



A Case Study of 38 U.S.C. Sections 4311 and 4312: *Erickson v. United States Postal Service*, 571 F. 3d 1364 (Fed. Cir. 2009)

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- 1.1.1.8—USERRA—Applicability to Federal Government
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The right to reemployment after a period of military service is derived from section 4312 of USERRA, 38 U.S.C. § 4312, while USERRA's anti-discrimination provision is found in [Section 4311](#), and provides as follows: "A person who is a member of . . . a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by any employer on the basis of that membership." [38 U.S.C. § 4311\(a\)](#). USERRA defines "benefit of employment" broadly as "any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement." [38 U.S.C. § 4303\(2\)](#). This article examines the distinction between Section 4311 and Section 4312.

An employer engages in a prohibited act under [§ 4311](#) "if the person's membership . . . 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." U.S.C. [§ 4311\(c\)\(1\)](#).

[Section 4311\(c\)](#) was enacted in response to the Supreme Court's ruling in *Monroe v. Standard Oil Co.*, 452 U.S. 549, 101 S. Ct. 2510, 69 L. Ed. 2d 226 (1981), in which the Court held that under the Veterans Reemployment Rights Act (VRRRA), allegations of discrimination in employment based upon military service could be proven only if the employee could establish that the discrimination was "motivated solely by reserve status." *Monroe*, 452 U.S. at 559. USERRA assuaged this requirement by providing that violations can be established if the individual's military service is a "motivating factor" in the discriminatory action, even if it was not the only factor. *Sheehan v. Dep't of Navy*, 240 F.3d 1009, 1012-13 (Fed. Cir. 2001). Patently, Congress "intended to lessen, but not eliminate, a veteran's obligation to show that the employer's adverse decision was related to his or her service in the armed forces." *Woodard v. N.Y. Health & Hosps. Corp.*, 554 F. Supp. 2d 329 (E.D. 2008); *Curby v. Archon*, 216 F.3d 549, 557 (6th Cir. 2000).

In contrast, Section 4312 provides for the right to reemployment so long as the following requirements are satisfied:

- The Service Member left a position of civilian employment for the purpose of performing uniformed service, voluntary or involuntary.
- The Service Member gave the employer prior oral or written notice.
- The Service Member's cumulative period or periods of uniformed service, relating to the employer relationship for which the Service Member seeks reemployment, must not have exceeded the five year statutory cap.
- The Service Member was released from the period of service without a punitive or other-than-honorable discharge.
- The Service Member made a timely application for reemployment with the pre-service employer, after

release from the period of service.

Following a period of service of more than 180 days, the Service Member must apply for reemployment within 90 days. 38 U.S.C. § 4312(e)(1)(D). Shorter deadlines apply to less significant periods of time. Requests for reemployment may be extended in the event of a Service Member's hospitalization or convalescence from injury or illness incurred (or aggravated) during the period of service. In such instances, requests for reemployment may be extended by the period of convalescence, for up to two years. 38 U.S.C. 4312(e)(2)(A).

In a recent case decided by the United States Court of Appeals for the Federal Circuit, Sergeant Major (SGM) Richard Erickson, ARNG prevailed on appeal to establish that Sections 4311 and 4312 are, in certain circumstances, properly deemed mutually exclusive violations of USERRA. In a favorable decision handed down by the United States Court of Appeals for the Federal Circuit, the *Erickson* case is noteworthy in so much as the Court found a Section 4311 violation, even though it rejected Erickson's Section 4312 argument that he was entitled to reemployment, after an untimely request for reemployment. Only future litigation will flesh out the nuances of the decision, however, *Erickson* may reasonably be read for the proposition that an Employer can violate Section 4311 of USERRA, even when a Service Member fails to meet the qualifications necessary to obtain reinstatement under Section 4312. 38 U.S.C. 4312. The distinction is particularly poignant for service members employed in a civilian capacity by a Federal government agency. The *Erickson* case is instructive on this matter.

