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Sergeant Major Erickson's Saga Continues[1]

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1.1.1.8—USERRA applies to Federal Government
1.1.3.1—USERRA applies to voluntary service
1.2—USERRA forbids discrimination
1.3.1.1—Left job for service and gave prior notice
1.3.1.2—Character and duration of service
1.3.1.3—Timely application for reemployment
1.4—USERRA enforcement
1.7—USERRA regulations
1.8—Relationship between USERRA and other laws/policies

Erickson v. United States Postal Service, 571 F.3d 1364 (*Fed. Cir. 2009*) (Erickson I).[3]

Sergeant Major (SGM) Richard Erickson was employed by the United States Postal Service (USPS) from 1988 until he was removed from his position in March 2000. He served in the Army National Guard (ARNG) and the United States Army Reserve (USAR) during the entire time he was employed by the USPS and also before and after his USPS employment. Between 1991 and 1995, he was away from his USPS job for military service for a total of 22 months, and between 1996 and his removal in 2000 he worked at the USPS for only four days, being on military duty the rest of the time.

Although SGM Erickson had been away from his civilian job for military service for more than 60 months (five years) cumulatively, he had not exceeded the five-year limit as of the time that he was fired by the USPS in 2000. Section 4312(c) of USERRA sets forth nine exemptions from the five-year limit—kinds of service that do not count toward the limit.[4] Much of the service that SGM Erickson had performed was exempt from the five-year limit, and the part that was not exempt did not add up to five years.

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[1] This case is discussed in Law Review 0937 (October 2009), by Captain Wright, in Law Review 1128 (May 2011), by Lieutenant Colonel Tully and Matthew Estes, and in Law Review 13021 (January 2013), by Lieutenant Colonel Tully. We invite the reader's attention to www.servicemembers-lawcenter.org. You will find 995 articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. Captain Wright initiated this column in 1997, and we add new articles each week. We added 169 new articles in 2013.

[2] Military titles are shown for purposes of identification only. The views expressed in this article are the views of the authors and should not be attributed to the Department of the Navy, the Department of the Army, the Department of Defense, or the United States Government. Mathew B. Tully is a life member of ROA and is the founding partner of Tully Rinckey PLLC, a law firm located in Albany (New York), Washington (District of Columbia), and Arlington (Virginia). Tully Rinckey represents Sergeant Major Erickson in this litigation.

[3] The citation means that you can find the *Erickson I* case in Volume 571 of *Federal Reporter, Third Series,* starting on page 1364.

[4] Please see Law Review 201 (August 2005) for a definitive discussion of what counts and what does not count in exhausting the five-year limit.

In January 2000, a USPS labor relations specialist contacted SGM Erickson by telephone at the military base where he was serving on active duty and asked him whether he intended to continue serving in the military or whether he intended to return to his USPS employment. He responded, saying that he would not report back to the USPS until he completed his current tour of duty, in September 2001. In the course of the conversation, he also stated that he preferred military service to working for the USPS and might not return to USPS if the Army kept extending his orders.

The USPS then issued a notice proposing to remove SGM Erickson from his USPS position because of "excessive use of military leave." He did not respond to the notice,[5] and the USPS removed him from USPS employment on March 31, 2000. He had a clean work record with the USPS. The only "misconduct" justifying his dismissal was his absence from work to serve our nation in uniform.

SGM Erickson had not exceeded the five-year limit as of March 31, 2000, when the USPS terminated his employment, but that is beside the point. The five-year limit is an *eligibility criterion for reemployment*—serving beyond the five-year limit must not be characterized as misconduct by any employer, especially a federal agency.[6] On March 31, 2000, SGM Erickson was still on active duty, and he had not applied for reemployment. Unless and until the service member applies for reemployment, no determination should be made as to whether he or she meets the eligibility criteria, including the five-year limit.

