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Call it the Escalator Principle, not the Elevator Rule

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Q: I am a Lieutenant Colonel in the Army Reserve and a member of the Reserve Officers Association (ROA). I understand that you are the expert on the Uniformed Services Employment and Reemployment Rights Act (USERRA).

I went to work for a large company (let's call it Daddy Warbucks International or DWI) in late 2000. Ten years later, in late 2010, I was called to active duty by the Army. Originally, this was an involuntary call-up for one year, but I agreed to three voluntary extensions and was ultimately on active duty for four years exactly, from October 1, 2010 to September 30, 2014. I informed the DWI personnel office and my direct supervisor of the mobilization, in August 2010, and of each extension.

I applied for reemployment on October 15 and returned to work on November 1. My complaint is that my rate of pay now is exactly what it was in September 2010, just before I was called to active duty. I think that if I had remained continuously employed by DWI during that four-year period I would have received pay raises each year. I think that I am entitled to those pay raises in my salary upon reemployment in November 2014, under USERRA's "elevator rule."

I complained to the DWI personnel office. They told me that there is no such thing as the "elevator rule" and that pay raises at DWI, for each individual, are based on the person's performance in the preceding year. Since I was not at work between October 2010 and

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[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1,300 "Law Review" 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. The Reserve Officers Association (ROA) initiated this column in 1997, and we add new articles each week.

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September 2014, the company has nothing to evaluate so I am not entitled to any pay raise for those four years.

At DWI, each employee is rated on performance, on a scale of one to five. A one is an absolutely stellar employee, and a five is an absolute dirt bag. I was rated a three in my first two years, then a two for the next two, and a one for the last six years before I was called to active duty in 2010. I don't know exactly what ratings my DWI colleagues received, because the company strictly enforces a rule against employees sharing rating information with fellow employees, but it is my impression that the vast majority of DWI employees receive a rating of three each year. There are a handful of stellar employees and a handful of dirt bags, and it is pretty much the same folks in these categories from year to year, except that the company manages to get rid of the dirt bags within two or three years, in most cases.

I believe that during the four years that I was on active duty even the dirt bags received small pay raises, and the stellar performers received substantial pay raises. Based on my having received a rating of one in each of the last six years before I was called to active duty, and based on pay raises that my similarly ranked DWI colleagues received while I was gone, I believe that I am entitled to a substantial pay increase now, upon my reemployment at DWI. What do you think?

A: First, it would help if you would use the proper terminology. You are referring to the *escalator principle,* not the "elevator rule."

USERRA and the Service Members Law Center

I invite your attention to www.servicemembers-lawcenter.org. You will find more than "Law Review" articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. ROA initiated this column in 1997, and we add new articles each week, including 169 new articles added in 2013.

Congress enacted USERRA (Public Law 103-353) and President Clinton signed it into law on October 13, 1994. We recently celebrated the 20th anniversary of USERRA, but this law is really almost 75 years old. USERRA was a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA). The STSA is the law that led to the drafting of millions of young men (including my late father) for World War II.

I have been dealing with the VRRA and USERRA for more than 32 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 interagency task force work product that President George H.W. Bush presented to Congress, as his proposal, in February 1991. The version of USERRA that

President Clinton signed on October 13, 1994 was about 85% the same as the Webman-Wright draft.

I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), and as an attorney in private practice. In June 2009, I retired from private practice and joined ROA's full-time staff as the first Director of the Service Members Law Center (SMLC).

In 2014, as SMLC Director, I received and responded to 8,109 inquiries (675 per month on average) from service members, military family members, attorneys, employers, ESGR volunteers, DOL investigators, congressional staffers, reporters, and others. Almost 55% of the inquiries were about USERRA, and the other 45% were about everything you can think of that has something to do with military service and law.

As SMLC Director, I am here at my post at ROA headquarters, answering e-mails and telephone calls, during regular business hours Monday-Friday and until 10 pm Eastern on Mondays and Thursdays. The point of the evening availability is to encourage Reserve and National Guard personnel to call me or e-mail me from the privacy of their own homes, not from their civilian jobs. As you can appreciate, you have no reasonable expectation of privacy when you use the employer's telephone, computer, or time to complain about the employer and to seek advice and assistance in dealing with the employer. Moreover, if the employer is annoyed with you because you have been called to the colors five times since 9/11/2001 and expect to be called again, and if the employer is looking for an excuse to fire you, the last thing that you should do is to give the employer the excuse that he or she is seeking.