i. 38 U.S.C. § 4311

SGM Erickson's case stemmed from a wrongful termination appeal regarding his employment with the United States Postal Service (Postal Service). During his employment, Erickson served concomitantly with the Army National Guard (ARNG) and the United States Army Reserve (USAR); he was a member of the Special Forces Group, received the Bronze Star for combat valor, and was the recipient of two Army Commendation Medals for valor and the Purple Heart for injuries sustained while performing in the National Guard. During Erickson's remarkable military service Erickson, he was also fired from his employment with the Postal Service because of his continued absences for military service. In a highly criticized decision, the Postal Service deemed Erickson's "excessive absence without foreseeable end" as grounds for a removal for cause. This mar on Erickson's otherwise pristine personnel file will have lasting implications for future employment with any governmental agency, or private employer for that matter.

The Postal Service premised its assertions on the erroneous assertion that Erickson could be removed from federal service because he exceeded the 5-year statutory cap implicit within Section 4312 and was no longer entitled to retention in employment under Section 4311. Although SGM Erickson had been away from his civilian job for military service for more than 60 months (five years) cumulatively, he did not exceed the five-year limit at the time of his termination by the Postal Service in 2000. Notably, Section 4312(c) of USERRA sets forth eight exemptions from the five-year limit. Most of the service SGM Erickson performed was exempt from the five-year limit, and that time which was not exempt fell unambiguously below the five-year cap.

The five-year limit is an *eligibility criterion* for reemployment. Notwithstanding, it stands to reason that service beyond the five-year limit, and should not constitute grounds for a misconduct charge by an employer, and least of which, by a federal government agency. On March 31, 2000, SGM Erickson was still on active duty, and had not applied for reemployment. Unless, and until, the Service Member applies for reemployment, no determination should be made concerning the eligibility criteria for reemployment, including the five-year limit.

On appeal, the Postal Service argued that Erickson was actually fired because of his extended absences and not because of military service, *per se*. In response Erickson argued, through counsel, that the Agency cannot avoid the mandates of Section 4311 by claiming their action was motivated solely by the inconvenience of Mr. Erickson's absence from employment rather than because of military service. Such an argument was attempted in *McLain*, where a city claimed it had not violated § 4311 by refusing to hire a serviceman because would be absent from employment during a particular time period. The court rejected this argument because the applicant's "unavailability [was] due to active service in the military" and hence § 4311(a) was violated under "USERRA's plain terms." *McLain*

v. City of Somerville, 424 F. Supp. 2d 329, at 333 (D. Mass. 2006). Compare *Carlson v. N.H. Dep't of Safety*, 609 F.2d 1024, 1027 n.5 (1st Cir. 1979) ["We are aware of defendants' purported distinction that the reason for plaintiff's transfer was not his military obligation per se but was the needs of the service occasioned by his two six-week absences. This semantic distinction does not change that but for plaintiff's reserve commitment he would not have been transferred"]. See also *Gillie-Harp v. Cardinal Health, Inc.*, 249 F. Supp. 2d 1113, 1120 (W.D. Wis. 2003) ["there is a difference between holding members of the armed services in high esteem and being eager to accommodate a reservist's absences from work"; even an otherwise sympathetic employer may "develop hostility towards an employee's reserve duties after experiencing the inconvenience that those duties can cause"]; *Fink v. City of N.Y.*, 129 F. Supp. 2d 511, 522 (E.D.N.Y. 2001)[holding that overt animus is not a necessary component of determining a USERRA violation, "a facially neutral policy that just happens to systematically discriminate against a particular group can be discriminatory without being intentionally discriminatory"; "it simply cannot be the case that the injury suffered is not redressable under USERRA"]

The court held that Erickson unequivocally established that his service in the military was a motivating factor in the Agency's decision to remove him when he introduced into the record the Agency's removal letter, which stated, *inter alia*, that he was being removed from federal service because of extended absence to perform military obligations. The Agency then failed to prove, or even assert, the affirmative defense that it would have taken the same action based on the other reasons alone and without regard to Erickson's protected status. The Agency instead argued that USERRA does not apply to Mr. Erickson.