SGM Erickson's active duty tour expired in September 2001, the same month as the terrorist attacks on our country. Because of the national emergency, and also because he was aware that the USPS had terminated his employment, he remained on active duty until December 31, 2005. For reasons that are not clear, he did not apply for reemployment with the USPS within 90 days after the date of his release from active duty, as required by 38 U.S.C. 4312(e)(1)(D).[7]

On Sept. 28, 2006 (almost nine months after he was released from active duty), SGM Erickson filed an appeal with the MSPB, alleging that the USPS violated section 4311 of USERRA when it terminated his employment on March 31, 2000 and also alleging that the MSPB violated section 4312 when it denied him reemployment after he was released from active duty on December 31, 2005 (two separate alleged violations).

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[5] He was not required to respond, and his military duties in another city precluded him from attending the USPS hearing.

[6] USERRA's first section expresses the "sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter." 38 U.S.C. 4301(b).

[7] It is likely that SGM Erickson did not apply for reemployment because he was aware that the USPS had terminated his employment in March 2000 and applying for reemployment may have seemed futile, but it certainly would have been better if he had submitted an application for reemployment. It is most unfortunate that SGM Erickson did not have the advantage of legal counsel during the 90 days following his release from active duty on December 31, 2005. He did not retain the law firm of Tully Rinckey PLLC until several months later. National Guard and Reserve service members need detailed information about USERRA so that they can protect their legal rights, and that explains why the Reserve Officers Association (ROA) established the Service Members Law Center (SMLC) on June 1, 2009. As the SMLC Director, I (Captain Wright) receive and respond to approximately 750-800 questions per month, and about half of the inquiries are about USERRA. I am at my post answering telephone calls and e-mails during regular business hours Monday-Friday and also until 10 pm Eastern Time on Mondays and Thursdays. The point of the evening availability is to enable National Guard and Reserve service members to call me from the privacy of their own homes, not from their civilian jobs.

The MSPB is a quasi-judicial federal agency consisting of three members, each of whom is appointed by the President with Senate confirmation. The MSPB decides disputes between federal agencies (as employers) and federal employees under many laws, including USERRA.

MSPB cases are initially tried before an Administrative Judge (AJ) of the MSPB, and the losing party can appeal to the MSPB itself. MSPB decisions can be appealed to the United States Court of Appeals for the Federal Circuit, a specialized federal appellate court that sits in our nation's capital. The Federal Circuit has nationwide jurisdiction, but only as to certain kinds of cases, including appeals from MSPB decisions. We invite the reader's attention to Law Review 189 (September 2005), titled "Appellate Review of MSPB Decisions on USERRA."

After a trial, the MSPB AJ held that the USPS had violated section 4311 by terminating SGM Erickson's employment in March 2000 because of his service in the uniformed services, but the AJ also held that SGM Erickson had "abandoned" his USPS career in favor of a military career. Thus, the AJ issued an initial decision denying SGM Erickson's appeal.

The AJ's decision is an example of fuzzy thinking. SGM Erickson's subjective "abandonment" of his civilian job for military service is irrelevant. If and when the recently separated veteran applies for reemployment, after release from a period of service, he or she is entitled to reemployment if he or she meets the five eligibility criteria, regardless of his or her intent about returning to work at the time of departure or during the period of service. In this case, SGM Erickson did not apply for reemployment in 2000—he remained on active duty until December 31, 2005.

The point of the reemployment statute is to maintain the service member's right to return to the civilian job as an unburned bridge. If the individual meets the eligibility criteria after release from the period of service, he or she is entitled to reemployment, regardless of what he or she may have intended or said or done before or during the period of service. *See Leonard v. United Air Lines, Inc.*, 972 F.2d 155 (7th Cir. 1992). We discuss *Leonard* and its implications in detail in Law Review 0857 (November 2008).