USERRA's eligibility criteria

As I have explained in Law Review 1281 and other articles, you must meet five conditions to have the right to reemployment under USERRA:

a. You must have left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services. It is clear that you did this.
b. You must have given the employer prior oral or written notice. It is clear that you gave such notice.
c. Your *cumulative* period or periods of uniformed service, relating to the employer relationship with respect to which you seek reemployment, must not have exceeded five years. As is explained in Law Review 201 and other articles, there are nine exemptions—kinds of service that do not count toward exhausting your five-year limit.
d. You must have been released from the period of service without having received a disqualifying bad discharge from the military. Because you are still in the Army Reserve, it is clear that you did not receive a disqualifying bad discharge.

e. After release from the period of service, you must have made a timely application for reemployment. After a period of service of 181 days or more, you have 90 days to apply for reemployment.[3] Shorter deadlines apply after shorter periods of service. Your application for reemployment was made well within the 90-day period permitted by law.

It is clear that you left your job for service and gave prior notice. It is clear that you were released from active duty without a disqualifying bad discharge and that you made a timely application for reemployment. The only remaining issue as to your eligibility is the five-year limit. Because the limit is *cumulative,* we must look back to 2000, when you began your DWI career, in determining if you have exceeded the five-year limit.

Your one-year *involuntary* call-up, from late 2010 to late 2011, is exempt from the five-year limit. Your voluntary extensions count toward the five-year limit, unless your orders contain "magic words" exempting those periods from the computation of the five-year limit. We must look to your decade of employment at DWI, from 2000 until 2010, in determining whether you performed periods of service that count toward your five-year limit and whether you have exceeded the limit with respect to DWI. For purposes of this article, we shall assume that you are well within the five-year limit and that you were entitled to reemployment in November 2014. Because you met the USERRA conditions, you were entitled to be treated, upon reemployment, *as if you had been continuously employed in the civilian job.*

The escalator principle

As I explained in Law Review 104 and other articles, Congress enacted USERRA[4] in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act, the law that led to the drafting of millions of young men (including my late father) for World War II. A year later, as part of the Service Extension Act of 1941, Congress amended the VRRA to make it apply to voluntary enlistees as well as draftees.

In late 1945 and early 1946, approximately nine million men (including my late father) and a few thousand women left active duty shortly after victory was achieved. Those who left private sector or federal jobs[5] when called to the colors (voluntarily or involuntarily) had the right to reemployment after they were discharged or released from active duty.

The Supreme Court has decided 16 cases about the VRRA and one about USERRA.[6] In the very first case, the Supreme Court enunciated the "escalator principle" when it held: "[The returning

[3] 38 U.S.C. 4312(e)(1)(D).
[4] USERRA is codified in title 38, United States Code, sections 4301 through 4335 (38 U.S.C. 4301-4335).
[5] The VRRA has applied to the Federal Government and to private employers since 1940. In 1974, Congress amended the law to make it also apply to state and local governments.
[6] Please see Category 10.1 in our Subject Index. You will find a case note about each Supreme Court case on the VRRA or USERRA.

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." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946).[7] In that same case, the Supreme Court held that the reemployment statute "is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold,* 328 U.S. at 285.

USERRA (enacted in 1994) codifies the escalator principle in section 4313(a)(2)(A) and section 4316(a). The first cited subsection provides that a person who meets the USERRA eligibility criteria is to be reemployed "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: "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 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]

In 1946, when the Supreme Court decided *Fishgold,* more than half of all private sector employees were unionized. Today, that figure is only 6.6%.[10] Unions are still strong today in some industries, such as railroads,[11] airlines, automobile-making, and steelmaking. In most of the private sector unions are rare.

When there is a union and a collective bargaining agreement (CBA) between the union and the employer, it is generally easy to determine where the returning veteran *would have been employed* if he or she had not been called to the colors. Under a typical CBA, promotions, pay raises, layoffs, and other important events are governed by seniority, which is determined by date of hire with the employer. Let us say that our returning veteran (Joe Smith) was hired on July 15, 2008. Mary Jones (hired July 14, 2008) is one step above Smith on the seniority roster, and Bob Williams (hired July 16, 2008) is one step below Smith. In determining what *would have happened* to Smith if he had not been called to the colors, we need only look to what has happened to Jones and Williams.

