U.S. Department of Justice
Civil Rights Division

Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403

July 21, 2011

The Honorable Andrew M. Contreras
Chief Deputy Clerk
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

Re: *Serricchio* v. *Prudential Securities, Inc.*, No. 10-1590-cv(L)

Dear Chief Deputy Clerk Contreras:

This letter brief is submitted in response to the Court's June 7, 2011, invitation for the views of the Secretary of the United States Department of Labor (DOL or the Secretary) on certain issues in this case.

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA or the Act), 38 U.S.C. 4301 *et seq.*, requires, in pertinent part, that an employer promptly reemploy a servicemember "in the position of employment in which [he] would have been employed if [his] continuous employment * * * had not been interrupted by [military] service, or a position of like seniority, status and pay." 38 U.S.C. 4313(a)(2)(A). The Secretary interprets the Act to require that an employer offer a servicemember returning from military duty to a fully-commissioned position, such as a financial analyst, a commission structure and commission earning opportunities, *i.e.*, a book of business, comparable to what he would have had but for his service. If the servicemember's book of business declined during his service, the employer must determine with reasonable certainty what book of business the servicemember would have attained if he had been continuously employed – regardless of what actually happened to the employee's book of business in his absence – and then take all appropriate measures to employ

him in a position of like "pay," including paying him an interim salary, if necessary. The Secretary's position is that, on this record, Wachovia Securities, LLC failed to offer Michael Serricchio a position comparable in "pay" and "status" to the position he would have enjoyed but for his military service, as USERRA requires.

STATEMENT OF THE CASE

1. Statutory Background

This case arises under USERRA, the latest in a series of statutory protections for members of the United States Armed Forces, which was enacted to improve the reemployment rights and benefits of veterans and servicemembers. See H.R. Rep. No. 65, 103d Cong., 1st Sess. 16 (1993); S. Rep. No. 158, 103d Cong., 1st Sess. 1 (1993). "The reemployment rights concept was first enacted into law as * * * [part] of the Selective Training and Service Act of 1940. For over 50 years, Federal law has continued certain civilian employment and reemployment rights * * * for those who serve their country in the uniformed services." *Id.* at 39. In enacting USERRA, Congress emphasized that case law interpreting predecessor statutes should apply with equal force to USERRA to the extent that it is consistent with the new law, thus ensuring substantial continuity among the servicemember reemployment protection laws. *Id.* at 40; H.R. Rep. No. 65 at 19; see also 20 C.F.R. 1002.2.

The purpose of USERRA is three-fold. The Act is intended: (1) to encourage military service "by eliminating or minimizing the disadvantages to civilian careers"; (2) "to minimize the disruption to the lives" of servicemembers and their employers "by providing for the prompt reemployment" of servicemembers; and (3) "to prohibit discrimination" against servicemembers. 38 U.S.C. 4301(a). These purposes have remained consistent from the first enactment in 1940 through the present time. See H.R. Rep. No. 65 at 20. USERRA accomplishes these purposes through a comprehensive statutory scheme that, among other things, requires an employer to

promptly reemploy a returning servicemember who meets the statutory requirements, absent a change in the employer's circumstances, 38 U.S.C. 4312, 4313(a); affords a returning servicemember all of the seniority, rights, and benefits that he would have attained had he remained continuously employed, 38 U.S.C. 4316(a); and prohibits an employer from discriminating against a servicemember because of his service, 38 U.S.C. 4311.

The Secretary has substantial enforcement responsibilities under USERRA. The Act, among other things, directs the Secretary to inform USERRA beneficiaries of their rights under the Act and to provide assistance regarding those rights, 38 U.S.C. 4321, 4322(c), 4333; to investigate complaints of USERRA violations and make efforts to ensure compliance with the Act, 38 U.S.C. 4322, 4326; and, upon a potential claimant's request, to refer a complaint for litigation to other executive agencies, 38 U.S.C. 4323(a)(1), 4324(a)(1). Pursuant to statutory authority, the Secretary issued regulations to assist with the implementation of USERRA. See 20 C.F.R. 1002 *et seq*. Congress also gave the Attorney General enforcement responsibilities under the Act, including the authority to initiate litigation on behalf of servicemembers in cases involving state or private employers. 38 U.S.C. 4323(a)(1).

2. Factual Background

In 2001, Michael Serricchio worked as a financial advisor for Prudential Securities, Inc. (PSI) (later Wachovia Securities, LLC (Wachovia)) in Stamford, Connecticut. *Serricchio* v. *Wachovia Sec., LLC*, 556 F. Supp. 2d 99, 102 (D. Conn. 2008) (*Serricchio I*). PSI recruited Serricchio in 2000 from another brokerage firm, where Serricchio had built up a book of business advising and executing securities transactions for retail clients. *Ibid.* Serricchio brought a number of these clients to PSI, which agreed to pay Serricchio almost $230,000 as "transitional compensation." *Ibid.* Serricchio was also a member of the United States Air Force Reserve, and was called into active service after the events of September 11, 2001. *Ibid.* At that

time, Serricchio managed over 200 client accounts and assets that yielded him approximately $6500 per month in commissions. *Ibid.*; *Serricchio* v. *Wachovia Sec., LLC*, 706 F. Supp. 2d 237, 246 (D. Conn. 2010) (*Serricchio III*). This book of business substantially declined during Serricchio's military service. *Serricchio I*, 556 F. Supp. 2d at 103.

