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REEMPLOYMENT UNDER USERRA SECTIONS 4312 & 4313: AT WILL EMPLOYMENT VS. TEMPORARY EMPLOYMENT

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ABSTRACT. As thousands of service members return to the U.S., severe economic conditions render acclimation to civilian life especially difficult. In 2010, as the combat mission in Iraq approached an end, the unemployment rate of Iraq and Afghanistan-era veterans had reached 13.1 percent. The Uniform Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301-4333 (1994) ("USERRA"), was enacted, in great part, to mitigate harms such as those caused by the aforementioned perfect storm. Among other things, USERRA protects service members by entitling them to reemployment after military service. More specifically, USERRA Sections 4312 & 4313 entitle returning service members to *reemployment* to the position which the member would have had if not for the military leave, or a like position to pre-leave positions. This article considers two issues: First, whether Section 4312 applicability is limited to the terms and conditions of the employer's first reemployment offer, or if its applicability extends to subsequent modifications to such terms and conditions. Second, whether under Sections 4312 and 4313, a member whose pre-service employment status was that of "employee at will," is entitled to reemployment to an "employee at will" position (with the corresponding expectation of indefinite employment duration) upon returning from service, or if such sections are satisfied by the reemployment of the service member for the temporary period of time. These very two issues are presented and to be decided in *Hart v. Family Dental Group P.C. and Kenneth Epstein*, a case currently pending with the U.S. Court of Appeals for the Second Circuit, in which the undersigned is legal counsel for the plaintiff. Accordingly, this article examines these two issues within the factual context of this case.

Keywords: USERRA, reemployment, at-will employment, temporary employment, status, section 4312

1. Introduction

As thousands of service members return to the U.S., severe economic conditions render acclimation to civilian life especially difficult. In 2010, as the combat mission in Iraq approached an end, the unemployment rate of Iraq and Afghanistan-era veterans had reached 13.1 percent.[1] During the same period, the unemployment rate of returning Reserve and National Guardsmen reached 10.6 percent.[2]

The Uniform Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301-4333 (1994) ("USERRA"), was enacted, in great part, to mitigate harms such as those caused by the aforementioned perfect storm.[3] USERRA protects service members in *four distinct ways*: (1) It entitles service members to reemployment after service (38 U.S.C. § 4312[4]); (2) it entitles service members to reemployment to the position which the member would have had if not for the military leave, or a like position (38 U.S.C. § 4313[5]); (3) it prevents employers from discriminating against service members because of their service (38 U.S.C. § 4311[6]); and (4) it prevents employers from dismissing service members without just cause within a prescribed period of time, generally, one hundred and eighty days to one year. (38 U.S.C. § 4316[7]).[8]

This article examines, in particular, the protection afforded to the returning service member by Section 4312 in conjunction with Section 4313.[9] More specifically, the article considers two issues: First, whether Section 4312 applicability is limited to the terms and conditions of the employer's first reemployment offer, or if its applicability extends to subsequent modifications to such terms and conditions. Second, whether under Sections 4312 and 4313, a member whose pre-service employment status was that of "employee at will," is entitled to reemployment to an "employee at will" position (with the corresponding expectation of indefinite employment duration) upon returning from service, or if such sections are satisfied by the reemployment of the service member for the temporary period of time. While the first issue deals with *which* reemployment terms and conditions fall under the governance of Section 4312, the latter issue deals with *what* may constitute proper reemployment under Sections 4312 and 4313.

These very two issues are presented and to be decided in *Hart v. Family Dental Group P.C. and Kenneth Epstein*,[10] a case currently pending with the U.S. Court of Appeals for the Second Circuit, in which the undersigned is legal counsel for the plaintiff. Accordingly, this article examines these two issues within the factual context of this case.