The more difficult but also more common question today is *how does the escalator principle apply in a non-union situation?* If the escalator principle only applies to *automatic* promotions

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[7] The citation means that you can find this case in Volume 328 of *United States Reports,* starting on page 275. The specific language quoted can be found at the bottom of page 284 and the top of page 285.
[8] 38 U.S.C. 4313(a)(2)(A) (emphasis supplied).
[9] 38 U.S.C. 4316(a) (emphasis supplied).
[10] *See* http://www.bls.gov/news.release/union2.nr0.htm.
[11] Six of the 17 Supreme Court cases on reemployment rights deal with railroads as employer-defendants.

that the returning veteran would have received with absolute certainty, that principle is of little value today, when unions, CBAs, and automatic promotions are unusual in the private sector.

In connection with the enactment of USERRA in 1993-94, the House Committee on Veterans' Affairs, chaired by the venerable Representative G.V. "Sonny" Montgomery[12] of Mississippi, held extensive hearings and wrote a thorough report (House Report No. 103-65). Most of that report is reprinted in the 1994 edition of *United States Code Congressional & Administrative News,* at pages 2449 through 2515. In two instructive paragraphs, the Committee summarizes the escalator principle as follows:

> Thus, whatever position the returning serviceperson would have attained with reasonable certainty (*see Tilton v. Missouri Pacific R. Co.,* 376 U.S. 169, 180 (1964)), but for the absence for military service, would be the position guaranteed upon return. This could be the same position or a higher, lower, or lateral (e.g., a transfer) position or even possibly layoff or severance status (*See Derepkowski v. Smith-Lee Co., Inc.,* 371 F. Supp. 1071 (E.D. Wis. 1974)), depending on what has happened to the employment situation in the servicemember's absence.
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> The Committee intends to affirm the interpretation of 'reasonable certainty' as 'a high probability.' (*see Schilz v. City of Taylor, Michigan,* 825 F.2d 944, 946 (6th Cir. 1987), which has sometimes been expressed in percentages. *See Montgomery v. Southern Electric Steel Co.,* 410 F.2d 611, 613 (5th Cir. 1969) (90 percent success of probationary employees becoming permanent meets reasonable certainty test); *Pomrening v. United Air Lines, Inc.,* 448 F.2d 609, 615 (7th Cir. 1971) (86 percent pass rate of training class meets reasonable certainty test).[13]

The First Circuit applies the escalator principle in 2013.

In a recent (2013) case, the United States Court of Appeals for the First Circuit[14] reversed the United States District Court for the District of Puerto Rico, which had read the "escalator principle" very narrowly as only applying to "automatic" promotions or pay raises that clearly would have happened, based on seniority. *Rivera-Melendez v. Pfizer Pharmaceuticals LLC,* 730 F.3d 49 (1st Cir. 2013).

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[12] Representative Montgomery was a World War II Army veteran and participated in the D-Day invasion on June 6, 1944. After the war, he remained active in the Army National Guard and rose to the rank of Major General. He was elected to the U.S. House of Representatives in 1966 and served until he retired in 1996. For more than a decade, culminating in 1994, he was the Chairman of the House Committee on Veterans' Affairs and was the "father" of many important laws for veterans and Reserve Component personnel. USERRA was the last of these laws and one of the most important. He was a life member of ROA for many years, until his death in 2006.

[13] House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2463-64.

[14] 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.

Luis A. Rivera-Melendez was employed by Pfizer Pharmaceutical, Inc. at its Puerto Rico manufacturing plant when he was called to active duty and deployed to Iraq in 2008. He was released from active duty in October 2009 and met the USERRA eligibility criteria. He returned to work for Pfizer at the same plant, but not in the same position that he had held before he was called to the colors.

Rivera-Melendez worked for Pfizer as an "Active Pharmaceutical Ingredient (API) Group Leader." In March 2009, while Rivera-Melendez was on active duty in Iraq, Pfizer eliminated the API Group Leader position and replaced it with two new positions, API Team Leader (the position of greater status and promotion opportunity) and API Service Coordinator. Those Pfizer employees who had been serving in API Group Leader positions were given the opportunity to apply for API Team Leader positions. No employees were automatically selected for API Team Leader. Selections were made based on experience and qualifications.