Serricchio was honorably discharged in October 2003, and requested reemployment in December 2003, pursuant to USERRA. *Serricchio I*, 556 F. Supp. 2d at 103. Wachovia was aware of its USERRA reemployment obligations, but did not offer Serricchio a position until nearly four months later. *Serricchio III*, 706 F. Supp. 2d at 249. At that time, Wachovia offered to reemploy Serricchio as a financial advisor with the same commission rate, as well as a $2000 repayable monthly advance against his commissions, a small number of client accounts, and an opportunity to "cold call" to rebuild his client base. *Id.* at 246, 249; *Serricchio I*, 556 F. Supp. 2d at 103. Serricchio had not "cold called" for clients since the early days in his career. *Serricchio III*, 706 F. Supp. 2d at 249. Serricchio's supervisor knew that this reemployment offer would not allow Serricchio to support himself and his family. *Ibid.* Serricchio refused the offer and was later terminated for job abandonment. *Serricchio I*, 556 F. Supp. 2d at 103.

3. Prior Proceedings

On November 17, 2005, Serricchio filed suit against PSI and Wachovia, alleging USERRA violations and other claims. J.A. 45-53.[1] The district court granted in part and denied in part Wachovia's motion for summary judgment, *Serricchio I*, 556 F. Supp. 2d 99, and the case proceeded to trial on Serricchio's USERRA claims. On June 17, 2008, a jury found Wachovia liable for violating USERRA by failing to promptly reinstate Serricchio, by failing to offer him a suitable reemployment position, and by constructively discharging him. J.A. 1655-1656. Inherent in this verdict as to Serricchio's USERRA reemployment claim was the jury's finding

[1] "J.A. __" refers to the page numbers of the Joint Appendix filed in this Court. "S.A. __" refers to page numbers in the Special Appendix filed in this Court.

"that Wachovia failed to reinstate [Serricchio] to a position which * * * reflected with reasonable certainty the pay, benefits, seniority and other job perquisites that he would have obtained if not for the period of his military service." J.A. 1557.

Following a bench trial on the issues of damages and equitable relief, on March 19, 2009, the district court awarded Serricchio $389,453 in back pay, $389,453 in liquidated damages, prejudgment interest, fees, and costs. *Serricchio* v. *Wachovia Sec., LLC*, 606 F. Supp. 2d 256, 268 (D. Conn. 2009) (*Serricchio II*). The court also ordered Wachovia to reinstate Serricchio as a financial advisor, paying him a salary for the first three months while he completed the required training and licensing examinations, and, for nine months thereafter, providing him with a monthly draw as he built up his book of business. The district court's judgment was based, in part, on its finding that, had Serricchio been continuously employed, his commissions, and thus his pay, would have increased, *id.* at 261, and that "[Wachovia] did not offer Serricchio a position comparable to the one he held before leaving for military service," *id.* at 266.

Wachovia moved for judgment as a matter of law or, alternatively, for a new trial. J.A. 24, 29, 2715-2956. In pertinent part, Wachovia argued that it had complied with USERRA by offering Serricchio the same "rate of pay," *i.e.*, the same commission rate, and the position most comparable to what Serricchio would have held absent his military service. *Serricchio III*, 706 F. Supp. 2d at 245. On March 31, 2010, the district court denied Wachovia's post-trial motions in all respects, calculated the amount of prejudgment interest, and awarded attorney's fees and costs. *Id.* at 265. In so ruling, the court held that USERRA required Wachovia to provide Serricchio with an opportunity for comparable earnings and advancement, which was a factual issue that the jury had decided in Serricchio's favor. *Id.* at 246-247. The court found that the evidence at trial was more than sufficient for the jury to conclude that Wachovia had violated USERRA when, among other things, it made Serricchio "a reinstatement offer that a reasonable person could regard as financially precarious and professionally degrading." *Id.* at 249-250.

4. The Pending Appeal

On May 5, 2010, Wachovia appealed. S.A. 1-2. The parties filed their merits briefs and the Court held oral argument on June 20, 2011. On June 7, 2011, the Court invited the Secretary to submit a letter brief expressing DOL's views on the meaning of "pay" under USERRA in the context of a fully-commissioned position. Specifically, the Court asked whether the Act requires that an employer offer a servicemember the same commission rate only, or the same commission rate together with commission earning opportunities comparable to what he would have had but for his military service. If the latter, assuming that the servicemember's book of business had substantially declined during his military service, the Court asked whether an employer is required to offer a comparable book of business or to pay the servicemember a salary while he rebuilds his book of business. The Court also allowed the Secretary to offer views on any other pertinent matter. The Secretary's answers to these questions are set forth below.

