

4 PJI 20 | USERRA - 38 USC §4312 - REEMPLOYMENT

In this case, [Plaintiff] makes a claim under the Uniformed Services Employment and Reemployment Rights Act, also called USERRA.

Under USERRA, employees who leave civilian jobs to serve in the military are entitled to reemployment rights and benefits upon their return from service. [Plaintiff] claims [he/she] was entitled to be reemployed by [Defendant]. [Defendant] denies [Plaintiff] was entitled to such a right.

To succeed on [his/her] claim, [Plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Plaintiff] left employment with [Defendant] to perform service in a uniformed service;

Second: [Plaintiff] gave [Defendant] advance notice of the service - unless it was impossible or unreasonable to give notice;

[Third: The cumulative length of [Plaintiff]'s absences from employment with [Defendant] due to periods of military service was not more than five years;]

Fourth: After completing the service, [Plaintiff] timely returned to [Defendant] or applied for reemployment with [Defendant]; and

Fifth: [Plaintiff] was separated from the service under honorable conditions.

[Name of Armed Forces Branch/Army National Guard/Air National Guard] is a "uniformed service."

For the first element, "service in a uniformed service" means the voluntary or involuntary performance of duty. It includes:

- (a) active duty;
- (b) active duty for training;
- (c) initial active duty for training;
- (d) inactive duty training;
- (e) full-time National-Guard duty;



(f) a person's absence from a position of employment for an examination to determine the person's fitness to perform any of these duties; and

(g) a person's absence from employment for performing funeral-honors duty.

For the second element, if you find that [Plaintiff] left employment with [Defendant] to perform service in a uniformed service, you must decide whether [Plaintiff] gave [Defendant] advance notice of [his/her] obligation [or was excused from giving notice because it was impossible or unreasonable]. The advance notice to [Defendant] of [Plaintiff]'s obligation or intention to perform military service can be written or oral, and it may be informal.

[For the third element, add up the number of days or months that [Plaintiff] was absent from his employment with [Defendant].]

For the [third/fourth] element, a "timely return" depends on how long [Plaintiff]'s period of service was.³

[Period of service less than 31 days or for a period of any length for the purpose of a fitness examination: To establish a timely return for purposes of reemployment, [Plaintiff] must prove by a preponderance of the evidence that [he/she] reported to [Defendant] no later than the start of the first full regularly scheduled work period on the first full calendar day after [he/she] completed service - except that [he/she] is not required to report before eight hours past the time needed for safe transportation from the place of service to [his/her] home. For example, if [Plaintiff] completes [his/her] service, travels home, and arrives at ten o'clock in the evening, [he/she] cannot be required to report to [Defendant] earlier than six o'clock the next morning-eight hours after arriving home.

If it is impossible or unreasonable for [Plaintiff] to report within that period through no fault of [his/her] own, [he/she] must report to the employer as soon as possible after the eight-hour period.]

[Period of service more than 30 days but less than 181 days: To establish a timely return for purposes of reemployment, [Plaintiff] must prove by a preponderance of the evidence that [he/she] applied to return to work no later than 14 days after [he/she] completed the military service. The application that [Plaintiff] submitted does not need to follow any particular format



and [he/she] may make it orally or in writing. If it is impossible or unreasonable for [Plaintiff] to apply within 14 days through no fault of [his/her] own, [he/she] must submit the application to [Defendant] not later than the next full calendar day after it becomes possible to do so.]

[Period of service more than 180 days: To establish a timely return for purposes of reemployment, [Plaintiff] must prove by a preponderance of the evidence that [he/she] applied to return to work no later than 90 days after [he/she] completed the military service. The application that [Plaintiff] submitted does not need to follow any particular format and [he/she] may make it orally or in writing.]