The Federal Circuit held: "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."

The Federal Circuit held that the Postal Service violated section 4311 when it terminated SGM Erickson's employment on March 31, 2000.

ii. 38 U.S.C. § 4312

In a separate analysis from that espoused under Section 4311 unlawful termination aspect of the decision, the Court examined whether the USPS violated Section 4312 when it denied him reemployment in 2006, thereby drawing the obvious distinction between firing SGM Erickson and denying him reemployment.

38 U.S.C. § 4312(e)(1)(D) requires servicemembers whose absence from employment exceeds 181 days to submit an application for reemployment with the agency no later than 90 days after the completion of military service. Mr. Erickson completed military service on December 31, 2005. However, 38 U.S.C. 4312(e)(2)(A) extends the application period for an additional two years in order to permit an injured to recuperate prior to submitting a request for reemployment.

Mr. Erickson's two year time period began upon his return from service in December of 2005. Mr. Erickson argued before the Board that he was awarded a Purple Heart, which is given only to service men and women who are injured while at war. He asserted further that he suffered injuries from which he was still recovering, thereby entitling him to two years, not 90 days, to re-apply for his position. On May 18, 2007, Mr. Erickson invoked his right to re-employment by expressly requesting reemployment and citing to 38 USC 4312(e)(2)(A). Mr. Erickson unambiguously stated that he wished to be returned to the position that he would have been entitled to but for his military service during the global war on terrorism and but for the Agency's unlawful termination in 2000.

With respect to the 4312 violation the Federal Circuit found that: "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 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."

As a result, the Court of Appeals concluded that Erickson was not entitled to reemployment.

iii. Practical Considerations in the Wake of *Erickson*

The five-year limit is an *eligibility criterion* for reemployment. Notwithstanding, it stands to reason that service beyond the five-year limit, should not constitute grounds for a misconduct charge by an employer, and least of which, by a federal government agency. On March 31, 2000, SGM Erickson was still on active duty, and had not applied for reemployment. Unless, and until, the Service Member applies for reemployment, no determination may be made concerning the eligibility criteria for reemployment, including the five-year limit

Although drawing the clear distinction between violations under Sections 4311 and 4312, it is worthy to note that the Federal Circuit's decision in *Erickson* departed from this premise in so much as the Court stated, unambiguously, not exceeding the 5-yr. statutory cap (a prerequisite to validly requesting reemployment under 4312) was a prerequisite to falling under the protections envisioned by Section 4311. The Court reasoned that to hold otherwise would render the 5-year limit on an employer's obligation to rehire meaningless. However, the court went on to state further that failure to timely request reemployment as necessitated by Section 4312 (an additional prerequisite of validly obtaining reemployment under 4312) would not operate to exclude protections afforded under Section 4311; including protections against denials of employment retention, or in Erickson's particular case, protections against termination.

As a practical matter however, Service Members should attempt to avoid the same hardships endured by SGM Erickson. The fact remains that nearly one decade after the Postal Service's unlawful violation of USERRA, Erickson's employment with the Postal Service remains the subject of litigation.

In Erickson's case, it may have been more advantageous to voluntarily resign as opposed to permitting termination. Although resignation may give the impression of acquiescence to an Employer's unlawful violation of USERRA, the effect of the action is two-fold: (i) First, and foremost, a Service Member's rights under USERRA do not vest until they return from active military service and the resignation is, in essence, meaningless; and, (ii) avoiding termination will effectively create an opportunity to recover from a USERRA violation by potentially obtaining employment more readily. For Federal Employees especially, the ability to obtain employment in another Federal Agency may be particularly important in relation to TSP and FERS retirement annuities.

Ariel E. Solomon, Esq. served as the principal attorney in *Erickson v. United States Postal Service*, 571 F. 3d 1364 (Fed. Cir. 2009) before the US Court of Appeals for the Federal Circuit.

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