DISCUSSION

1. USERRA Should Be Liberally Construed In The Servicemember's Favor

The Secretary's analysis starts from the bedrock principle the Supreme Court enunciated over sixty years ago: federal legislation requiring the reemployment of returning service-members "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* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (discussing the Selective Training and Service Act of 1940). Congress, the Supreme Court, and the Secretary have adhered to and reiterated this principle. See, *e.g.*, S. Rep. No. 158, 103d Cong., 1st Sess. 40 (1993); H.R. Rep. No. 65, 103d Cong., 1st Sess. 19 (1993); *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 584-585 (1977); Final Rules, Uniformed Services Employment and Reemployment Rights Act of 1994, as amended, 70 Fed. Reg. 75,246 (Dec. 19, 2005). Thus, when presented with competing interpretations of the Act, the Secretary "read[s] the provision in [the servicemember's] favor under the canon that provisions for benefits to

members of the Armed Services are to be construed in the beneficiaries' favor." *King* v. *Saint Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991) (interpreting the Veterans' Reemployment Rights Act of 1974).

2. USERRA Obligates The Employer To Offer The Returning Servicemember His "Escalator Position" Or A Position Of Like Seniority, Status, And Pay

USERRA requires, in pertinent part, that a servicemember who served in the uniformed services for more than 90 days be promptly reemployed "in the position of employment in which [he] would have been employed if [his] continuous employment * * * had not been interrupted by such service, or a position of like seniority, status and pay." 38 U.S.C. 4313(a)(2)(A). As the Supreme Court explained, a returning servicemember "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*, 328 U.S. at 284-285. Congress explicitly referred to this "escalator" principle in enacting USERRA, S. Rep. No. 158 at 52; H.R. Rep. No. 65 at 30, and the Secretary incorporated it into the USERRA regulations, 20 C.F.R. 1002.191-1002.197; 70 Fed. Reg. at 75,270. Accordingly, a servicemember must be reemployed in the "position that he or she would have attained with reasonable certainty if not for the absence due to uniformed service"; that is, at the "escalator position." 20 C.F.R. 1002.191; see also *Kelly* v. *Ford Instrument Co., Div. of Sperry Rand Corp.*, 298 F.2d 399, 404 (2d Cir. 1962). Although *Fishgold* referred only to "seniority," as the Secretary has made clear in the USERRA regulations, the "escalator position" encompasses "the seniority, status, and rate of pay that an employee would ordinarily have attained in that position given his or her job history, including prospects for future earnings and advancement." 20 C.F.R. 1002.193.

The term "pay" is undefined in the Act and the legislative history provides little insight into Congress's intent in using this term, other than to say that "pay" is "easily determined." H.R. Rep. No. 65 at 31. The commentary to the USERRA regulations explains that the

servicemember is entitled to "any compensation, in whatever form, that the employee would have received with reasonable certainty if he or she had remained continuously employed." 70 Fed. Reg. at 75,278. To determine the servicemember's "pay" – whether at the "escalator position" or a position of like pay, seniority, and status – the employer may examine his work history and "prospects for future earnings," 20 C.F.R. 1002.193(a), as well as the pay of similarly situated employees, *Loeb* v. *Kivo*, 169 F.2d 346, 351 (2d Cir. 1948).

3. Under USERRA, The "Pay" Of A Fully-Commissioned Employee Includes Both The Commission Rate And Commission Earning Opportunities

Early cases interpreting a USERRA predecessor statute in the context of servicemembers returning from World War II to salesmen positions establish that an employee who previously earned commissions must be reemployed in a position that provides comparable commission earning opportunities. Thus, in *Loeb*, this Court ruled that the employer failed to offer the returning servicemember salesman a position of like pay, seniority, and status, where the servicemember was "was kept at work in the stockroom, was given no opportunity to meet any customers[,] * * * no time outside the defendants' offices to solicit business or to seek familiarity with his old customers, and denied all opportunity of any kind to act as a salesman." 169 F.2d at 348 (internal quotation marks omitted); see also *Major* v. *Phillips-Jones Corp.*, 192 F.2d 186, 188 (2d Cir. 1951) (discussing *Loeb*).

Similarly, the Seventh Circuit held in *Levine* v. *Berman*, 161 F.2d 386, 388 (7th Cir. 1947), that the employer did not offer the servicemember a salesman position with like pay and status where he was offered a different territory and commission rate. Implicit in the court's ruling is its recognition that the reemployment offer was deficient because the servicemember was not allowed to leverage "his acquaintance and knowledge of this territory" into commission-generating sales, resulting in reduced commission earning opportunities. *Ibid.*; see also *Schwetzler* v. *Midwest Dairy Prods. Corp.*, 174 F.2d 612, 613 (7th Cir. 1949) (explaining that

Levine stands for the proposition that the servicemember was entitled to his original position because the reemployment position "did not offer comparable opportunities").