SGM Erickson filed a petition for review by the full MSPB. The MSPB adopted the AJ's result but not all of the reasoning. The MSPB decision did not address the question of whether SGM Erickson had "abandoned" his civilian career for a military career. Rather, the MSPB found, contrary to the AJ, that the USPS did not violate section 4311 because the March 31, 2000 termination was motivated by SGM Erickson's *absence* from work and not by his uniformed *service.*

On appeal, the Federal Circuit forcefully rejected this nonsensical distinction: "We reject that argument. An employer cannot escape liability under USERRA by claiming that it was merely discriminating against an employee on the basis of absence when that absence was for military service. … The most significant—and predictable—consequence of reserve service with respect to the employer is that the employee is absent to perform that service. To permit an employer to fire an employee because of his military absence would eviscerate the protections afforded by USERRA." *Erickson I,* 571 F.3d at 1368.

The Federal Circuit held that the USPS violated section 4311 when it terminated SGM Erickson's employment on March 31, 2000. That is a separate issue from the question of whether the USPS violated section 4312 when it denied him reemployment in 2006. It should be emphasized that there is an important distinction between firing SGM Erickson and denying him reemployment.

SGM Erickson had not exceeded the five-year limit prior to March 31, 2000, because much of the service

that he had performed was excluded from the computation of the limit. It is unclear whether he exceeded the limit sometime between March 31, 2000 and December 31, 2005, when he finally left active duty.

If SGM Erickson was beyond the five-year limit by December 31, 2005, he would not have had the right to reemployment with the USPS. Nonetheless, he could have applied to the USPS or another federal agency for *initial employment*, and he likely would have been hired. As it is, it is most unlikely that SGM Erickson will be hired by any federal agency, or even by a state or local government or private employer. The official record shows that he was fired for *misconduct* on March 31, 2000, although the misconduct consisted solely of serving in our nation's armed forces and thereby inconveniencing his civilian employer. It is *unconscionable* that the USPS and the MSPB consider military service to amount to misconduct in a federal civilian job.

In its decision, the MSPB found that SGM Erickson's cumulative military service had exceeded the five-year limit before December 31, 2005, when he finally left active duty. SGM Erickson appealed this point to the Federal Circuit, contending that his continued active duty after September 2001 should not count because it was for the purpose of mitigating the damages caused by the unlawful dismissal on March 31, 2000.

In its USERRA Regulations, the Department of Labor (DOL) has taken the position that "Service performed to mitigate economic harm where the employee's employer is in violation of its employment or reemployment obligations to him or her" is to be excluded from the computation of the individual's five-year limit. 20 C.F.R. 1002.103(b).[8] We also invite the reader's attention to Law Review 190 (September 2005), titled "Active Duty To Mitigate Damages Does Not Count Toward Five-Year Limit."

Unfortunately, the Federal Circuit found that it did not need to reach the question of whether SGM Erickson was within the five-year limit because he failed to meet one of the other eligibility criteria:

"Because Mr. Erickson completed his military service on December 31, 2005, he was required to submit an application for reemployment with the agency [USPS] by April 1, 2006, but there is no evidence that he did so. Although he suggested in a deposition that he had asked an agency official for his job back shortly after his removal, he conceded at oral argument that he had merely 'expressed a concern' that he was unlawfully removed in violation of USERRA and that he did not affirmatively request to be reemployed by the agency. Similarly, while Mr. Erickson states that he was in frequent contact with his union regarding alleged violations of his USERRA rights (both before and after his removal), he has not provided any evidence that the union sought his reemployment with the agency. An application for

[8] In footnote 1 of its most recent decision, the MSPB cited 20 C.F.R. 1002.103(b) and also the DOL comments on the USERRA Regulations, available at 70 Fed. Reg. 75257 (Dec. 19, 2005). *Erickson v. United States Postal Service,* 2013 MSPB 101, page 3, footnote 2. Section 4331 of USERRA (38 U.S.C. 4331) gives DOL the authority to promulgate regulations on the application of USERRA to state and local governments and private employers, and DOL did so on Dec. 19, 2005. Section 4331 also gives the Office of Personnel Management (OPM) the authority to promulgate regulations about the application of USERRA to federal agencies, as employers, and OPM did so on Sept. 1, 1995. The OPM USERRA Regulations are codified at 5 C.F.R. 201-211. We discuss the OPM USERRA Regulations in Law Review 0763 (Nov. 2007). The OPM Regulations are far less comprehensive than the DOL Regulations, and the OPM Regulations do not address the specific question of whether additional active duty performed for the purpose of mitigating damages caused by an earlier USERRA violation by the employer should be excluded from the computation of the five-year limit. It is most interesting that the MSPB has cited the DOL USERRA Regulations on a question not addressed by the OPM USERRA Regulations.