[Prompt reemployment: To prove that [Defendant] violated the reemployment requirement of USERRA, [Plaintiff] must prove by a preponderance of the evidence that [Defendant] failed to offer [him/her] reinstatement as soon as was practicable under the circumstances. Uncertainty or mistake about what rights USERRA grants - on the part of either [Plaintiff] or [Defendant] - does not affect USERRA's prompt reinstatement requirement. [Defendant] must prove that unusual circumstances justified or excused any delay in [Plaintiff]'s reemployment.]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:5

1. That [Plaintiff] left employment with [Defendant] to perform service in a uniformed service?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

2. [That [Plaintiff] gave [Defendant] advance notice of the service/That it was impossible or unreasonable for [Plaintiff] to give advance notice of the service]?

Answer Yes or No _____



If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

[3. That the cumulative length of [Plaintiff]'s absences from employment with [Defendant] because of military service does not exceed five years?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.]6

4. That [Plaintiff] timely returned to [Defendant] or timely applied for reemployment with [Defendant] after completing the service?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

5. That [Plaintiff] was separated from the service under honorable conditions?

Answer Yes or No _____



SO SAY WE ALL.

DATE: _____

Foreperson's Signature

((Rev. 03/2022) | *Judicial Council of the United States Eleventh Judicial Circuit*)

Annotations and Comments

USERRA provides reemployment rights to “any person whose absence from a position of employment is necessitated by service in the uniformed services.” 38 U.S.C. §4312(a). To invoke the right to reemployment, a returning service member must comply with the procedural requirements of 38 U.S.C. §4312. Rogers v. City of San Antonio, 392 F.3d 758, 762-63 (5th Cir. 2004). 38 U.S.C. §4312 does not require a showing of discriminatory intent. Coffman v. Chugach Support Servs., Inc., 411 F.3d 1231, 1235 (11th Cir. 2005).

38 U.S.C. §4313 details the manner in which an employer must reemploy a service member, including setting forth a means to determine to what position the employee must be reinstated.

A person who is reemployed under “USERRA is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.” 38 U.S.C. §4316(a).

Reemployment-position claims

When a claim is for an employer’s failure to reinstate an employee to the same position, or a to a position which is similar, the Committee recommends the insertion of the following language:

It is your duty as a jury to determine, first, the applicable reemployment position and, second, whether Defendant employed Plaintiff in that position. USERRA sets an order of priority to determine which reemployment position is appropriate. Generally speaking, an employee is entitled to the position [he/she] would have but for [his/her] service in the uniformed services, or a position of like seniority, status and pay. However, if Plaintiff is not qualified to perform the duties of such a position, then [he/she] is entitled to the position [he/she] held as of the date [his/her] leave to service in the uniformed services began.



Should you find that Plaintiff is not qualified to be employed in the position of employment in which Plaintiff would have been employed but for the interruption of employment by service in the uniformed services, and further find that Plaintiff is not qualified for [his/her] position prior to [his/her] service in the uniformed services for any reason you must then decide if Defendant failed to use reasonable efforts to enable Plaintiff to become qualified. If you make each of these findings, then Defendant has a duty to provide Plaintiff any position which is the nearest approximation to first, the position Plaintiff would have been in but for [his/her] service in the uniformed services, or second, the position Plaintiff was in prior to [his/her] service in the uniformed services.

Plaintiff bears the burden of proof to show that Defendant failed to reemploy [him/her] in an appropriate position, that is, the position which reflected with reasonable certainty the pay, benefits, seniority, and other job perquisites that Plaintiff would have attained but for [his/her] military service or a position of like seniority, status, and pay; or to [his/her] preservice position; or to a position which was the nearest approximation to any of these positions.

To determine if a position is of like seniority, status, and pay, you may examine any agreements, policies of the company, and practices at the company. In evaluating if a reemployment position is of like status, you may consider the opportunities for advancement, the general working conditions, the location of the job, the shift assignment, the rank, and the responsibility.

See 38 U.S.C. §4313.

Affirmative defenses to reemployment claims

Affirmative defenses to a reemployment claim under USERRA are statutory. See 38 U.S.C. §4312(d). When a defendant raises affirmative defenses, the following language, as appropriate, should be inserted in the charge:

Defendant has raised [an] affirmative defense[s] against Plaintiff's claims. Defendant bears the burden of proof by a preponderance of the evidence on [this] [these] defense[s].

