Litigating Claims Under The Uniformed Services Employment And Reemployment Rights Act

Adam Augustine Carter, R. Scott Oswald & Jason M. Zuckerman[1]

I. Introduction

The Uniformed Services Employment and Reemployment Rights Act (USERRA), codified at 38 U.S.C. §§ 4301 to 4335, is a federal law that provides reemployment rights to returning members of the uniformed services. USERRA differs from other laws prohibiting discrimination in employment in the breadth and potency of protections it offers, both in mandating reemployment and in prohibiting discrimination and retaliation. This article provides an overview of the expansive protections and remedies available under USERRA, and offers strategies to effectively litigate USERRA claims.

II. Who is Covered?

USERRA is expansive in its coverage. With limited exceptions, "employer" is defined as any person, institution, organization, or other entity that pays a salary or wages for work performed or that has control over employment opportunities, including:

1. a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities;
2. the Federal Government;
3. a State;
4. any successor in interest to a person, institution, organization, or other entity referred to in § 4303; and
5. a person, institution, organization, or other entity that has denied initial employment in violation of § 4311.

38 U.S.C. § 4303(4)(A); see also *Brandsasse v. City of Suffolk, Va.*, 72 F. Supp. 2d 608 (E.D. Va. 1999) (both the city and its director of personnel were subject to liability as "employers"); *Jones v. Wolf Camera, Inc.*, 1997 WL 22678 (N.D. Tex. 1997) (for the purpose of a Rule 12(b)(6) motion, plaintiff's supervisor could not be eliminated as an "employer" under the act).

The statute defines "employee" as "any person employed by an employer" regardless of the number of employees. § 4303(3). For purposes of the statute's retaliation provisions, however, coverage extends to anyone vindicating a protected right, regardless of status with respect to the uniformed services. § 4311(b)(4).

III. Types Of USERRA Claims

Under USERRA an employee can advance claims against his or her employer for:

1. failure to reemploy (§ 4312);
2. premature termination (§ 4316); and
3. discrimination in the denial of an entitled right or benefit, or retaliation for exercising a right or engaging in an activity protected under the Act, where the employee's uniformed service is a motivating factor in the employer's adverse action (§ 4311).

A. The Right To Reemployment

Persons who are absent from a job to serve in the uniformed services are entitled to specific reemployment rights. See *Serricchio v. Wachovia Sec.*, LLC, 606 F. Supp. 2d 256 (D. Conn. 2009) (recognizing a USERRA claim where the Bank failed to promptly reinstate a returning reservist to his former position despite knowledge of its obligation to do so under USERRA); *Petty v. Metro. Gov't of Nashville-Davidson County*, 538 F.3d 431 (6th Cir. 2008) (police department violated USERRA when it delayed reemployment of a returning employee on the grounds that he did not adhere to the department's return–to–work process). These rights are subject to certain qualifications, however, regarding cumulative length of absence and proper notice. The right to reemployment is also subject

to certain employer affirmative defenses, i.e., where reemployment is unreasonable, impossible, or creates an undue hardship. See § 4312.

There are three key aspects of the right to reemployment:

1. *The "escalator principle."* Under § 4316(a), the returning service member is entitled to the seniority and other rights and benefits that the employee had on the date of the commencement of service in the uniformed services plus any additional seniority, rights and benefits that such employee would have attained if the employee had remained continuously employed.

2. *Employee deemed on a leave of absence*. When an employee is absent from employment because of military service, an employer must treat such absence as unpaid leave or a leave of absence. See § 4316(b). If the service member is a federal employee, the Federal Government must approve the employee's leave request where the military determines that it cannot reschedule or cancel the duty assignment. See 5 C.F.R. § 353.203; see also *Moravec v. Office of Pers. Mgmt.*, 393 F.3d 1263 (Fed. Cir. 2004) (finding that an employee's intention to pursue a career in the military at the time he left his position in the National Guard precluded him from receiving benefits under USERRA).