Other cases are in accord and hold that a commissioned employee's "pay" encompasses the opportunity to earn commissions. See *Schwetzler*, 174 F.2d at 613 (the reemployment offer "afford[ed] comparable opportunities as to seniority, status and pay"); *Trusteed Funds* v. *Dacey*, 160 F.2d 413, 419 (1st Cir. 1947) (reemployment offer was not of like seniority, status, and pay where, among other things, the position would require the servicemember salesman "to start from scratch, recruiting a sales force, and building up the business in the region assigned"); *Whitver* v. *Aalfs-Baker Mfg. Co.*, 67 F. Supp. 524, 527 (N.D. Iowa 1946) (reemployment offer "did not constitute an offer to restore the plaintiff to a position with like pay * * * because the volume of sales in the proffered territory would be smaller"); cf. *Bova* v. *General Mills, Inc.*, 173 F.2d 138, 139-140 (6th Cir. 1949) (servicemember must be offered a comparable sales territory with the same rights, duties, and privileges he enjoyed before his military service).

More recent cases reaffirm this same principle. For example, in *Fryer* v. *A.S.A.P. Fire & Safety Corp., Inc.*, 680 F. Supp. 2d 317, 326 (D. Mass. 2010), the court ruled that the employer had violated USERRA because the reemployment "position lacked the sales commissions and other benefits of plaintiff's preservice position. The evidence supports a significant reduction in pay because the * * * position lacked an adequate opportunity to pursue and procure sales commissions." See also *Maxfield* v. *Cintas Corp. No. 2*, 427 F.3d 544, 552 (8th Cir. 2005) (servicemember was denied a benefit of employment when he was reemployed in a position that denied him an opportunity to earn bonuses based on his own performance).

In light of this extensive body of case law dating back to the 1940s, the Supreme Court's admonitions that servicemember reemployment legislation should be interpreted broadly for the servicemember's benefit, *King*, 502 U.S. at 220 n.9; *Fishgold*, 328 U.S. at 285, the Secretary's experience and guidance interpreting the Act, *e.g.*, 20 C.F.R. 1002.193(a) (advising that the

"escalator position" "include[s] prospects for future earnings and advancement"), the Secretary concludes that, under USERRA, "pay" in the context of a fully-commissioned employee means something more than the mere commission rate in isolation. The Secretary's position has been and continues to be that "pay" encompasses both the commission rate and commission earning opportunities, which together determine the employee's actual earnings. See U.S. Dep't of Labor, Legal Guide and Case Digest, Veterans' Reemployment Rights Under the Universal Military Training and Service Act, as amended, and related Acts (Legal Guide) (Attachment A) § 6.211 at 643 (1979); Att. A at 5; *Sykes* v. *Columbus & Greenville Ry.*, 117 F.3d 287, 294-295 (5th Cir. 1997) (Legal Guide entitled to deference); see also *Gualandi* v. *Adams*, 385 F.3d 236, 243 (2d Cir. 2004).

4. The Employer Must Offer A Book Of Business That Corresponds To The Servicemember's "Escalator Position" Or Take Other Appropriate Measures To Restore Him To A Position Of Like Pay

a. Under this definition of "pay," the Secretary interprets USERRA's guarantee of like "pay" to require that an employer offer a returning servicemember both the commission rate and commission earning opportunities that correspond to his "escalator position." See 38 U.S.C. 4313(a)(2)(A); 20 C.F.R. 1002.191. In the context of a financial advisor or stockbroker position, commission earning opportunities essentially equate to the employee's book of business; that is, to his list of client accounts. Thus, USERRA requires that an employer provide a servicemember returning to a financial advisor or stockbroker position the book of business that he "would have attained with reasonable certainty if not for the absence due to uniformed service." *Ibid.* This book of business is determined by examining how similarly situated employees fared during the servicemember's absence, as well as the servicemember's own work history, length of service, and qualifications. See 20 C.F.R. 1002.192, 1002.193; *Loeb*, 169 F.2d at 347, 351 (approving of the district court's use of the employee who took over the servicemember's position as the appropriate "yardstick" in determining the servicemember's rights and damage award).

The servicemember's "escalator" position, and thus his post-service book of business, may increase or decrease, depending upon the nature of intervening circumstances or events. See 20 C.F.R. 1002.194. However, USERRA expressly prohibits a servicemember from being disadvantaged in his civilian career *because of his military service*. 38 U.S.C. 4301(a); 70 Fed. Reg. at 75,271 ("USERRA's intent is to ensure that returning service members are accorded the status, pay and benefits to which they are entitled had they not served in the uniformed services, generally without exception."). Therefore, where the servicemember's book of business declined during his military service, the proper inquiry is not what happened to the servicemember's book of business during his absence, but rather what would have happened if the servicemember had been continuously employed. In other words, the employer must determine what book of business the servicemember "would have attained with reasonable certainty" but for his military service – regardless of what actually happened to his pre-service book of business in his absence. See 20 C.F.R. 1002.191.