2. Hart v. FDG: Summary of Facts

In *Hart*, pursuant to a written agreement, the defendants (collectively referred to as "FDG") hired the plaintiff ("Hart") in 2001, as an employee at will, to

practice dentistry in its Connecticut offices. Hart had previously notified FDG that he was a member of the U.S. Army Reserves assigned to the 405th Combat Support Hospital. Eventually, in September of 2004, Hart was deployed to active duty in Iraq. In December of 2004, upon termination of his service in Iraq, Hart returned to Connecticut and pursuant to his work schedule (which FDG had previously emailed to him) returned to the FDG on January 17, 2005.

Three days later, however, on January 20, FDG presented Hart with a letter stating that his employment would be terminated in sixty (60) days. Subsequently, on January 27, 2005, FDG reduced this 60 day period to 30 days. As result of both reductions, on February 7, 2005, Hart filed a USERRA administrative complaint with the United States Department Labor's Office of Veteran's Employment and Training. In the aftermath of Plaintiff's USERRA complaint, FDG extended Hart's temporary employment to a total of one hundred and eighty (180) days, which period would begin to run retroactively on January 20, 2005. Eventually, on July 20, 2005, the end of the 180 day period, FDG discharged Hart.

After exhausting his administrative remedies, in 2007 Hart filed a civil action in the U. S. District Court. Hart's complaint presented multiple claims, including counts alleging discrimination and retaliation in violation of USERRA Section 4311 and counts alleging violations of Sections 4312 and 4313. The Section 4311 based claims were heard by a jury, which found in favor of defendant. The Sections 4312 and 4313 counts, however, did not reach jury consideration after being dismissed pursuant to FDG's motion for judgment as a matter of law.

During oral argument in connection to such motion, the aforementioned issues were argued. FDG argued that Section 4312 protection applied only to the terms and conditions of Hart's initial reemployment (i.e., that of January 17, 2005); FDG argued that Section 4312 did not protect Hart from subsequent modifications to his reemployment. Hart, on the other hand, argued that Section 4312 *did* apply to modifications made subsequent to the January 17, 2005 reemployment.

FDG also argued that Sections 4312 and 4313 were satisfied because Hart's temporary employment was eventually extended for 180 days, the period referenced in Section 4316. Hart argued that the temporary employment offered by FDG, regardless of whether it was to endure 60, 30 or 180 days, was not proper "reemployment" as required by Sections 4312 and 4313; Hart argued that temporary reemployment was not equivalent to his pre-service employee at will employment.

As previously stated, these two issues are currently pending with Second Circuit Court.

3. Duration of Section 4312 Applicability & Protection: Post "Reemployment" Modifications

This article begins with consideration of the first issue set forth above within the factual context of *Hart*, that is, whether Section 4312 applicability is limited to the terms and conditions of the reemployment of January 17, 2005, or if its applicability and protection extends to the subsequent reemployment duration modifications (i.e., the 60, 30 and 180 day terms).

Given the similar nature of all subsequent modifications (i.e., all three modifications changed Hart's employment from at will employment to temporary employment), for purposes of this issue only, the article will consider the first modification, that of January 20, 2005, as the operative modification and will limit its analysis to such modification.[11] (The fact that the temporary period of time contemplated by the January 20th modification was later again changed is inconsequential to this particular issue since the employment remained *temporary* at all times thereafter.)

Accordingly, the pertinent factual context of *Hart* is as follows: On January 17, 2005, FDG seemingly reemployed Hart in accordance with Section 4312 and 4313, when, among other things, it reinstated him as an employee at will. However, two work days later on the 20th, FDG withdrew its commitment to reemploy Hart as an employee at will and reduced his employment duration to a temporary period.

Section 4312 *entitles* the service member to certain rights and benefits, in pertinent part, it states that "any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled reemployment rights and benefits."[12] Section 4313, in turn, specifies, among other things, that the reemployment rights and benefits protected Section 4312 require the employer to reemploy the service member "in the position of employment 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."[13]

Recovery under Sections 4312 and 4313 is separate from and not dependent on Section 4311 or Section 4316.[14] Sections 4312 and 4313 protect the service member during the reemployment phase, while Sections 4311 and 4316 protect the service member subsequent to reemployment.[15]

Given the distinct phases of protections, the applicability of Section 4312 is ostensibly limited to a certain period of time. In *Hart*, the January 17 decision undisputedly falls within the Section 4312 protection phase, the date which reemployment first occurred. However, it is less clear whether the January 20 modification is also encompassed within this period of Section 4312 protection.