When Rivera-Melendez returned to work after his military service, it was as an API Service Coordinator, the lesser position. He argued that if he had not been in Iraq on active duty at the time, he would have applied for the API Team Leader and would have been selected, with reasonable certainty. After Pfizer rejected that argument, Rivera-Melendez brought this lawsuit in the United States District Court for the District of Puerto Rico.

After discovery, Magistrate Judge Lopez[15] granted Pfizer's motion for summary judgment, under Rule 56 of the Federal Rules of Civil Procedure. He held that USERRA's escalator principle *only applies to automatic promotions,* and not to discretionary promotions as in this case. In my view, he clearly erred. I am pleased to report that the First Circuit agrees with me.

Rivera-Melendez appealed to the First Circuit, and as is standard in our federal appellate courts the case was assigned to a panel of three appellate judges. In this case, the panel consisted of Judge Sandra Lynch (Chief Judge of the First Circuit, appointed by President Clinton in 1995), Judge Juan R. Torruella (appointed by President Reagan in 1984), and Senior Judge[16] Kermit Lipez (appointed by President Clinton in 1998). Judge Lipez wrote the decision, and the other two judges joined in a unanimous decision.

In a scholarly and well-written decision, Judge Lipez cited the text and legislative history of USERRA, the USERRA regulations promulgated by the Department of Labor (DOL),[17] and case

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[15] A Magistrate Judge does not have the same status and authority as a Federal District Judge, who is appointed by the President with Senate confirmation and life tenure. With the consent of all parties, a Magistrate Judge can make a binding decision. Otherwise, the Magistrate Judge must make a recommendation that the District Judge can accept, modify, or reject. When all parties have agreed to let the Magistrate Judge decide, his or her decision can be appealed to the Court of Appeals, like a District Judge's decision.

[16] After attaining sufficient age and years of service, a federal judge can take "senior status" and then continue hearing cases on a reduced calendar basis for as long as his or her health permits, and then the President can appoint a new judge, with Senate confirmation.

[17] Section 4331 of USERRA, 38 U.S.C. 4331, gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL published proposed USERRA regulations, for notice and comment, in September 2004. After considering the comments received and

law under the VRRA and USERRA. His decision includes the following most interesting paragraphs:

> 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 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 (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*)(emphasis added), and that the principle therefore had no applicability to the facts of Rivera's case.
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> 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 (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 insuring 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

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making a few minor adjustments, DOL promulgated final USERRA regulations on December 19, 2005. The regulations are published in title 20 of the Code of Federal Regulations, Part 1002 (20 C.F.R. Part 1002).

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 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 Commission*, 708 F.3d 63, 73 (1st Cir. 2013) (citing *Auer v. Robbins*, 519 U.S. 452, 461 (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.
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> 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.[18]

The Court of Appeals reversed the District Court's grant of the employer's motion for summary judgment and remanded the case back to the District Court. In LEXIS (a computerized legal research service), there is no subsequent judicial decision on this case. This most likely means that the parties settled on remand.

Proving where the escalator would have carried you

Q: Thank you for that detailed explanation of the escalator principle. Now, I have a better understanding of what I need to prove to be entitled to pay raises that I believe that I would have received during the time that I was away from work for military duty. But how do I determine and establish what pay raises I would have received? My colleagues at DWI have adamantly refused to tell me how much they are paid and what pay raises they received between October 2010 and September 2014, even when I have contacted them on weekends, away from work.

A: If you sue, you can obtain this "comparator" information via the discovery process. The problem is that it may be difficult for you to get a lawyer to represent you (especially on a contingent fee basis) if the best you can say going in is "I think that I have a good case, and we need to engage in discovery to find out."

In your situation, you may wish to consider filing a formal written USERRA complaint against DWI with the Veterans' Employment and Training Service of the United States Department of

[18] *Rivera-Melendez,* 730 F.3d at 56-58 (internal footnotes and page numbers omitted).

Labor (DOL-VETS). You can go to www.dol.gov/vets and file the Eligibility Data Form (DOL Form 1010) on-line.

After you file a complaint with DOL-VETS, that agency will conduct an investigation to determine if your complaint has merit, and DOL-VETS has subpoena power.[19] Based on the information and records that DOL-VETS obtains in its investigation, you can then decide whether it is worthwhile to request that DOL-VETS refer the case to the United States Department of Justice (DOJ) or whether you should obtain private counsel and sue or whether you should simply drop the matter.

USERRA's enforcement mechanism

Q: How does the USERRA enforcement mechanism work?