reemployment under section 4312 requires more than 'a mere inquiry.' *McGuire v. United Parcel Service,* 152 F.3d 673, 676 (7th Cir. 1998), and Mr. Erickson's actions were insufficient to constitute requests for reemployment under the statute."[9] *Erickson I,* 571 F.3d at 1368.[10]

Erickson v. United States Postal Service,* 636 F.3d 1353 (Fed. Cir. 2011) (*Erickson II).

In *Erickson I,* the Federal Circuit remanded the case to the MSPB, and the MSPB remanded the case to the AJ. After further hearings, the AJ held that SGM Erickson had "abandoned" his USPS career and thereby waived his USERRA rights, including his rights under section 4311, 38 U.S.C. 4311. The MSPB affirmed the AJ, and SGM Erickson appealed to the Federal Circuit. On the second appeal, the Federal Circuit found that there was insufficient evidence to support the MSPB's finding that SGM Erickson had abandoned his USPS career. *Erickson II,* 636 F.3d at 1356.[11] Accordingly, the Federal Circuit found that SGM Erickson had retained his section 4311 rights and the case was again remanded to the MSPB.

In what we believe to be an unwarranted expansion on USERRA's statutory language, the court in *Erickson II* applied the five-year cap on the cumulative duration of the period or periods of uniformed service relating to a specific employer relationship to its interpretation of the abandonment doctrine. The abandonment doctrine provides that a civilian employee who abandons his civilian job in favor of a career in the military thereby waives his or her reemployment rights. *See Woodman v. Office of Personnel Management*, 58 F.3d 1372 (Fed. Cir. 2001). Although *Woodman* was decided under USERRA's predecessor, the Veterans' Reemployment Rights Act (VRRA),[12] both statutes arguably draw the same distinction between career and noncareer service.

USERRA's introductory paragraph sets forth its purpose: "to encourage *noncareer* service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service." 38 U.S.C. 4301(a) (emphasis supplied)**.**[13] It can be argued that Congress intended for USERRA, much like the VRRA, to apply only with respect to noncareer military service. *Woodman, supra*.

In reaching its decision, the court in *Woodman* looked to legislative authority and prior treatment of noncareer status under the VRRA. The court particularly noted *Paisley v. City of Minneapolis*, wherein the court held that VRRA's reemployment rights did not extend to an employee who served in the military for over fourteen (14) years. The *Paisley* court stated:

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[9] Under 38 U.S.C. 4312(e)(1)(D), the deadline to apply for reemployment is 90 days after release from the period of service, if the period of service lasted for 181 days or more. Shorter deadlines apply after shorter periods of service.

[10] The Federal Circuit decision does not address the argument that SGM Erickson was excused from the obligation to apply for reemployment because making such an application clearly would have been futile, because the USPS had already fired SGM Erickson six years earlier. The law generally does not require a person to perform an act that would clearly be futile.

[11] We believe that all of these "career abandonment" cases are wrongly decided, and we will develop that theory in subsequent paragraphs.

[12] As is explained in Law Review 104 and other articles, Congress enacted USERRA in 1994, as a long-overdue rewrite of the VRRA, which was originally enacted in 1940.

[13] We believe that entirely too much has been made of the single word "noncareer" in 38 U.S.C. 4301(a). We believe that the word "noncareer" is simply shorthand for the five-year limit (including its nine exemptions) contained in 38 U.S.C. 4312(c).