It seems that no court has squarely addressed whether the Section 4312 applicability phase should last one day, three days, a reasonable period of time or some other prescribed period. Apparently, the concern with the specific duration of Section 4312 applicability has been lessened by the argument that a service member remains protected by Section 4311 even after the expiration of the illusive Section 4312 applicability period.[16] Presumably, under such premise, an employer that properly reemploys a service member even for only one hour, has met his Section 4312 duties, and the member is thereafter protected by Section 4311.

This paradigm, however, is contrary to two interests. First, if Section 4312 applicability is permitted to be unreasonably short because of the presumed, ensuing Section 4311 protection, an employer is, in essence, free to completely disregard its Section 4312 duties by simply reemploying the service member to a proper position *only* for a day, an hour or even an instant. In such a scenario, Section 4312 is rendered utter surplusage because of reliance on Section 4311. Such result is contrary to the concerns of any court interpreting a statute, as the Francis court stated (by quoting): "[W]e 'loath' to read one statutory provision so as to render another provision of the same statute superfluous."[17]

The second interest placed in peril by the aforementioned standard is the interest of the service member. Burden of proof requirements under Section 4312 are separate and distinct from those of Sections 4311 and 4316. Section 4312 imposes no burden of proof on the service member by *entitling* the service member to certain reemployment.[18] The Department of Labor specified that "[t]he employee is not required to prove that the employer discriminated against him or her because of the employee's uniformed service in order to be eligible for reemployment."[19] On the other hand, "[a]n employee proceeding under Section 4311 has the burden of proving that the employer discriminated against him or her based on a status or activity protected by USERRA."[20]

Given such differences, the harshness caused by an unreasonably short Section 4312 applicability period may not always be fully mitigated by Section 4311. If Section 4312 applicability is permitted to be unreasonably limited (e.g., to the "first" "reemployment" only) because of ensuing Section 4311 protection, an employer is, again, free to disregard its Section 4312 duties by reemploying the service member to a proper position *only* for a day, an hour or even an instant. Such a scenario not only would Section 4312 be rendered superfluous, as stated above, but would also cause a shift of the burden of proof from the employer (under Section 4312) to the service member (under Section 4311). In *Hart*, limiting section 4312 applicability to the January 17 reemployment only, would require Hart to present any claims regarding the January 20 modification as Section 4311 discrimination claims, under which he bears the initial burden of proof.

As stated above, the entitlement created by Section 4312 is absolute; the returning service member need not show any evidence of discrimination.[21] While, on the other hand, an employee proceeding under Section 4311 bears the initial burden.[22] Shifting the burden of proof is equivalent to depriving service members of their entitlement.

While courts have seemingly not affirmatively decided the duration of Section 4312 applicability, the issue is considered in dictum in several cases, for example, Section 4312 protection duration was considered in *Francis*, when before dismissing the plaintiff's claims, the court considered the timing of the employer's actions: "The actions Francis [plaintiff] complained of occurred significantly after her return to BAH in August of 2003. Accordingly, they fall outside of § 4312's scope. Specifically, Francis' work hours were not changed until several weeks after she was rehired. She further admitted during her deposition that changes in her job responsibilities occurred in late October, 2003 (several months after reemployment)."[23]

To protect the aforementioned interests and, in particular, the member's reemployment *entitlement* interest, Section 4312 protection must remain applicable for a reasonable time following initial reemployment. Accordingly, in Hart, the modification of January 20, 2005, must be considered part of the reemployment phase to which Section 4312 applies. To hold that January 20 falls outside the scope of Section 4312 would, as stated above, nullify any Section 4312 automatic entitlements and would impose on Hart the burden of proving that he was not properly reemployed due to discrimination.