3. *Priority of positions to which a returning employee is entitled.* Section 4313 prescribes the priority order of the position to which an employee returning from a period of uniformed service is entitled. For example, an employee whose period of service in the uniformed services was 91 days or less must be reemployed:

> (A) in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, the duties of which the person is qualified to perform; or
>
> (B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, only if the person is not qualified to perform the duties of the position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person. § 4313(a)(1).

An employer may not refuse to reemploy a returning service member on the basis of the timing, frequency, and duration of the employee's military training or service, so long as the service does not exceed five years and the employee provides notice of such service to the employer. § 4312. The Fifth Circuit reiterated this principle in *Rogers v. City of San Antonio*, 392 F.3d 758, 770–71 (5th Cir. 2004), when it held that the reemployment rights under "§ 4316(b)(1) [are] fully applicable to reservists' short absences from civilian employment for weekend drills or two week annual training." See also *Gordon v. Wawa, Inc.*, 388 F.3d 78, 81 (3d Cir. 2004) (construing "service in the uniformed services" as applicable to a reservist's "weekend Reserve duties").

An employer is required to make reasonable efforts to qualify the employee for the entitled position and to reasonably accommodate service-related or aggravated disabilities. See § 4313(a)(1), (a)(2)(b), (a)(3)(a). Employers are not, however, required to reemploy a person if:

> (A) the reemployment is impossible or unreasonable due to the employer's changed circumstances;
>
> (B) the reemployment would impose an undue hardship on the employer, or would require the creation of a useless job; or
>
> (C) 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. § 4312(d)(1); see also *Wrigglesworth v. Brumbaugh*, 121 F. Supp. 2d 1126, 1136 (W.D. Mich. 2000) (the exception under § 4312(d)(1)(A) applies only "where reinstatement would require creation of a useless job or where there has been a reduction in the work force that reasonably would have included the veteran."); *McLain v. City of Somerville*, 424 F. Supp. 2d 329, 336 (D. Mass. 2006) (court held that employer failed to prove that it had no continuing need for police patrol officers when it refused to reinstate reservist).

B. Premature Termination

Section 4316(c) specifically protects returning service members against discharge by providing for a period of time after reemployment during which they cannot be discharged

except for "cause." See § 4316(c). The employer bears the burden of coming forward with cause sufficient to justify the discharge. See *Carter v. United States*, 407 F.2d 1238, 1242 (D.C. Cir. 1968) (the law giving a returning veteran a right to be free of discharge except for "cause" puts on the employer the burden of coming forward with a cause sufficient to justify the discharge). Moreover, an employer must demonstrate that the employee had notice that certain conduct would be a ground for discharge. *Id.*

According to one court, "cause" under § 4316(c) must be liberally construed and strictly enforced for the benefit of service members. See *Johnson v. Michigan Claim Serv., Inc.*, 471 F. Supp. 2d 967 (D. Minn. 2007) (question of whether employee's discharge was "for cause" for purposes of USERRA was raised where employee was terminated for refusing to sign a non–compete agreement). At least one court has allowed a § 4316(c) claim to proceed under a theory of constructive discharge during the protected period. See *Serricchio*, 556 F. Supp. 2d 99 (recognizing a theory of "constructive discharge" to satisfy § 4316(c), where employer offered employee reemployment conditions "so onerous that [the employee] had no choice but to leave"). In *Serricchio*, for example, the court found that the employer violated § 4316(c) where the offer of reemployment was "so intolerable that a reasonable person in the employee's position would have felt compelled to resign." 556 F. Supp at 109. Here, upon his return a reservist found his financially comfortable position had become a job in which he had no book of business and had to begin anew by cold–calling prospective customers in order to pay off the $2,000 monthly advance which Wachovia offered him as compensation.