As to which client accounts should comprise the servicemember's post-service book of business, the Secretary interprets USERRA to require the employer to endeavor to return the servicemember's original client accounts wherever possible to minimize the disruption of military service, see 38 U.S.C. 4301(a)(2), and so that the servicemember can retain the benefits of his knowledge, relationships, good will, and other advantages that courts have recognized as important for employees working in the sales and service industries, see, *e.g.*, *Levine*, 161 F.2d at 388; *Whitver*, 67 F. Supp. at 526. The employer may need to increase or decrease the client accounts comprising the servicemember's pre-service book of business depending upon his post-service "escalator position." If pre-service client accounts are no longer available, the employer should substitute or supplement the servicemember's book of business with comparable accounts, if that would be consistent with what he would have attained if not for his military service. See 20 C.F.R. 1002.192.

When it is not possible for the employer to provide a book of business that corresponds to the servicemember's "escalator position," the employer should pay the servicemember an interim salary or take other appropriate steps to restore the servicemember to a position of like "pay" while the servicemember rebuilds his book of business. USERRA is remedial legislation intended to protect servicemembers, and calls for a flexible approach to carry out its purposes. See *Morris-Hayes* v. *Board of Educ. of Chester Union Free Sch. Dist.*, 423 F.3d 153, 160 (2d Cir. 2005) ("USERRA provides a comprehensive remedial scheme to ensure the employment and reemployment rights of those called upon to serve in the armed forces."); 70 Fed. Reg. at 75,273 (the option of providing either the "escalator position" or a position of like pay, seniority, and status was "intended to provide the employer with a degree of flexibility in meeting its reemployment obligations"). As the Third Circuit aptly noted:

> Men and women returning from military service find themselves, in countless cases, in competition for jobs with persons who have been filling them in their absence. Handicapped, as they are bound to be by prolonged absence, such competition is not part of a fair and just system, and the intention was to eliminate it as far as reasonably possible.

Kay v. *General Cable Corp.*, 144 F.2d 653, 655-656 (3d Cir. 1944). Therefore, employers must take all appropriate steps to ensure that a servicemember is not "handicapped" by his service in the Armed Forces upon return from duty.

b. On the facts determined by the jury and trial judge in this case, the Secretary's position is that Wachovia violated USERRA by failing to reemploy Serricchio at his "escalator position" or a position of like "pay." Wachovia should have determined what Serricchio's book of business would have been but for his military service by examining Serricchio's past performance and how similarly situated financial analysts fared during his absence, and then offered Serricchio his original and/or comparable client accounts that corresponded to his "escalator position" book of business. If, for whatever reason, it was not possible to provide

Serricchio with the appropriate book of business, Wachovia should have taken other steps to restore Serricchio to a position of like "pay," such as paying him an appropriate interim salary or offering him other opportunities for additional compensation while he built up his book of business to the requisite level. As the jury in this case correctly found, Wachovia's reemployment offer to Serricchio – *i.e.*, the same commission rate, a $2000 monthly advance repayable against his commissions, a small number of client accounts, and an opportunity to "cold call" for new clients (see p. 4, *supra*) – was insufficient to satisfy USERRA's same "pay" reemployment requirement.

5. An Employer Also Violates USERRA By Failing To Offer A Position Of Like "Status" When It Requires The Servicemember To Rebuild Nearly His Entire Book Of Business

Under USERRA, just as its predecessor statutes, a servicemember returning from military duty is "protected against receiving a job inferior to that which he had before entering the armed services." *Fishgold*, 328 U.S. at 284. The preceding discussion has, pursuant to the Court's inquiry, centered on the meaning of "pay." However, the "status" of the reemployment position is an equally important consideration, for Congress intended to "ma[ke] the restoration as nearly a complete substitute for the original job as was possible." *Id.* at 286. In light of the purposes of USERRA and the Secretary's experience under the Act, the Secretary interprets USERRA's like "status" requirement, 38 U.S.C. 4313(a)(2)(A), to mean that an employer also violates the Act when it requires the servicemember to rebuild nearly his entire book of business by "cold calling" for new clients, as this would not restore the servicemember to his "escalator position" or a position of like "status." See Legal Guide §§ 6.41 at 862, 6.44 at 883; Att. A at 8, 10.

a. Courts have consistently held that USERRA and its predecessor statutes prohibit an employer from reemploying a servicemember in a position that results in a material diminution of status. See, *e.g.*, *Smith* v. *United States Postal Serv.*, 540 F.3d 1364, 1366 (Fed. Cir. 2008); *John S. Doane Co.* v. *Martin*, 164 F.2d 537, 540 (1st Cir. 1947); *Trusteed Funds*, 160 F.2d at