4. Employment at Will and Temporary Employment: Not the Same

As stated above, the second issue presented herein is whether under Sections 4312 and 4313, a member whose pre-service employment status was that of "employee at will," is entitled to reemployment to an "employee at will" position upon returning from service, or if such sections are satisfied by the reemployment of the service member for the temporary period of time.

As previously sated, prior to his leave, Hart was an employee at will pursuant to a written agreement and had been such since 2001. However, on the January 20, 2005, FDG withdrew its commitment to reemploy Hart as an employee at will and reduced his employment duration to a temporary period.

As previously stated, Section 4313 requires an employer to reemploy a service member to the position of employment, *not excluding an at will employment position*, which the member would have had if not for the military leave, or reemploy the member in "a position of like seniority, status, and pay, the duties of which the person is qualified to perform."[24] Accordingly, employment at will status is a protected right or benefit under Section 4312. The issue then becomes whether reemploying a member for a temporary of

time is the same as reemploying a member as an employee at will. Unsurprisingly, FDG argued that since employment at will may be terminated at will, it offers the same duration of employment assurances as those offered by temporary employment.

However, the disparity between employment at will status and temporary employment status is stark and obvious. Under the prior, by definition, employment duration is indefinite.[25] While under the latter, employment duration is limited to a definite, impermanent period of time.

Section 4312(d)(1)(c) clearly distinguishes between the two and recognizes the greater value of the at will status over the temporary status.[26] Under this section, an employer need not reemploy a member if the member's predeployment position was for a brief, non recurrent period, i.e., temporary employment status is not protected under Section 4312.[27] On the other hand, the subsection requires an employer to reemploy a member if the pre deployment position is one where there is "a reasonable expectation that such employment will continue indefinitely," i.e., employment at will status is protected under Section 4312.[28]

Hart had a reasonable expectation that his employment would continue indefinitely given that his employee at will status was clearly set forth in a written agreement, and that he had been employed as an employee at will since August 2001.

The distinction made by Section 4312(d)(1)(c) demonstrates that when FDG reemployed Hart as a temporary employee, it did not reemploy Hart to a position commensurate to his pre deployment position, which was that of an employee with reasonable expectation of employment for an indefinite duration. Consequently, FDG arguably violated Section 4312.

The clear distinction made by Section 4312 is further elucidated by independent scrutiny of the central terms and conditions of the respective positions. Simply put, under the temporary status, Hart's pay, duties and status (seniority rights are not contested) became non-existent. Under the temporary status, Hart held no expectation of indefinite pay, duties, and status, as was the case prior to his deployment. Additionally, even if the scrutiny is narrowed to a comparison between Hart's pre deployment position and his status, pay, and duties as they existed strictly *within* the temporary period, the difference remains evident. While Hart's pay and duties during the temporary employment were the same as his pre deployment position (he simply continued being a dentist and was compensated at the same rate), his status was plainly different.

When analyzing the question of status, courts are to afford the term "status" its ordinary and common meaning.[29] Because USERRA was enacted to protect the rights of military service members and veterans it is construed broadly and "in favor of its military beneficiaries."[30] Six factors should be evaluated in determining if an offered position for reemployment is of like status: (1)

opportunities for advancement (2) general working conditions (3) job location (4) shift assignment (5) rank and (6) responsibility.[31]

In the instant case, during his temporary employment, Hart's job location, shift assignments and responsibilities remained unaltered. The less tangible factors, however, were severely changed: Opportunities of advancement, general working conditions and rank were to say the least, curtailed. Hart's status as temporary employee with a definite, impending dismissal looming over him, his patients and co-workers was best described by FDG President's very words: Hart was a "lame duck" dentist.

Of course, employment at will status, generally, does not promise *or deny* any specific advancement or promotion opportunities; as with duration of employment, the terms of at will employment with regard to promotion and advancement are also indefinite. However, clearly, the degree of opportunities for advancement is greater under at will employment than under temporary employment, simply because in the latter case the opportunities are not undefined, they simply do not exist.