Even if Plaintiff is otherwise eligible for reemployment benefits, Defendant is not required to reemploy [him/her] if it proves by a preponderance of the evidence that the employment position vacated by Plaintiff in order to perform service in the uniformed services was for a brief, nonrecurring period and that there was no reasonable expectation that the employment would continue indefinitely or for a significant period.



Even if Plaintiff is otherwise eligible for reemployment benefits, Defendant is not required to reemploy [him/her] if Defendant proves by a preponderance of the evidence that its circumstances had so changed as to make reemployment impossible or unreasonable. The fact that Defendant may have hired a replacement worker in Plaintiff's pre-service position does not allow Defendant to refuse to reemploy Plaintiff when [he/she] returned from military service, even if reemployment of Plaintiff might require the termination of that replacement employee.

Even if Plaintiff is otherwise eligible for reemployment benefits, Defendant was not required to reemploy [him/her] if Defendant proves by a preponderance of the evidence that assisting Plaintiff in becoming qualified for reemployment would have imposed an undue hardship.

[The term "qualified" means that Plaintiff has the ability to perform the essential tasks of the position. Plaintiff's inability to perform one or more non-essential tasks of a position does not make [him/her] unqualified. "Undue hardship" as used in this charge, means an action requiring significant difficulty or expense, when considered in light of –

- (1) The nature and cost of the action needed to comply with USERRA;
- (2) 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;
- (3) 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
- (4) 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.

See 20 C.F.R. §1002.139(c). For the statutory definitions of "undue hardship," see 38 U.S.C. §4303(15)(A)-(D).

Discharge for cause during protected period

Once a plaintiff is reemployed under USERRA, he or she is entitled not to be terminated, except for cause, for a specified time of such reemployment. See 38 U.S.C. §4316(c). Hence, where appropriate, the following charge should be inserted:



[Because Plaintiff performed more than 180 days of service in the services prior to [his/her] return to employment with Defendant, Defendant was prohibited from terminating Plaintiff, except for cause, for the first year of Plaintiff's reemployment.]

[Because Plaintiff performed more than 30 but less than 181 days of service in the services prior to [his/her] return to employment with Defendant, Defendant was prohibited from terminating Plaintiff, except for cause, for the first 180 days of Plaintiff's reemployment.]

Where, as here, Defendant alleges the discharge was based upon Plaintiff's conduct, Defendant bears the burden of proving by a preponderance of the evidence that its discharge of Plaintiff for the conduct in question was reasonable, and that Plaintiff had prior notice that the conduct in question would constitute cause for discharge. Such notice may be written, oral, or fairly implied under the circumstances.

OR

Where, as here, Defendant alleges a legitimate nondiscriminatory reason for the termination of Plaintiff, such as a layoff or elimination of Plaintiff's position, Defendant bears the burden of proving by a preponderance of the evidence that the layoff or job elimination was for a legitimate nondiscriminatory reason and that such layoff would have affected anybody in Plaintiff's position, regardless of his or her protected status or activity.

Other USERRA Considerations:

Entitlement to benefits under USERRA ends upon any discharge from uniformed service that is not an honorable discharge. 38 U.S.C. §4304.

The term "uniformed services" means the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency.

38 U.S.C. 4303(16).

USERRA provides that a court may award three kinds of relief:

- (1) an injunction requiring an employer to comply with USERRA's provisions;
- (2) compensation for lost wages or benefits suffered by reason of the employer's failure to comply with USERRA, and
- (3) liquidated damages in an amount equal to lost wages or benefits if the employer's failure to comply with USERRA was willful. 38 U.S.C. §4323(d)(1)(A)-(C).

USERRA does not allow damages for mental anguish or emotional distress, nor does it allow recovery of punitive damages. *Dees v. Hyundai Motor Mfg. Ala., LLC*,



605 F. Supp. 2d 1220, 1229 (M.D. Ala. 2009), aff'd 368 F. App'x 49 (11th Cir. 2010) (per curiam).