"There is a legally significant distinction between an intent to take a true leave of absence from civilian employment, the length of which is not subject to a reasonableness standard, and an intent to make the military a career, which suggests a choice to forsake one's civilian job and any reemployment rights attached thereto."

Paisley v. City of Minneapolis, 79 F. 3d 722, 725 n. 5 (8th Cir. 1996).

Relying on the holdings of *Woodman* and its progeny, *Erickson II* analyzes SGM Erickson's noncareer status in determining whether or not SGM Erickson had abandoned his USPS career. In contrast to SGM Erickson's facts, the courts in *Moravec v. Office of Personnel Management*, 393 F.3d 1263 (Fed. Cir. 2004), and *Dowling v. Office of Personnel Management***,** 393 F.3d 1260 (Fed. Cir. 2004) found that both employees had abandoned their civilian careers and thereby waived their USERRA rights after particularly long absences from their civilian careers. Mr. Moravec and Mr. Dowling served for sixteen (16) years and twelve (12) years, respectively, on active duty before returning to federal civilian service.

The court in *Erickson II* reaffirmed that "the duration of an employee's military service is frequently relevant to the abandonment inquiry." *Erickson II*, 636 F.3d at 1357. While "there is no minimum period of military service that will trigger the assumption that the employee has abandoned their civilian career," the court needed some framework to evaluate when a service member has evidenced his or her intent to abandon the civilian career. *Erickson II,* 636 F.3d at 1357-58.

In analyzing SGM Erickson's case the court in *Erickson II* applied the five-year maximum duration criterion of section 4312 to its interpretation of the abandonment doctrine. The court held that "absent clear evidence to the contrary, employees who have not exceeded [the five-year] period do not intend to abandon their civilian positions." *Erickson II,* 636 F.3d at 1358. As SGM Erickson's cumulative period of service at the time of his USPS termination (March 2000) had not exceeded the five-year duration-of-service cap of section 4312(c), the court found it reasonable to infer that SGM Erickson did not intend to abandon his civilian career.

The courts in *Dowling***,** *Moravec*, and *Woodman* found that these individuals had abandoned their civilian careers based on periods of service of 12, 16, and 20 years. Juxtaposed against this line of cases, the Court in *Erickson II* found that absences that do not exceed USERRA's five –year limit create a presumptive bar to the abandonment inquiry. Noticeably, the court's decision in *Erickson II* declines to state how much weight should be given to a period of service that is greater than five years but less than 12 years. *Erickson II***,** 636 F.3d at 1358. We are left to wonder how the Federal Circuit and other courts will evaluate these "gray area" military absences in future cases involving the abandonment issue.

While the decision reached in *Erickson II* is favorable, the abandonment doctrine itself contradicts long-standing USERRA and VRRA case law. As set forth in the quintessential case of *Leonard v. United Air Lines*, a service member's reemployment rights cannot be waived absent a waiver that is "clear, convincing, specific, unequivocal, and not under duress." *Leonard v. United Air Lines*, 972 F.2d 155, 159 (7th Cir. 1992). Furthermore, only known rights that are already in existence may be waived***.*** ***Id*****.** In a particularly eloquent discussion of the rationale behind a reluctance to find waiver of future reemployment rights, the court stated in *Leonard***:**

"War is hell, and a call to arms is harrowing. Faced with this unavoidable disruption in their lives, inductees may make choices that are sensible when death looms, but cease to make sense when they

discover that they have survived. The reemployment rights provided by the act are necessarily directed to the survivors, and Congress intended that they be able to return to civilian life as easily as possible. Veterans should not be burdened by the choices they make when called to arms."

Leonard, 972 F.2d at 159-60.

Two years after *Leonard***,** this same principle (that an employee cannot waive USERRA's rights until they have matured) was codified by USERRA's enactment. *See generally* 20 CFR 1002.88, 1002.152. Congress clearly intended to afford service members the greatest protections possible in returning to civilian work after leaving military service, and the abandonment doctrine is inconsistent with that intent.