C. Prohibitions Against Discrimination and Retaliation

USERRA contains a broad prohibition against discrimination. Under § 4311(a), an employer is prohibited from denying a person initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of... membership, application for membership, performance of service, application for service, or obligation [to perform military service]. 38 U.S.C. § 4311(a).

The law defines "benefit of employment" expansively to include: any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment. § 4303(2); see also § 4311(a); *Koehler v. PepsiAmericas*, 2006 WL 2035650 (S.D. Ohio July 18, 2006) (recognizing that the employee had been denied a "benefit of employment" when his employer withdrew an automatic deposit equal to the pay differential between his salary and military pay while on reserve duty); *Petersen v. Dep't of Interior*, 71 M.S.P.R. 227, 236 (1996) (observing that USERRA's "benefit of employment" should be expansively interpreted).

Thus, an employer violates USERRA "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 [decision]" to deny the person any benefit of employment to which the person is entitled. § 4311(c)(1).

Similar to other antidiscrimination laws, § 4311(b) explicitly prohibits reprisal for exercising a protected right or taking any action to vindicate such a right. Thus, an employer cannot retaliate against an employee for:

- assisting;
- testifying; or
- participating in a proceeding or investigation under USERRA. § 4311(c)(2).

1. *Burden of Proof for § 4312 and § 4316 Claims.*
   Under USERRA §§ 4312 and 4316, the employer has the burden of persuasion. Once the employee demonstrates that her membership or obligation to perform service in the uniformed services was a motivating factor in the employer's decision not to reemploy her (§ 4312) or to prematurely terminate her (§ 4316), the employer must prove that it did not violate USERRA, i.e., that it would have made the same decision regardless of the employee's relationship to the uniformed services. See *McLain*,

424 F. Supp. 2d at 336. In other words, if the employee presents evidence that his or her military service was a "motivating factor" in the employer's failure to hire her, or the employer's decision to discharge her, the burden shifts to the employer to demonstrate that the employee would not have been hired, or would have been fired, even if the employee had not taken leave to serve in the uniformed services. An employer that cannot meet its burden of persuasion will be strictly liable under USERRA. *Francis v. Booz, Allen, & Hamilton, Inc.*, 452 F.3d 299, 304 (4th Cir. 2006).

Because § 4312 provides an unqualified right to reemployment, an employee seeking relief under this section need not meet the additional burden of proof requirements for discrimination cases brought under § 4311, i.e., the employee need not prove that the employer intended to violate USERRA by refusing reemployment. *Id.*; see also *Wrigglesworth*, 121 F. Supp. 2d at 1132 (holding that § 4312 creates an entitlement of reemployment that does not require proof of discrimination); 20 C.F.R. § 1002.33 (2006). ("The employee is not required to prove that the employer discriminated against him or her because of the employee's uniformed service in order to be eligible for reemployment.")

2. *Burden of Proof for § 4311 Claims.*

Under § 4311, the burden of proof remains largely with the employer. Unlike many other antidiscrimination statutes, the *McDonnell Douglas* burden–shifting regime does not apply to a § 4311 claim. Instead, USERRA adopts the burden–shifting scheme applicable to cases under the National Labor Relations Act, i.e., a USERRA plaintiff must prove that her military service was a "substantial or motivating factor" in the adverse employment action. *Sheehan v. Dep't of Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001). The employee need not prove that her protected status was the sole reason for the adverse employment action. See *Kelley v. Maine Eye Care Assocs., P.A.*, 37 F. Supp. 2d 47, 54 (D. Me. 1999). An employer can avoid liability by demonstrating that the adverse employment action would have been taken in the absence of the employee's military status. 38 U.S.C. § 4311(c)(1); *Hill v. Michelin N. Am., Inc.*, 252 F.3d 307, 312 (4th Cir. 2001).