A: A person who claims that his or her employer, former employer, or prospective employer (federal, state, local, or private sector) has violated USERRA may file a formal complaint with DOL-VETS.[20] The agency "shall investigate each complaint submitted pursuant to subsection (a). If [the agency] determines as a result of the investigation that the action alleged in such complaint occurred, [the agency] shall attempt to resolve the complaint by making reasonable efforts to ensure that the person or entity named in the complaint complies with the provisions of this chapter."[21]

If the DOL-VETS investigation and its "reasonable efforts" do not result in a resolution of the complaint, the agency is required to notify the complainant of the results of the investigation and of the individual's options in pursuing the matter further.[22]

The complainant then may request (in effect demand)[23] that DOL-VETS refer the case file to DOJ, if the complaint is against a state or local government or private employer.[24] If DOJ is reasonably satisfied that the complaint has merit, it may (not required to) appear and act as attorney for the complainant in filing and litigating the lawsuit against the employer,[25] in the appropriate federal district court.[26] If DOJ decides not to represent the complainant, it must so

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[19] 38 U.S.C. 4326.
[20] 38 U.S.C. 4322(a).
[21] 38 U.S.C. 4322(d).
[22] 38 U.S.C. 4322(e).
[23] DOL-VETS is required to refer the case file to DOJ even if the agency believes the case to be without merit. In that case, the file will probably be referred with a negative recommendation. It is hard enough to get DOJ to file cases that come with positive recommendations, but it is conceivable that DOJ could file a case that comes with a negative recommendation, if there is a fundamental disagreement between DOL-VETS and DOJ about legal standards, for example.
[24] 38 U.S.C. 4323(a)(1). If the complaint is against a federal executive agency, as employer, DOL-VETS will refer the case file to the Office of Special Counsel. 38 U.S.C. 4324(a)(1).
[25] 38 U.S.C. 4323(a)(1).
[26] The suit may be brought in the United States District Court for any district where the employer maintains a place of business. 38 U.S.C. 4323(c).

notify the individual in writing, within 60 days after the DOL-VETS referral to DOJ.[27] If DOJ brings the suit, there is no cost to the complainant for legal fees, but the suit is nonetheless filed in the name of the individual complainant, not the United States of America, as plaintiff.[28]

When DOL-VETS advises the complainant of the results of the agency's investigation, the complainant can choose to retain private counsel and sue the employer in federal court, in lieu of requesting referral to DOJ.[29] If the complainant requests referral to DOJ and later receives notification of declination of representation from DOJ, the complainant can then retain private counsel and sue.[30]

Alternatively, the individual who has a USERRA complaint against a private employer or a political subdivision of a state[31] may bypass DOL-VETS altogether and retain private counsel[32] and file suit in the appropriate federal district court.[33] Unlike other federal statutes, USERRA has no "exhaustion of remedies" requirement, and the individual does not need a "right to sue letter" from a federal agency.

In most cases, I recommend that the USERRA complainant bypass DOL-VETS and find a good private lawyer and sue. Your case may be different, because you probably need the DOL-VETS investigation to help you determine if you have a worthwhile case.

USERRA forbids reprisal for filing a complaint

Q: I am afraid that if I file a complaint with DOL-VETS or if I retain private counsel and sue, the employer will reprise against me with respect to promotions or even fire me. Is that a legitimate concern?

A: Yes, the possibility of reprisal is a legitimate concern, but such reprisal would be a clear violation of section 4311 of USERRA, which provides:

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

[27] 38 U.S.C. 4323(a)(2).
[28] 38 U.S.C. 4323(a)(1). If the defendant employer is a state (not including a political subdivision of a state), the suit will be filed in the name of the United States of America, as plaintiff. 38 U.S.C. 4323(a)(1) (final sentence).
[29] 38 U.S.C. 4323(a)(3)(B).
[30] 38 U.S.C. 4323(a)(3)(C).
[31] Complaints against states, as employers, are immensely complicated by the 11th Amendment of the United States Constitution.
[32] It is also possible to file the suit oneself, acting as one's own attorney. I do not recommend that course of action. Abraham Lincoln said, "A man who represents himself has a fool for a client." And the law is so much more complex today than it was during Lincoln's time.
[33] 38 U.S.C. 4323(a)(3)(A).

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--
(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.[34]

[34] 38 U.S.C. 4311 (emphasis supplied).