In contrast to the long-standing principles regarding waiver of USERRA rights, the court's dicta in *Erickson II* suggests that an employee may be able to abandon his or her civilian career, and waive his or her USERRA rights, merely upon a showing of "clear evidence" of the employee's intent to abandon his or her civilian career in favor of a career in the military. *Erickson II***,** 636 F.3d at 1358. The court's language not only contradicts *Leonard's* strict requirements for a showing of waiver but also contradicts the principle that a waiver can only be effective for "rights already in existence." *Leonard,* 972 F.2d at 159.[14]

The fact that the court in *Erickson II* does not even raise the long-standing waiver principle or cite the quintessential USERRA and VRRA case law on the matter suggests that the court failed to consider these implications in rendering its decision. Accordingly, the long-standing waiver precedent set forth in *Leonard***,** and subsequently codified, should remain binding, and "in all but the most unusual circumstances, a veteran cannot expressly or impliedly waive" his or her right to reemployment before or during the period of service. *Leonard*, 972 F.2d at 159.

In light of *Erickson II***,** a clear intent to give up your civilian job will likely result (at least in federal employment) in a finding that you have abandoned your right to reemployment. Accordingly, we advise that you should keep to yourself your intentions about returning or not returning to your pre-service civilian job after release from uniformed service. SGM Erickson did not do himself any favors when he stated explicitly (in a January 2000 telephone conversation with a USPS personnel official) that he preferred active service to USPS employment and that he would likely not return to USPS as long as the Army was willing to keep extending his active duty orders. If we had had the opportunity to advise SGM Erickson in January 2000, before he received the telephone call from the USPS personnel official, we would have advised him to be very circumspect about his statements to USPS officials.

When you give notice to your civilian employer of an impending period of voluntary or involuntary service in the uniformed services, you are not required to make any predictions about whether or not you will be returning to your civilian job after your period of service. The DOL USERRA regulations are very explicit on this point:

"Is the employee required to tell his or her civilian employer that he or she intends to seek reemployment after completing uniformed service before the employee leaves to perform service in the uniformed services?

[14] The individual's right to reemployment does not exist until he or she has been released from the period of service and has made a timely application for reemployment with the pre-service employer.

No. When the employee leaves the employment position to begin a period of service, he or she is not required to tell the civilian employer that he or she intends to seek reemployment after completing uniformed service. Even if the employee tells the employer before entering or completing uniformed service that he or she does not intend to seek reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment after completing service. The employee is not required to decide in advance of leaving the civilian employment position whether he or she will seek reemployment after completing uniformed service."

20 C.F.R. 1002.88 (bold question in original).

It should also be noted that there is a paragraph in USERRA's 1994 legislative history that is clearly contrary to the abandonment doctrine:

"The Committee [House Committee on Veterans' Affairs] wishes to stress that rights under chapter 43 [USERRA] belong to the claimant, and he or she may waive those rights, either explicitly or impliedly, through conduct. Because of the remedial purposes of chapter 43, any waiver must, however, be clear, convincing, specific, unequivocal, and not under duress. Moreover, only known rights that are already in existence may be waived. *See Leonard v. United Airlines, Inc.,* 972 F.2d 155, 159 (7th Cir. 1992)."

House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2453.

When an individual leaves a job for voluntary or involuntary uniformed service, he or she will have the right to reemployment after release from the period of service, provided that he or she meets the five USERRA eligibility criteria.[15] He or she must have left the civilian job for the purpose of performing uniformed service and must have given prior oral or written notice to the civilian employer.[16] The individual must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to that specific employer relationship.[17] The individual must have been released from the period of service without having received a disqualifying bad discharge from the military, as enumerated in section 4304, 38 U.S.C. 4304. After release from the period of uniformed service, the individual must have made a timely application for reemployment.

