaranty Corporation warned today in its annual report.
>
> At the same time, the agency said its single employer program covering about 28 million participants continues to improve and is likely to emerge from deficit sooner than previously anticipated.
>
> "Recent increases in asset returns and decreases in expected future claims increase the likelihood that the (single employer) program will reach net surplus a few years earlier than previously projected," the PBGC forecast.
>
> The PBGC said the likelihood the multi-employer insurance program covering millions of union workers primarily in transportation, mining, construction and hospitality will remain solvent after 2026 has declined to 1% as the health of troubled plans has worsened.

[32] *See* https://www.pbgc.gov/.

> It estimated about 130 multi-employer plans covering 1.3 million people will run out of money over the next 20 years.
>
> About one quarter of all 1,400 multiemployer union pension plans are considered in "critical" status and will be unable to meet minimum funding requirements or remain solvent over the long term.[33]

In the past, Congress has bailed out bankrupt government sponsored enterprises, honoring the "implicit" federal guarantee standing behind those enterprises. Will Congress bail out the PBGC? Is such a bailout even possible at a time when the spiraling national debt exceeds $33 *trillion?* To paraphrase the Reverend Dr. Martin Luther King, Jr.: "I have a nightmare."

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[33] *See https://www.bing.com/search?q=is+the+pbgc+solvent&form=EDGSPH&mkt=en-us&httpsmsn=1&msnews=1&rec_search=1&plvar=0&refig=a8a7f58853dd4b83b7c38a70e8169b9d&sp=1&qs=HS&sk=PRES1&sc=8-0&cvid=a8a7f58853dd4b83b7c38a70e8169b9d&cc=US&setlang=en-US.*

the Army Reserve (176,171 members), and the Army National Guard (329,705 members).[34]

ROA is more than a century old—on 10/2/1922 a group of veterans of "The Great War," as World War I was then known, founded our organization at a meeting in Washington's historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing, who had commanded American troops in the recently concluded "Great War." 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 more than a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Through these articles, and by other means, including amicus curiae ("friend of the court") briefs that we file in the Supreme Court and other courts, we advocate for the rights and interests of service members and educate service members, military spouses, attorneys, judges, employers, Department of Labor (DOL) investigators, Employer Support of the Guard and Reserve (ESGR) volunteers, federal and state legislators and staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, 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.

[34] *See* https://crsreports.congress.gov/product/pdf/IF/IF10540/. These are the authorized figures as of 9/30/2022.

If you are now serving or have ever served in any one of our nation's eight[35] uniformed services, you are eligible for membership in ROA, and a one-year membership only costs $20 or $450 for a life membership. 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 https://www.roa.org/page/memberoptions. 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 Organization of America
1 Constitution Ave. NE
Washington, DC 20002[36]

[35] Congress recently established the United States Space Force as the eighth uniformed service.
[36] You can also contribute on-line at www.roa.org.