

# When Johnny & Jenny come marching home again (the USERRA) HURRAH!

By Glenn R. Gaffney, Glendale Heights

The uniformed services employment and reemployment rights act of 1994 (USERRA),<sup>iv</sup> strengthens and expands the employment and re-employment rights of all uniformed service members.

Re-employment act rights extend to persons who have been absent from employment because of “service in uniformed services” which includes active duty, training for active duty, full time National Guard duty, absence for examination to determine fitness for duty and even “funeral honors” performed by National Guard or reserve members – the reality of war and military service is chillingly apparent in this act<sup>v</sup>. An employee’s attendance at “National Guard Event” without guard orders was not deemed an absence “necessitated by reasons of service in an uniformed services” and thus the employee forfeited reemployment rights under the Act.<sup>vi</sup>

The term “uniformed services” is broad including all of the usual military forces as well as the Coast Guard, Reserves, National Guard and “commission corps of the public health service” as well as “any other categorical persons designated by the President in time of war or emergency”.<sup>vii</sup>

The Act requires that the employee must provide the employer with advanced notice of military service. Notice may be written or oral provided by the employee or an officer of the military absent “military necessity”.<sup>viii</sup> The Act does not apply to pre-service positions that are “brief or non-recurrent”.<sup>ix</sup> Employee that signed resignation letter while on active duty with National Guard for “administrative purposes” which did not mention statutory right of reemployment was not deemed a waiver of reemployment rights pursuant to USERRA.<sup>x</sup>

The USERRA is applicable to the cumulative length of service that causes a persons absence from a position that may not exceed five years. The two-week annual training sessions and monthly weekend drills mandated for Reservists and National Guard Members are exempt from the five-year limitation.<sup>xi</sup>

A dishonorable discharge disqualifies the employee from the statute.<sup>xii</sup> The time limit within which the person must report back to work is governed by the act<sup>xiii</sup> and depends upon duration of the person’s military service. For example, if the military service was brief (1-30 days) the person must report back to the employer the beginning of the first regularly scheduled workday. If services last from 31-100 days, an application for reemployment must be submitted no later than 14 days after completion of service. Longer service is governed by a 90-day rule. The reporting or application deadlines are extended for up to 2 years for persons who are hospitalized or convalescing as a result of an injury during military service. In the event that a person does not reapply within the

required time limits, the employee will be subject to the employer's rules governing unexcused absences. <sup>xiv</sup>The Army Reserve member did not submit an application for reemployment after returning from active duty but only contacted his old supervisor who subsequently wrote to the employee that he should contact a certain human resources employee, and the employee did not do so.

The Act<sup>xv</sup> provides that an employer has the right to request an employee absent for more than 31 days provide documentation showing that the application for reemployment is timely, the person has not exceeded the 5 year limitation and his or her separation from service was not disqualified pursuant to the Act. <sup>xii</sup>

An employee whose military service lasted 90 days or less shall be "promptly reemployed" in the job the person would have held had the person remained continuously employed as long as the person is still qualified. If the person is not or cannot be qualified, the person is to be reemployed in a position that is the nearest approximation to the prior position, with full seniority.<sup>xvi</sup> If the employee has been in active service for more than 91 days, the person is to receive a position of like seniority status and pay so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer. If the employee cannot become qualified for the prior position or one of like seniority status and pay, the employee is to receive another position of lesser status and pay which most nearly approximates the prior position, with full seniority. The law provides an "escalator" principal which requires that each returning service member actually step back onto the seniority escalator at the point the person would have occupied had the person remained continuously employed. For example, if the employee would have been promoted with reasonable certainty absent the military service, the employee would be entitled to that promotion upon reinstatement.

The Act provides a scheme for persons with disabilities incurred or aggravated with military service.<sup>xvii</sup> There is also a provision for conflicting reemployment claims.<sup>xviii</sup> Reemployment may be excused if the employer's circumstances have changed so much that reemployment of the person would be impossible or unreasonable. The accommodation requirement for those with service-connected disabilities may be excused for "undue hardship". Also, if prior to leaving for military service an employee knowingly provides clear written notice of an intent not to return to work after military service, the employee waives entitlement to leave of absence rights and benefits. 43 USC Sec. 4316.

Pension/Retirement benefits which are tied to seniority are given separate and detailed treatment at Sec. 4318. Although service members cannot be forced to use vacation time for military service, they must, at their request, be permitted to use any vacation time accrued before beginning military service. Sec. 4316 (d).

The Act provides for health benefit continuation for persons who are absent from work to serve in the military even when their employers are not covered by COBRA (43 USC Sec. 4317 (a) 1. An employee has the right to continue health plan coverage for up to eighteenth months and cannot be required to pay more than 102% of the full premium for the coverage. 43 USC Sec. 4317.

An employee that returns from active duty has protection from subsequent discharge. A reemployed employee may not be discharged “without cause” for one year after the date of reemployment if the person’s military service was in excess of 181 days. 43 USC § 4316 (C)(1). Those that are absent between 31-180 days have the “without cause” protection for six months. Persons who serve for 30 or fewer days are not protected by the “without cause” provision but are still subject to the Act<sup>xix</sup> protection against “discrimination and retaliation”.