419. The term "status" is undefined in the Act, and thus should be given its ordinary meaning. *Nichols* v. *Department of Veterans Affairs*, 11 F.3d 160, 163 (Fed. Cir. 1993); *Duarte* v. *Agilent Techs., Inc.*, 366 F. Supp. 2d 1039, 1045 (D. Colo. 2005). The legislative history reveals that Congress interpreted "status" broadly to include "opportunities for advancement, general working conditions, job location, shift assignment, * * * rank and responsibility." H.R. Rep. No. 65 at 31 (quoting *Monday* v. *Adams Packing Ass'n, Inc.*, 85 L.R.R.M. 2341, 2343 (M.D. Fla. 1973)); see also H.R. Rep. No. 56, 102d Cong., 1st Sess. 28 (1991) (same). The USERRA regulations explain that "[t]he facts and circumstances surrounding the position determine whether a specific attribute is part of the position's status for USERRA purposes," and list some examples of "status," which include, as relevant here, "the exclusive right to a sales territory [and] the opportunity to advance in a position." 70 Fed. Reg. at 75,273; see also Legal Guide §§ 6.41 at 862, 6.44 at 883; Att. A at 8, 10.

Cases interpreting the "status" requirement of USERRA and predecessor statutes indicate that "status" extends beyond mere shift assignment and schedule, *e.g.*, *Grubbs* v. *Ingalls Iron Works Co.*, 66 F. Supp. 550, 554 (N.D. Ala. 1946); and encompasses working conditions, *e.g.*, *Hill* v. *Michelin N. Am., Inc.*, 252 F.3d 307, 311-313 (4th Cir. 2001); the nature and substance of the servicemember's duties, *e.g.*, *Francis* v. *Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 306 (4th Cir. 2006); *Carlton* v. *New Hampshire Dep't of Safety*, 609 F.2d 1024, 1026 (1st Cir. 1979); and the servicemember's level of responsibility and supervision, *e.g.*, *Nichols*, 11 F.3d at 163-164; *John S. Doane Co.*, 164 F.2d at 540.

These cases reveal that a change in employment position that materially affects a servicemember's duties, level of responsibility, position vis-à-vis other employees, and ability to advance constitutes a diminution of status prohibited by USERRA – even if the reemployment position offers the same seniority and pay. See *Nichols*, 11 F.3d at 163-164 (reemployment position did not have the same status because it lacked well-defined responsibilities and a staff to

supervise); *John S. Doane Co.*, 164 F.2d at 540 (employer "was not in compliance with the spirit and intent" of predecessor statute when it offered the servicemember the same pay either to work in a position with lesser responsibilities or to stay home); *Duarte*, 366 F. Supp. 2d at 1045-1046 (reemployment position resulted in diminished status where servicemember who previously led a team assisted coworkers and worked on a special project).

b. Thus, the Secretary's position is that Wachovia also violated USERRA by failing to offer a reemployment position of like "status" when – instead of offering Serricchio a book of business that corresponded to his "escalator position" – it required him to "cold call" to rebuild his client accounts. This requirement diminished Serricchio's level of responsibility, his position vis-à-vis other employees, and his opportunity for advancement. Like the salesman in *Trusteed Funds*, 160 F.2d at 419, Serricchio would have been forced "to start from scratch, recruiting [clients], and building up the business." Wachovia's reemployment offer essentially reduced Serricchio to entry-level work, see *Serricchio III*, 706 F. Supp. 2d 237, 249 (D. Conn. 2010), which deprived him of the "status" to which he is entitled under USERRA.

CONCLUSION

For these reasons, the Court should hold that Wachovia violated USERRA's reemployment requirement when it failed to offer Serricchio his "escalator position" or a position of like "pay" and "status" upon his return from military service.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor
Office of the Solicitor
U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, N.W.
Washington, D.C. 20210

THOMAS E. PEREZ
Assistant Attorney General

s/Erin Aslan
DENNIS J. DIMSEY
ERIN ASLAN
Attorneys, Appellate Section
Civil Rights Division
U.S. Department of Justice
Ben Franklin Station, P.O. Box 14403
Washington, D.C. 20044-4403

Legal Guide and Case Digest

Veterans' Reemployment Rights
Under the Universal Military
Training and Service Act,
as amended, and related Acts

U.S. Department of Labor
Ray Marshall, Secretary

Office of the Solicitor
Carin A. Clauss, Solicitor

Labor-Management Services Administration
Francis X Burkhardt, Assistant Secretary

Office of Veterans' Reemployment Rights
Joseph R. Beever, Director

Foreword To Legal Guide and Case Digest

During the 20 years in which such Federal laws have been in effect, nearly 600 court decisions have been reported. This Legal Guide gives the interpretations of these Federal statutes by the Secretary of Labor and supplies up-to-date notes of judicial decisions. The final interpretation of these statutes is left to the courts. On some issues, conflicts of view in lower courts have not yet been resolved by the Supreme Court; many other problems have not been decided by an court. The interpretations of the Secretary of Labor in these matters do not represent an exercise of any statutory power to interpret the acts; they represent his best opinion as to the meaning of the statute in the light of Supreme Court decisions.