If Joe Smith meets these five conditions, after completing his period of service, he is entitled to reemployment in his pre-service civilian job (federal, state, local, or private sector). Joe's intent about returning at the time he left the job for service or some time during the period of service is not relevant to his right to reemployment after release from service. We advise Joe to keep his thoughts to himself about his intentions, but even if he has blurted out that he does not intend to return this does not defeat his right to reemployment. Joe is entitled to change his mind about his intent to return to his pre-service job. The abandonment doctrine is fundamentally inconsistent with these important principles.

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[15] Please see Law Review 1281 (August 2012) for a detailed discussion of the criteria.

[16] Prior notice is not required in circumstances where giving prior notice is precluded by military necessity or otherwise impossible or unreasonable. 38 U.S.C. 4312(b).

[17] Under section 4312(c), there are nine exemptions—kinds of service that do not count toward exhausting the individual's five-year limit with that employer relationship. Both of us have talked to numerous service members who have been away from civilian jobs for ten years or more without have exceeded the five-year limit, because much of their service is exempt.

We believe that the abandonment doctrine is also inconsistent with section 4312(h) of USERRA, which provides: "In any determination of a person's entitlement to protection under this chapter, the timing, frequency, and duration of the person's training or service (including voluntary service) in the uniformed services shall not be a basis for denying protection of this chapter if the service does not exceed the limitations set forth in subsection (c) [the five-year limit, including the nine exemptions] and the notice requirements established in subsection (a)(1) and the notification requirements [timely application for reemployment] established in subsection (e) are met." 38 U.S.C. 4312(h).[18]

The individual service member's right to time off from his or her civilian job is not limited by what the employer or even a court might consider "reasonable." For many years, there was a dispute about whether a "rule of reason" limited the duration of Reserve Component training, but that dispute was resolved by the Supreme Court, favorably to Reservists and National Guard members, even before USERRA was enacted in 1994.

Under the VRRA, there was a four-year limit on "active duty" with respect to any one employer, but there was no express limit on the duration of active duty for training (ADT) and inactive duty training (either of a particular period or cumulatively with that employer). For almost 20 years, there was an intense dispute and conflicting court decisions about whether there was an implied limit or a "rule of reason." The Supreme Court finally put an end to that argument in 1991 when it held that there was no limit on the duration of ADT. *See King v. St. Vincent's Hospital*, 502 U.S. 215 (1991).

USERRA eliminated the sometimes confusing distinctions among categories of military training or service found in the VRRA. All categories (active duty, ADT, inactive duty training, initial active duty training, funeral honors duty, etc.) now fit within USERRA's broad definition of "service in the uniformed services." 38 U.S.C. 4303(13). Under USERRA, the cumulative limit on service, with respect to a particular employer, is generally five years, but Reserve Component training and several other categories of service are exempt from the five-year limit. To the extent that there was any lingering doubt about the continuing existence of a "rule of reason," Congress drove a stake in it when it enacted 38 U.S.C. 4312(h), quoted above.

This section could hardly be clearer, but the intent of Congress is further buttressed by USERRA's legislative history. In its report (House Report No. 103-65, 1994 *United States Code Congressional & Administrative News*, at page 2463), the House Committee on Veterans' Affairs wrote:

"Section 4312(h) is a codification and amplification of *King v. St. Vincent's Hospital*. This new section makes clear the Committee's intent that no 'reasonableness' test be applied to determine re-employment rights and that this section prohibits consideration of timing, frequency or duration of service so long as it does not exceed the cumulative limitations under section 4312(c) and the service member has complied with the requirements under sections 4312(a) and (e).