Employment discrimination because of past, current or future military obligations is prohibited in hiring, promotion, reemployment, termination and benefits. Sec. 4311 (c) provides that if past, present or future connection with service is a motivating factor in an employers adverse employment action against the individual, the employer has committed a violation unless the employer can prove that it would have taken the same action regardless of the individuals connection with military service. The burden of proof shifts to the employer once a prima fascia case is established. The Act also provides a “retaliation” provision protecting anyone who files a complaint, testifies or otherwise participates in an investigation whether or not the person has performed military service. 43 USC Sec. 4311 (b).

The U.S. Secretary of Labor is empowered to issue regulations implementing the statutes which have been accorded “a measure of weight” by the courts. Reemployment assistance is provided by the Veteran’s Employment and Training Service (VETS) of the Department of Labor. VETS investigates complaints and attempts to resolve disputes. 43 USC Sec. 4321 and 4322. A person whose complaint is not successfully resolved by VETS may seek court action through the Attorney General’s office. The Attorney General may file a court action on complainant’s behalf if the action is “meritorious”. 43 USC Sec. 4323 (a) 1.

Section 4323 (a) provides for a private cause of action if a complaint is not fueled by the Attorney General on behalf of a complainant. Sec. 4323 (d) 1 (c) provides for an award of back pay which may be doubled for violations deemed to be “willful”. That definition is not statutorily defined and the ADEA definition of “knowingly or recklessly in disregard of the law” seems applicable by virtue of the laws legislative history. Attorney’s fees, expert witness fees and litigation expenses to a successful plaintiff is available “at the Court’s discretion”. 43 USC Sec. 4323 (h) 2.

An employee can also pursue a claim of “harassment” on account of prior service in the uniformed services if it is so pervasive as to alter the conditions of employment and create an abusive working environment. *Petersen v. Department Interior*, MSPB 71 MSPR 227 (1996). Discriminatory motivation under the Act may be reasonably inferred

from circumstantial evidence including proximity of time between employee's military activity and adverse employment action, inconsistencies amongst comparatives, expressions of hostility and desperate treatment. *Leisek v. Brightwood Corp.*, 278 F.3d 895 (9<sup>th</sup> Cir. 2002). The employee must make an initial showing that the military status was at least "a motivating or substantial factor" in the adverse action which then shifts the burden to the employer to prove that the action would have been taken despite the protected status. *Sheehan v. Department of Navy*, 240 F.3d 1009 (CA Fed. 2001). A *prima facie* case can be established if the employer relied upon, took into account, considered or conditioned its decision on the employee's military related absence. *Robinson v. Moore Chevrolet-Buick, Inc.*, 974 F.Supp. 571 (Tex. 1997). An employee was deemed governed by the retaliation provision of USERRA when he made internal complaints of activity he perceived as USERRA discrimination. *Gagnon v. Sprint Corp.*, 284 F.3d 839 (8<sup>th</sup> Cir. 2002).

When a neutral employment policy such as a promotional exam is administered on a particular date to all employees, it may constitute USERRA discrimination to refuse to allow Veteran's away on leave to take a make-up exam upon their return from service. *Fink v. City of New York*, 129 F.Supp.2d 511 (NY 2001). A police officer stated a viable cause of action for retaliation when he alleged that the Department's refusal to accommodate his taking of a promotional exam which conflicted with service in the Army Reserve then resulted in retaliatory and willful investigation calculated to deprive him of promotional opportunities. *Brandsasse v. City of Suffolk*, 72 F.Supp.2d 608 (VA. 1999). The evidentiary burdens set out in the Act shift the burden of persuasion, as well as production, to the employer. *Gagnon v. Sprint Corp.*, 284 F.3d 839 (8<sup>th</sup> Cir. 2002) the burden shift to the employer is applicable in both the "dual motive" case and in the "pretext" case. *Sheehan v. Department of Navy*, 240 F.3d 1009 (CA Fed. 2001).

For additional information see [www.dol.gov/vets](http://www.dol.gov/vets) and then find "The USERRA Advisor". Lets give our returning service men and women a warm welcome home.

---

<sup>iv</sup> 38 USC Chapter 43, Sections 4301-4333

<sup>v</sup> 38 USC Sec. 4303 (13)

<sup>vi</sup> *Leisek v. Brightwood Corp.*, 78 F.3d 895 (9<sup>th</sup> Cir. 2002)

<sup>vii</sup> 38 USC Sec. 4303 (16)

<sup>viii</sup> 43 USC Sec. 4312 (a) 1

<sup>ix</sup> 43 USC Sec. 4312 (d) 1 (c)

<sup>x</sup> *Wigglesworth v. Brumbaugh*, 121 F.Supp.2d 1126 (W.D. MICH. 2000)

<sup>xi</sup> 43 USC Sec. 4312 (e) 3

<sup>xii</sup> 43 USC Sec. 4304

<sup>xiii</sup> 43 USC Sec. 4312 (e)

<sup>xiv</sup> *McGuire v. United Parcel Service*, 152 F3d 673 (7<sup>th</sup> Cir. 1998)

<sup>xv</sup> 43 USC Sec. 4312 (f)

<sup>xvi</sup> 43 USC Sec. 4313 (a) 4.

<sup>xvii</sup> 43 USC Sec. 4313 (a) 3.

<sup>xviii</sup> 43 USC Sec. 4313 (b) 1 & 2 (a).

<sup>xix</sup> 43 USC Sec. 4311