These decisions show that the statutes did not intend the servicemen to lose ground in his employment because of his military activity but that such activity does not entitle him to a position or rights that he could not have had, if he had not engaged in that activity. The interpretations set forth here are the positions that representatives of the Department of Labor will take in administering the responsibilities of the Department under the statutes.

This Legal Guide and Case Digest has been prepared by the Office of the Solicitor of Labor and tl Office of Veterans Reemployment Rights to assist th attorneys and field representatives in handling the problems connected with employment rights after military service and training, arising under the Universal Military Training and Service Act and related Federal legislation. It is also designed as a useful source of information for ex-servicemen, employers, employee organizations and others concerned with the operation of these laws.

The Secretary of Labor, through the Office of Veterans' Reemployment Rights has since 1947 had the responsibility of assisting those performance organizations and others concerned with the operation of these laws.

The Secretary of Labor, through the Office of Veterans' Reemployment Rights, has since 1947 had the responsibility of assisting those performing military service or training to realization of their statutory rights under Federal law. This reference work is, in general, limited to Federal reemployment provisions and to rights of employees of private employers.

TABLE OF CONTENTS

6.2 Pay Rates on and After Reinstatement

Section Contents

6.21 Pay—General

6.211 *Meaning of Pay in Statute.* Pay is an integral part of the rights guaranteed under the reemployment statutes. The ex-serviceman must be reemployed in his former position or a position of "like seniority, status, and pay" or in certain situations in a different position. Generally, the ex-serviceman is entitled upon reinstatement to the pay or wage scale which he would then have been receiving as a result of continuous employment in his civilian job. He is not entitled to any gain over and above this. If the pay for his former job has been increased during his absence he is entitled to the increase. If his position has increased in importance and responsibility due to the expansion of business, or as a result of wartime prosperity, the ex-serviceman is entitled to the benefit of such increase.

The "pay" protected under the statutes includes all elements of pay, such as traveling expenses, drawing accounts, hourly rates, piece rates, bonuses, etc. It must be borne in mind that the courts look to the actual pay accorded the ex-serviceman, not the technical pay terms of his job. Hence, assigning an ex-serviceman as a "like" position a different sales territory with commission percentages identical to those in his former position will not effect compliance, if the new territory does not yield the equivalent of the pay he would receive, if restored to his former position. Likewise, piece rates or hourly rates in a job yielding less total pay than the former position will not effect compliance, notwithstanding the job is of "like" seniority and status and the rates are identical to those of the former job. As made clear by the statutes, there must be like seniority, status and *pay*.

"Pay" is compensation for work done or to be done, or for some other activity in the employment, such as stand-by service, or it may be an inducement to remain in the employment or to limit voluntary absences. Compensation for such acts may anticipate their performance, may immediately follow their performance or may be in part or whole deferred after the performance. (For fringe rights as "pay", see sec. 6.212.)

6.4 Status

Section Contents

6.41 General

Generally speaking, "status" refers to and includes all the incidents or attributes attached to and inherent in a particular job. It refers to the rank or responsibility of the position, its duties, working conditions and the pay and seniority encompassed within the position. All of these elements in a position are part of its status, and of the status of the individual holding the position. While, strictly speaking, "status" includes pay and seniority, it may be used in a more specific sense. Because pay is one of the more important features of a job, and because seniority is the result of the particular contract or practice in an employment, these two job features were named specifically in the statutes establishing reemployment rights, and will not be discussed here nor considered as part of the employee's "status." Whether "status" also includes ancillary benefits attached to the position, such as vacations, pension rights, place of employment and similar features of a job, has not been conclusively adjudicated.

The general rule is that all features of a serviceman's position must be restored to him upon his reemployment. The reason is that the position which must be restored to the serviceman includes his "status" and the *Fishgold* decision "guarantees the veteran against loss of position or loss of seniority by reason of his absence." Hence it is not only the serviceman's seniority that cannot be reduced in a discriminatory manner because of his military service; the other features of his position including status, are to be similarly treated. However, the reemployment statutes do not relieve an ex-serviceman of the need to comply with all valid conditions precedent to acquiring the benefits inherent in his status.

For example, if by unchanging rules the serviceman was entitled to a preferred status, but only if he made a specific choice of that status, and he is given an opportunity upon his return to exercise the choice, he is not entitled to the preferred status unless he duly makes the choice. The status to which the veteran is restored, including any increase in rights resulting from counting military service as time employed, is protected by the statutes.

In the history of reemployment laws, the word "seniority" was initially introduced into subsection (b) by an amendment inserting it, with a comma after it, into the phrase "position of like status and pay." This indicates that "status" was recognized as a separate concept that might embrace more rights than fall literally within "seniority" and "pay," and some courts have so ruled. Refusal to reinstate the serviceman to a position of like "status" violates the law, even though his seniority and pay are all that is required. Advantages that would be considered to be of the nature of "status" are the exclusive right to a sales territory, the opportunity to advance in position, where this was a feature of the pre-service position, eligibility for possible election to shop stewardship, with resulting advantages from being elected, and the maximum availability of work where piece rates apply and the available work differs in different shifts.