The Committee believes, however, that instances of blatant abuse of military orders should be brought to the attention of appropriate military authorities [*see Hilliard v. New Jersey Army National Guard*, 527 F. Supp. 405, 411-412 (D. N.J. 1981)], and that voluntary efforts to work out acceptable alternatives

[18] The argument that the service member has "abandoned" his or her right to reemployment by remaining on active duty for an extended time, without having exceeded the five-year limit imposed by section 4312(c), is a *sub rosa* way to reintroduce the "reasonableness" inquiry that Congress explicitly rejected when it enacted section 4312(h).

could be attempted. However, there is no obligation on the part of the service member to rearrange or postpone already-scheduled military service nor is there any obligation to accede to an employer's desire that such service be planned for the employer's convenience. Good employer-employee relations dictate, however, that voluntary accommodations be attempted by both parties when appropriate."

In its very first case construing the VRRA, the Supreme Court stressed that the returning veteran need not decide whether to seek reemployment until after he or she has left military service, and not immediately then: "He [the returning veteran] is not pressed for a decision [about returning to the pre-service job] immediately on his discharge [from military service] but has the opportunity to make plans for the future and readjust himself to civilian life." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284 (1946). In this sentence in the majority decision, Justice William O. Douglas was no doubt referring to the 90-day deadline to apply for reemployment, after release from the period of military service.

Proceedings after *Erickson II*

We are not entirely pleased with the rationale of *Erickson II* and the precedent that it sets for future cases, but the bottom line is that the Federal Circuit reversed the MSPB a second time and remanded the case back to the MSPB for further actions consistent with the Federal Circuit decision. The MSPB in turn remanded the case to the AJ.

On December 14, 2012 the AJ issued an initial decision granting SGM Erickson's request for corrective action under USERRA. He ordered the USPS to cancel the March 2000 removal of Erickson from USPS employment, retroactive back to March 2000. He ordered the USPS to compensate SGM Erickson for the loss of wages and benefits that he suffered as a result of the USPS' unlawful March 2000 action, but he did not attempt to compute the amount, which is likely to be quite substantial. The AJ further directed that, in the event either party filed a petition for review by the MSPB itself, the USPS should provide interim relief for SGM Erickson, in accordance with 5 U.S.C. 7701(b)(2)(A).

On January 8, 2013, before filing its petition for review, the USPS filed a "Motion for Leave to File Motion to Stay Order of Interim Relief." In other words, the USPS asked the MSPB to suspend its obligation to grant interim relief. Although the MSPB did not stay the interim relief order, the USPS continued to flout the AJ's order to grant interim relief. Finally, on December 31, 2013 (more than a year after the AJ's decision), the MSPB denied the USPS' motion to stay the order to grant interim relief, but SGM Erickson is still not back at work at the USPS, and he has not received any back pay.

On January 18, 2013, ten days after asking for a stay of the order to provide emergency relief, the USPS filed a petition for the MSPB to review the AJ's decision. Instead of addressing the motion for stay separately, the MSPB reviewed both issues in a single opinion. The MSPB denied the USPS' motion for stay and affirmed the AJ's order on December 31, 2013. *Erickson v. United States Postal Service,* 2013 MSPB 101 (Merit Systems Protection Board Dec. 31, 2013).

Is Sergeant Major Erickson's saga finally over?

It certainly appears that this long case is finally nearing completion, because USERRA does not permit a federal agency (as employer) to appeal from the MSPB to the Federal Circuit. USERRA provides: "A person adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board under subsection (c) may petition the United States Court of Appeals for the Federal Circuit to review the final order or decision. Such petition and review shall be in accordance with the procedures set forth in section 7703 of title 5." 38 U.S.C. 4324(d)(1).

The doctrine of *expressio unius est exclusio alterius* applies here. That is Latin for "to express one is to exclude all the others." By expressly providing for Federal Circuit appeals by aggrieved USERRA claimants and not mentioning aggrieved federal agencies, section 4324(d)(1) clearly means that *only* the aggrieved claimant can appeal to the Federal Circuit. It should also be noted that 5 U.S.C. 7703(a)(1) permits an aggrieved federal employee or applicant for federal employment to appeal a final MSPB decision to the Federal Circuit, but section 7703 makes no provision for an appeal by a federal agency that is dissatisfied by a final order of the MSPB.

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