IV. Litigating USERRA Claims

A. Burden Of Proof

Unlike other antidiscrimination statutes, the employer's burden in rebutting a *prima facie* case of discrimination or retaliation is both a burden of production and persuasion. See *Sutherland v. SOS Intern., Ltd.*, 541 F. Supp. 2d 787 (E.D. Va. 2008) (summary judgment in favor of employer was precluded where court found a genuine issue of material fact as to whether the decision to terminate Army reservist for allegedly unsatisfactory performance was made only after employer realized the extent of the employee's reservist obligations).

In determining whether the employee has proven that her protected status was part of the motivation for the agency's conduct, courts employ a totality of the circumstances test. See *Sheehan*, 240 F.3d at 1014. Courts will likely infer motive from any of the following:

1. Where there is temporal proximity between the employee's military activity and the adverse employment action;
2. Where there are inconsistencies between the proffered reason for the employer's adverse action and other actions of the employer;[2]
3. Where an employer expresses hostility towards service members protected under the statute; and
4. Where there is disparate treatment of certain employees compared to other employees with similar work records or offenses. *Id.* (citing *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995)).

B. Pleading Strategies

1. *To the extent possible, cast the complaint as a § 4312 denial of reemployment or a § 4316 premature termination.*

Doing so invokes a strict liability analysis, in which the employer's motivation for the adverse action is irrelevant. By contrast, discrimination under § 4311 requires an initial showing that the employee's uniformed service was a motivating factor in the adverse action. This burden should be avoided if possible.

2. *Consider demanding a jury trial.*

Plaintiffs have a right to a jury trial under USERRA. See *Duarte v. Agilent Tech. Inc.*, 366 F. Supp. 2d 1036 (D. Colo. 2005) (court held that a reservist was

entitled to present his USERRA claim to a jury even though USERRA does not expressly provide for such a right); see also *Spratt v. Guardian Auto. Prod.*, 997 F. Supp. 1138 (N.D. Ind. 1998) (denying employer's motion to strike demand for jury trial on the ground that USERRA contains a liquidated damages provision). Thus, where doing so would be beneficial, a USERRA plaintiff should demand a jury trial.

3. *Consider naming multiple defendants including the offending supervisor.*

Given the expansive definition of "employer," courts will likely permit USERRA claims to proceed against an individual supervisor. See, e.g., *Brandsasse*, 72 F. Supp. 2d at 613 (denying motion to dismiss and holding that "from the face of the complaint, and the facts as pleaded... the allegations in the complaint are actionable against all three named defendants," i.e., the city of Suffolk, Va., the city's Director of Personnel and its Chief of Police).

4. *Consider the escalator principle and ensure that the employee is returned to the position she would have had if her term of constant employment had not been interrupted.*

The escalator principle applies to pay, benefits, seniority, duties, job location, schedule or any other benefit of employment. Thus, counsel should examine the employee's current job duties, responsibilities, benefits, and schedule and compare these aspects of the position to the position that the employee would have occupied had she not taken leave to serve in the military.

5. *Consider pleading facts that demonstrate status in the uniformed services was "a motivating factor" in the adverse employment action.*

"To establish a certain factor as a motivating factor, a claimant need not show that it was the sole cause of the employment action, but rather that it is one of the factors that 'a truthful employer would list if asked for the reasons for its decision.'" *Brandsasse*, 72 F. Supp. 2d at 617 (citing *Kelley*, 37 F. Supp. 2d at 54).

6. *Consider pleading facts demonstrating employee compliance with the statute's requirements as to (a) employer notification of impending service-related absence; (b) notification of return to work after such absence; and (c) cumulative time of such absence.*

As discussed above, at least one court has ruled that demonstrating employee compliance with these requirements creates an "unqualified right" to reemployment, subject only to affirmative employer defenses. *Jordan v. Air Prods. & Chems., Inc.*, 225 F. Supp. 2d 1206, 1208 (C.D. Cal. 2002).