5. Employment at Will and Temporary Employment for 180 Days: Still Not the Same

An extension of the second issue, deserving separate analysis, is the FDG's argument that Section 4312 and 4313 obligations were satisfied because the temporary employment was eventually extended to 180 days, the period of time referenced in Section 4316.[32]

This premise is, however, inconsistent with all that has been stated above, simply put, each section of USERRA provides distinct protection and imposes distinct and independent requirements.[33] Consequently, the satisfaction of Section 4316 requirements is irrelevant to the satisfaction of Section 4312 requirements.

Even in the absence of interpretive cases, the plain language of Sections 4311, 4312, 4313 and 4316 makes clear that the protection offered by the respective sections is distinct and diverse. Most notably, Section 4312 and Section 4313 protection do not mandate proper reemployed for any specifically prescribed period of time (such as the 180 days period contemplated by Section 4316).[34] Section 4316, on the other hand, does not state that proper reemployment, as required by Section 4312, is to be limited to 180 days.[35] As it does not, for example, state that protection from discrimination (as required by Section 4311) ends at the end of the 180 day period.[36] Section 4316 simply offers service members protection that is *additional to* reemployment and anti-discrimination protection.[37] In order to avoid perfunctory employment, Section 4316 simply creates minimum amount of time an employer must retain a member unless cause exists to discharge.[38]

In the end, good, bad or ugly, the elements listed in Section 4313 and those enumerated in 20 C.F.R. § 1002.194 with regard to status are the measuring units by which the properties of the pre deployment position are measured against those of the post deployment position, in order to determine the satisfaction of Section 4312 and 4313.[39] The comparison between at will employment and temporary employment (whether for one day or 180 days) must be made solely under such criteria. And, in the end, such metric in no manner expresses or implies that reemployment for 180 days is akin to reemployment to employment at will.

At this point in the analysis an inevitable question arises: If employment at will status is not met by reemployment for 180 days, then when can an employer discharge an employee at will, i.e., how long should "reemployment" endure for an employee at will? The scenarios offered below are demonstrative of how to answer this question.

Under the aforementioned metric, the Section 4312 and 4313analysis is, generally, relatively simple. *Scenario One*: For example, Sections 4312 and 4313 are unquestionably violated if upon returning from leave, a service member is reemployed to the same pre deployment position title with corresponding "pay rate," but at the time of reemployment is informed that the "pay rate" will be greatly reduced after 180 days of reemployment.[40] In this scenario, Sections 4312 & 4313 are clearly violated because the measuring unit of the aforementioned metric, i.e., the "pay rate," is not commensurate to the pre deployment pay rate because it will definitely be lowered in the future. The violation is determined *solely* by the scrutinizing the particular metric unit of the Section 4312 analysis, the "pay rate;" that is, the violation occurs regardless of the lack of a Section 4311 violation (see footnote) and, most importantly, regardless of *the satisfaction* of Section 4316 requirements, i.e., proper reemployment for 180 days.

Scenario Two: A Section 4312 violation occurs when upon returning from leave, a service member is reemployed to the same pre deployment position title, but at the time of reemployment is informed that his title and duties will be downgraded after 180 days of reemployment. Again, the violation occurs because the measuring units, i.e., the "title and duties," are not commensurate to the pre deployment title and duties because they will definitely be downgraded. Once again, the violation is determined *solely* by the scrutinizing the metric units of the Section 4312 analysis, that is, the violation occurs regardless of the lack of a Section 4311 violation (see footnote) and, most importantly, regardless of *the satisfaction* of Section 4316 requirements, i.e., proper reemployment for 180 days.

In both above scenarios the violations are evident. In their consideration, ostensibly, no one would ask how long a proper "pay rate" or proper "title and duties" should endure, or whether they should endure for any a specified period of time at all. And yet, inexplicably, the question is posed when, as in

Hart, the measuring unit is "duration of status." And, in a desperate search for answer, a strained correlation is made between Sections 4312 and 4316 simply because the latter incorporates a duration period. However, seeking refuge in Section 4316's language is improper since it is of no relevance to the 4312 metric.