As with seniority and pay, a returning serviceman is entitled to the status he would have had a right to enjoy if he had remained continuously in his civilian employment. During the statutory year, a reduction in status, by transfer or otherwise, constitutes a "demotion" and therefore a "discharge" which is unlawful, if "without cause." After the first year following proper restoration, the serviceman's status, like his seniority, is not immune to change through non-discriminatory changes in collective bargaining or practice, but as long as the employment lasts, the serviceman is protected from reduction in his status affecting him particularly or with special detriment because of his military service.

The use of "status" in pre-1948 laws was continued in the Universal Military Training and Service Act; but that act used the term "status" again and in a different context in section 9(c)(2) which was characterized as a restatement of the escalator principle.

"It is hereby declared to be the sense of the Congress that any person who is restored to a position . . . should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

"Status" in this sense, is used in relation to the "employment", not merely the "position"; it may therefore be of broader impact than "status" as that term appears in section 9(b) of U.M.T.S.A., and in earlier acts which used the language adopted in subsection (b). As a statutory guide to interpretation, section 9(c)(2) should be read as including not only "seniority", "status" and "pay" as components or describers of a "position" but all the relationships and rights of the employee against the employer arising from the fact of employment itself.

No difficulty inheres in reconciling this with a proper interpretation of the two "furlough or leave of absence" provisions of section 9(c)(1), if the required liberal interpretation of the statute is followed. They may not properly be interpreted as limiting protections existing in the Army Reserve and Retired Personnel Service Law before the language affording those protections was supplemented (and the earlier law conformed) by Congress in passing the Selective Training and Service Act of 1940, since the only description of the amendments was that they added to existing protection.

(For relevant legislative history, see sec. 6.51.)

On this view, just as any element of "pay" is protected by the escalator principle as "pay", and seniority of all kinds as well as rights dependent on seniority (to the extent that seniority controls) are protected as "seniority", so are the essentials of "status" protected. "Status" should include any posture or relationship that represents (a) the fact of employment or (b) the ex-serviceman's experience, history or actions in the employment, as constituted both by preservice facts, by his escalator history during military absence, and by the facts of employment on and after restoration. This "status" is protected on the escalator principle not only in his restoration but thereafter. This means that for correct "status", military service represents continuous employment, but not work, experience or pay for work for the period in which the serviceman was actually absent.

A tendency toward using status, possibly in its non-statutory sense, in phrases such as "employment status" "seniority status" and "pay status" leaves considerable uncertainty as to whether judicial references to "status", when used alone, are to the statutory term or to its generic common usage.

6.44 Other Features of Job—Place of Employment, Housing Conditions, Going Organization, Shift Choice

There are many features of a job which do not offer the worker any direct financial gains and which do not even indirectly contribute toward his pay. Among these features are the place of employment of the worker, the conditions of his housing, the existence of a going organization in which his work is carried on, the existence of a proven business territory within which he functions. Features such as these contribute to the worker's well being or satisfaction indirectly and enable him to perform work well with a minimum of effort. Often the advantages of these features are the result of years of continued effort by the worker in carrying out his duties and building up his position. It is manifest that these features must be taken into account in the restoration of the serviceman, and that the position to which he is restored must include these features of the job, in the same manner and to the same extent that it must include pay and seniority.

For example, if a returned serviceman formerly had a position of sales manager in a particular territory where there was a going organization and substantial volume of business, it is not sufficient to restore him to a new and untried area, even though he is guaranteed the same pay he formerly received.

When an employee is reinstated in a different shift, the employer has properly reinstated him to a position of like seniority, status and pay, if the shift imposes no substantially greater burdens or inconveniences on the employee, and does not affect his pay or potential earnings, and if the choice of shift is not a seniority right.

The employer has a statutory option to substitute for the position left one of like seniority, status and pay, or if seniority does not apply one of like status and pay. This right does not depend on the existence after military service of a contractural right or accepted policy permitting transfers at the employer's will. (See sec. 5.24.) Whether or not the employer has this kind of right, such a transfer in restoration will violate the statute if it produces inferior status, in terms of the protection of status described in secs. 6.41 and 6.42 and decision notes thereunder. By parity of reasoning, any substitution that substantially alters for the worse the features discussed in this section makes the new position one of unlike status and violates the law. The items of difference and the degree and weight thereof are mixed questions of fact and law.

In summary, the right of transfer based on contract or accepted policy cannot lawfully be exercised to substitute a position of inferior "status" (or seniority, or pay) on restoration, without violating the law. The exercise of a right of transfer so founded after initial

proper restoration so as to result in a reduction in "status" (or seniority, or pay) would be a demotion, and might constitute in law a "discharge", if "without cause".

(See for discussion and decision notes secs. 6.34 and 6.63.)

Differences in work effort, working conditions and opportunities for advancement incident to a change of shift may be so marked as to amount to a change in "position" as well as in "status."