7. *With respect to premature termination subsequent to reemployment, consider pleading facts demonstrating that the termination did not conform to USERRA's for–cause standard.*

Show that the employer either did not have or did not adequately disseminate rules of conduct that would justify a for–cause termination. If the employer did in fact have a well–published code of conduct in place at the time it terminated the employee within the cause period, show how the employee's conduct did not violate any of the employer's conduct rules. Carefully calculate the for–cause period following reemployment; a termination not for–cause within this period is dispositive.

Should termination occur outside the protected period, consider characterizing the termination as retaliatory. An adverse employment action closely following a protected period suggests reprisal. See *Pittman v. Dep't of Justice*, 486 F.3d 1276 (Fed. Cir. 2007); *Johnson*, 471 F. Supp. 2d 967 (court held that "for cause" must be construed liberally and strictly enforced for the benefit of those who left private life to serve their country); see also *Ferguson v. Walker*, 397 F. Supp. 2d 964 (C.D. Ill. 2005) (court recognized discharge "for cause" where employer discharged police officer due to budgetary constraints); *Duarte*, 366 F. Supp. 2d at 1039 (court held that the employer failed to meet its burden of establishing "for cause" termination where employee was terminated four months after his reemployment, without fair opportunity to resume his previous duties).

C. Employer Affirmative Defenses

USERRA provides three statutory defenses by which an employer can refuse to reemploy a person returning from military leave: (1) the impossibility or unreasonableness of reemployment; (2) undue hardship; and (3) the brevity or nonrecurrent period of employment.

1. *Impossibility or unreasonableness of reemployment.*

An employer is not required to reemploy an otherwise eligible returning service member if the employer's "circumstances have so changed as to make such reemployment impossible or unreasonable." § 4312(d)(1)(A). This exception, however, has been narrowly construed. The relevant test is whether the position would be useless to recreate. An employer's defense that "mere low work load, layoffs, and a hiring freeze" precluded it from reinstating a returning service member was deemed insufficient to prevail on the impossibility of unreasonableness of reemployment defense. See *Dunlap v. Grupo Antolin Kentucky, Inc.*, 2007 WL 855335, at 3 (W.D. Ky. Mar. 14, 2007). As one recent decision put it, "The statutory exemption excusing a refusal to re–employ a veteran where reinstatement would be unreasonable is a very limited exception to be applied only where reinstatement would require creation of a useless job or where there has been a reduction in the work force that would reasonably have included the veteran." *Lapine v. Town of Wellesley*, 167 F. Supp. 2d 132, 137-39 (D. Mass. 2001) (quoting *Davis v. Halifax County Sch. Sys.*, 508 F. Supp. 966, 968 (E.D.N.C. 1981) (further cites omitted).

Thus, a court will likely not render reemployment impossible or unreasonable merely because another employee occupies the returning service member's position. See 20 C.F.R. § 1002.139(a); see also *Murphree v. Commc'n Tech., Inc.*, 460 F. Supp. 2d 702 (E.D. La. 2006) (evidence that contractor hired a replacement employee on a permanent basis after reservist left was insufficient to demonstrate the impossibility or unreasonableness of re–hiring the reservist).

Potential pre–emptive pleading strategies: Plead facts tending to show that the service member's job class has not been eliminated, or that the employer has hired others into the position. Also consider pleading facts showing that the service member's duties were absorbed by other employees, supporting a finding that the service member's position is not "useless."

2. *Undue hardship.*

In the case of a person entitled to reemployment under subsections (a)(3), (a)(4), or (b)(2)(B) of § 4313,[3] an employer need not re–employ a returning service member if such employment would impose an undue hardship on the employer. §4312(d)(1)(B). For example, an employer need not re–employ a returning employee if it can establish that assisting the individual to become qualified for the appropriate reemployment position would impose an "undue hardship" on the company. To assess whether an employer would suffer undue hardship, courts consider the nature and costs of the necessary action, the overall financial resources of the employer, and the size of the employer in terms of its employees and facilities. Thus, a court may find an undue hardship under USERRA where an employer has to hire another employee to enable the now–disabled employee to return to work, but will likely not find undue hardship where an employer has to deviate from a policy or practice in order to transfer the returning employee to another position for which the employee is qualified.