Coherency and consistency require that the answer to the question stated at above is that the question should not be posed. As in the two scenario above, Sections 4312 and 4313 measuring units do not require this question to be posed. Accordingly, it should be undisputable that a Section 4312 and Section 4313 violation should occurs in *Scenario Three*: A returning service member, whose pre deployment employment was at will, is reemployed for 180 days only. Again, the violation should be found by *solely* analyzing the applicable measuring units, e.g., "seniority, pay, status and duties." Such analysis should lead to the conclusion that the status of a reemployment for 180 days is not commensurate to the to the pre deployment at will position with a corresponding reasonable expectation of employment for an indefinite duration, regardless of that the temporary period happens to satisfy 4316.

6. Conclusion: Employer Must Give the Same "Fighting Chances"

As stated in the introduction, among the central purposes of USERRA is "to minimize the disruption to the lives of persons performing service in the uniformed services ... by providing for the prompt reemployment of such persons upon their completion of such service."[41] Accordingly, Sections 4312 and 4313 entitle the service member to more than just reemployment, but to specific types of reemployment (see Section 4313). In the end, regardless of the unit of measure at issue, to achieve this purpose, in essence, the service member must be offered the same "fighting chances" he would have had in absence of the leave (to hopefully aid to obtaining the same "fighting chances" in life at large). Although an impalpable metric unit, employment at will status offers clearly better "fighting chances" than those offered by temporary employment status. Lastly, to make this protection more than superfluous, its applicability must endure for a reasonable period of time.

NOTES AND REFERENCES

1. Bureau of Labor Statistics, U.S., Dep't of Labor, Economic News Release April 2, 2010 http://www.bls.gov/news.release/archives/empsit_05072010.pdf (last modified April 2, 2010).

2. Bureau of Labor Statistics, U.S., Dep't of Labor, Economic News Release April 2, 2010 http://www.bls.gov/news.release/archives/empsit_05072010.pdf (last modified April 2, 2010).

3. The purposes of USERRA are: "(1) to encourage non-career service in the uniformed services ...; (2) to minimize the disruption to the lives of persons performing service in the uniformed services ... by providing for the prompt reemployment of such persons upon their completion of such service; and (3) to prohibit discrimination against persons because of their service in the uniformed services." 38 U.S.C. § 4301(a); See also Major Michele A. Forte, "Reemployment Rights for The Guard and Reserve: Will Civilian Employers Pay the Price For National Defense?" 59 *A.F. L. Rev.* 287 (2007)

4. In part, § 4312: Reemployment rights of persons who serve in the uniformed services.

(a) Subject to subsections (b), (c), and (d) and to section 4304, any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter if—

(1) the person (or an appropriate officer of the uniformed service in which such service is performed) has given advance written or verbal notice of such service to such person's employer;

(2) the cumulative length of the absence and of all previous absences from a position of employment with that employer by reason of service in the uniformed services does not exceed five years; and

(3) except as provided in subsection (f), the person reports to, or submits an application for reemployment to, such employer in accordance with the provisions of subsection (e).

(b) No notice is required under subsection (a)(1) if the giving of such notice is precluded by military necessity or, under all of the relevant circumstances, the giving of such notice is otherwise impossible or unreasonable. A determination of military necessity for the purposes of this subsection shall be made pursuant to regulations prescribed by the Secretary of Defense and shall not be subject to judicial review.

(c) Subsection (a) shall apply to a person who is absent from a position of employment by reason of service in the uniformed services if such person's cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment, does not exceed five years, except that any such period of service shall not include any service—

(1) that is required, beyond five years, to complete an initial period of obligated service;

(2) during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;

(3) performed as required pursuant to section 10147 of title 10, under section 502 (a) or 503 of title 32, or to fulfill additional training requirements determined and certified in writing by the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining; or

(4) performed by a member of a uniformed service who is—

(A) ordered to or retained on active duty under section 688, 12301 (a), 12301 (g), 12302, 12304, or 12305 of title 10 or under section 331, 332, 359, 360, 367, or 712 of title 14;