In any proceeding involving an issue of whether... any accommodation, training, or effort referred to in subsection (a)(3), (a)(4), or (b)(2)(B) of § 4313 would impose an "undue hardship" on the employer... the employer shall have the burden of proof. See § 4312(d)(2). In turn, § 4312(d)(2)(B) and the cited subsections of § 4313 contemplate employers making reasonable efforts to accommodate service–related disabilities, to train returning service members, and to make other reasonable efforts to qualify returning employees for the positions they would have had with continuous employment.

Thus, under § 4312, an employer must make reasonable efforts, including training, to qualify and/or accommodate a returning service member unless doing so would cause an "undue hardship" to the employer. The obligations are defined by the terms "reasonable efforts" and "undue hardship": "[R]easonable efforts," in the case of actions required of an employer under this chapter, means actions, including training provided by an employer, that do not place an undue hardship on the employer. § 4303(10).

"[U]ndue hardship," in the case of actions taken by an employer,

means actions requiring significant difficulty or expense, when considered in light of:
(A) the nature and cost of the action needed under this chapter;
(B) the overall financial resources of the facility or facilities involved in the provision of the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;
(C) the overall financial resources of the employer; the overall size of the business of an employer with respect to the number of its employees; the number, type, and location of its facilities; and
(D) the type of operation or operations of the employer, including the composition, structure, and functions of the work force of such employer; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer. § 4303(15).

Potential pre–emptive pleading strategies: Plead facts tending to show that the requisite training or accommodation did not occur and that neither those nor the reemployment itself would have constituted an undue hardship based on the definition's criteria.

3. *Brief, nonrecurring employment.*

An employer is not required to reemploy an otherwise eligible returning service member if the employment from which the person leaves to serve in the uniformed services is for a brief, non–recurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period. The burden of proof, however, is on the employer to show that the employment was in fact brief and non-recurrent. See § 4312(d)(2).

Potential pre–emptive pleading strategies: This is straightforward. Plead facts tending to show that there was a reasonable expectation of extended employment, bearing in mind that the burden of proof rests with the employer.

D. Surviving Dispositive Motions

1. *Statute of Limitations.*

Congress deliberately omitted a statute of limitations in the text of USERRA because it intended that none be used. In October 2008, the Veterans' Benefits Improvement Act (VBIA) was signed into law, which expressly prohibits the application of any statute of limitations to USERRA. See § 4327(b) ("there shall be no limit on the period for filing the [USERRA] complaint or claim").

2. *Failure to Comply with Employer Policy for Reinstatement.*

The failure to satisfy an employer's additional eligibility criteria for reemployment is not a valid reason to bar a USERRA claim. Indeed, USERRA prohibits an employer's adoption of any policy, plan or practice that creates additional prerequisites to a service member's statutory rights to reemployment. *Petty*, 538 F.3d 431; see also § 4302(a).

3. *Arbitration.*

USERRA's preemption provision invalidates any contractual limitations on procedural rights. Thus, contractual provisions that require an employee to submit a USERRA claim to private binding arbitration are not enforceable. See *Brelectic v. CACI, Inc.*, 413 F. Supp. 2d 1329 (N.D. Ga. 2006); *Lopez v. Dillard's Inc.*, 382 F. Supp. 2d 1245 (D. Kan. 2005) (court denied a motion to compel arbitration on the basis of USERRA's preemption provision); *Garrett v. Circuit City Stores, Inc.*, 338 F. Supp. 2d 717 (N.D. Tex. 2004).

E. Discovery Strategies

The dynamics of USERRA suggest some approaches and objectives that may be particularly fruitful. Discovery strategies may focus effectively on eliciting information that: (a) shows that the right to re–employment was violated and that the employer's affirmative defenses of changed circumstances/unreasonably and undue hardship are unavailing; (b) shows a premature termination within protected time periods and that the criteria of a "for cause" termination were not met; and (c) shows that the employee's uniformed service was a motivating factor in the adverse employment action.

1. *Written Discovery*

While the following discussion is not exhaustive, it does suggest efforts that may be opportune under USERRA.
(a) Failure to reemploy: Written discovery requests should focus on

demonstrating that the employee satisfied all of the notice requirements precedent to her unqualified right of rehire and explore an employer's defenses, including a claim that the position was eliminated. Was the entire class of jobs eliminated? Was there an actual force reduction? Or was the particular job eliminated due to employee's absence for uniformed service and the duties assigned to other employees? Has the employer continued to hire into that job class or to fulfill those duties? In addition, written discovery should pin down whether training for the purpose of qualifying actually took place and should explore efforts to qualify the employee, and the state of the employer relative to the economic, business and other statutory criteria against which the "undue burden" is judged.

(b) Premature termination: Written discovery should establish the timeline of the termination and explore the employer's "for cause" standard as well as the circumstances surrounding the employee's termination. For example, what is the employer's "for cause" standard? How was it developed? How was it disseminated to the employees? What are the objective criteria? How many other employees were terminated for engaging in similar conduct? What rationale did the employer provide to the state's unemployment insurance office for the termination of the plaintiff's employment? For example, did the employer represent to the state unemployment insurance office that the plaintiff's position was eliminated?

(c) Discrimination/retaliation: Practitioners should consider propounding interrogatories and document requests thoroughly exploring the employer's formal and informal decision making process (written and oral) to show that the employee's military status was a motivating factor in the employer's decision to deny a benefit of employment. The objective is to discover evidence of animus for military leave or evidence that the employer considered the employee's protected status when deciding to take an adverse employment action. Discovery should also elicit evidence that the employer's established decision making protocol was not followed, which can create an inference of discriminatory treatment.

2. *Depositions*

(a) Offensive—deposing the employer. Several areas stand out as perhaps particularly fruitful for 30(b)(6) exploration. Again, in each case, denying employer an essential element of his proof sets the stage for summary judgment.

i) Failure to reemploy.
Where the employer's defense rests on changed circumstances and the alleged uselessness of the employee's position, deposition questioning should focus on the decision to eliminate that position. Was it actually part of a reduction in force? Was the employer forced to discontinue a particular department or activity due to budget constraints or some other necessary conditions, e.g., did the employer lose funding for a particular research project that the returning veteran was initially hired to work on? Was an entire class of positions eliminated or did the employer just eliminate the job of the service member? What discussions took place around the decision to eliminate the employee's position and was military status or service–related absence considered in the decision?

ii) Premature termination.
Depositions should focus on the "for cause" standard, i.e., how it was developed, whether the employee's conduct met that standard, whether the standard is applied consistently, and whether the employee's military status or service–related absence played any role at all in the decision.

iii) Discrimination.
Depositions should focus on the motive of the employer and its agents in denying an entitled benefit, as well as any consideration given to the employee's service–related absence in the course of deciding to deny a benefit. All manifestations of the employer's decision making process—both formal and informal—should be explored.

iv) Retaliation.
Depositions should explore all evidence suggesting that assertion of a USERRA–protected right played a role in the decision to take any adverse action.

(b) Defensive—preparing the plaintiff.

i) Failure to reemploy.
If inadequate notice is an issue—either the need for service–related absence or the planned return to work—prepare the employee to

defend her efforts to provide the required notice and/or why such notice was "impossible or unreasonable" (e.g., under § 4312(b), § 4312(e)(1)(A)(ii), or §4312 (e)(1)(C)).

ii) Premature termination.
Prepare the plaintiff to describe or characterize her behavior in light of the employer's relevant "for cause" standard.

iii) Discrimination/retaliation.
Prepare the plaintiff to describe disparate treatment, unreasonable treatment, or other ways in which the employee was discriminated against, and to provide specific facts showing that her uniformed service was a substantial or motivating factor in the discriminatory or retaliatory treatment.

F. Jurisdiction And Venue

A USERRA claim brought against a state, local or private employer must be filed in federal court. The claim can be brought in any jurisdiction where the employer maintains a place of business. See § 4323. Actions brought against federal agencies, however, must be brought before the Merit Systems Protection Board (MSPB). § 4324. An employee who is dissatisfied with the MSPB's decision may appeal it to the Court of Appeals for the Federal Circuit. *Id.*

V. Damages

The remedies available under USERRA include lost wages and benefits caused by the employer's violation, reinstatement, attorneys' fees, and front pay where reinstatement is not a viable option. See 38 U.S.C. § 4323(d)(1)(B); *Serricchio*, 606 F. Supp. 2d at 268 (court awarded reservist $1.3 million and reinstatement); *Woodard v. New York Health & Hosp. Corp.*, 554 F. Supp. 2d 329, 354 (E.D.N.Y. 2008); *Carpenter v. Tyler Indep. Sch. Dist.*, 429 F. Supp. 2d 848 (E.D. Tex. 2006) (front pay was an appropriate remedy under USERRA given the acrimony between the parties). Where the violation is considered willful, the court may award liquidated damages or double damages. See *Serricchio*, 606 F. Supp. 2d at 265 (a prevailing USERRA plaintiff is entitled to a doubling of the back–pay award "if the court determines that the employer's failure to comply with the provisions of [USERRA] was willful.") (quoting § 4323(d)(1)(C)). In addition to these monetary remedies, the statute provides the courts with "full equity powers... to vindicate fully the rights and benefits" guaranteed by USERRA. § 4323(e).

Currently, there is no provision for punitive damages under USERRA. *Woodard*, 554 F. Supp. 2d at 354. However, there is pending legislation before Congress to provide for awards of punitive damages where an employee presents evidence that the employer acted willfully or recklessly when it violated USERRA. S.263, 111th Cong. (2009); H.R. 1474, 111th Cong. (2009).

VI. Conclusion

In sum, USERRA is a potent remedy for service members to vindicate their rights to reemployment and to protect them against discrimination and retaliation. It is critical, however, to take full advantage of the favorable burden of proof and the broad scope of reemployment rights under USERRA. ■

[1]*Adam Augustine Carter, R. Scott Oswald, and Jason M. Zuckerman are principals at the Employment Law Group law firm in Washington, DC.*

[2]*"An employee may demonstrate that an employer's proffered, non–discriminatory reasons for an adverse employment action are pretextual by revealing the 'weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions' in the employer's explanation."* Wilson v. Rubin, *104 S.W.3d 39, 50-51 (Tenn. Ct. App. 2002) (quoting* Garrett v. Hewlett Packard Co., *305 F.3d 1210, 1217 (10th Cir. 2002)).*

[3]*These subsections concern returning employees (with and without service–related disabilities) experiencing difficulties becoming qualified (through employer training) for positions of advancement to which they are entitled.*

Adam A. Carter
Attorney at Law
The Employment Law Group, PC
888 17th Street, NW
Suite 1250
Washington, DC 20006
phone - (202) 331-2883
fax - (202) 261-2835
acarter@employmentlawgroup.com
www.employmentlawgroup.com

R. Scott Oswald
Attorney at Law
The Employment Law Group, PC
888 17th Street, NW
Suite 900
Washington, DC 20006
phone - (202) 331-2883
fax - (202) 261-2835
soswald@employmentlawgroup.com
www.employmentlawgroup.com

Jason Mark Zuckerman
Attorney at Law
The Employment Law Group, PC
888 17th Street, NW
Suite 900
Washington, DC 20006
phone - (202) 331-2883
fax - (202) 261-2835
jzuckerman@employmentlawgroup.com
www.employmentlawgroup.com