(B) ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;
(C) ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section 12304 of title 10;
(D) ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services; or
(E) called into Federal service as a member of the National Guard under chapter 15 of title 10 or under section 12406 of title 10.
(d)
(1) An employer is not required to reemploy a person under this chapter if—
(A) the employer's circumstances have so changed as to make such reemployment impossible or unreasonable;
(B) in the case of a person entitled to reemployment under subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313, such employment would impose an undue hardship on the employer; or
(C) the employment from which the person leaves to serve in the uniformed services is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period.
(2) In any proceeding involving an issue of whether—
(A) any reemployment referred to in paragraph (1) is impossible or unreasonable because of a change in an employer's circumstances,
(B) any accommodation, training, or effort referred to in subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313 would impose an undue hardship on the employer, or
(C) the employment referred to in paragraph (1)(C) is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period, the employer shall have the burden of proving the impossibility or unreasonableness, undue hardship, or the brief or nonrecurrent nature of the employment without a reasonable expectation of continuing indefinitely or for a significant period.
(e)
(1) Subject to paragraph (2), a person referred to in subsection (a) shall, upon the completion of a period of service in the uniformed services, notify the employer referred to in such subsection of the person's intent to return to a position of employment with such employer as follows:
(A) In the case of a person whose period of service in the uniformed services was less than 31 days, by reporting to the employer—
(i) not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person's residence; or
(ii) as soon as possible after the expiration of the eight-hour period referred to in clause (i), if reporting within the period referred to in such clause is impossible or unreasonable through no fault of the person.
(B) In the case of a person who is absent from a position of employment for a period of any length for the purposes of an examination to determine the person's fitness to

perform service in the uniformed services, by reporting in the manner and time referred to in subparagraph (A).
(C) In the case of a person whose period of service in the uniformed services was for more than 30 days but less than 181 days, by submitting an application for reemployment with the employer not later than 14 days after the completion of the period of service or if submitting such application within such period is impossible or unreasonable through no fault of the person, the next first full calendar day when submission of such application becomes possible.
(D) In the case of a person whose period of service in the uniformed services was for more than 180 days, by submitting an application for reemployment with the employer not later than 90 days after the completion of the period of service.
(2)
(A) A person who is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service in the uniformed services shall, at the end of the period that is necessary for the person to recover from such illness or injury, report to the person's employer (in the case of a person described in subparagraph (A) or (B) of paragraph (1)) or submit an application for reemployment with such employer (in the case of a person described in subparagraph (C) or (D) of such paragraph). Except as provided in subparagraph (B), such period of recovery may not exceed two years.
(B) Such two-year period shall be extended by the minimum time required to accommodate the circumstances beyond such person's control which make reporting within the period specified in subparagraph (A) impossible or unreasonable.
(3) A person who fails to report or apply for employment or reemployment within the appropriate period specified in this subsection shall not automatically forfeit such person's entitlement to the rights and benefits referred to in subsection (a) but shall be subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work.

5. § 4313: Reemployment positions.

(a) Subject to subsection (b) (in the case of any employee) and sections 4314 and 4315 (in the case of an employee of the Federal Government), a person entitled to reemployment under section 4312, upon completion of a period of service in the uniformed services, shall be promptly reemployed in a position of employment in accordance with the following order of priority:
(1) Except as provided in paragraphs (3) and (4), in the case of a person whose period of service in the uniformed services was for less than 91 days—
(A) 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, the duties of which the person is qualified to perform; or
(B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, only if the person is not qualified to perform the duties of the position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.
(2) Except as provided in paragraphs (3) and (4), in the case of a person whose period of service in the uniformed services was for more than 90 days—
(A) 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; or
(B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status and pay, the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of a position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.
(3) In the case of a person who has a disability incurred in, or aggravated during, such service, and who (after reasonable efforts by the employer to accommodate the disability) is not qualified due to such disability to be employed 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—
(A) in any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer; or
(B) if not employed under subparagraph (A), in a position which is the nearest approximation to a position referred to in subparagraph (A) in terms of seniority, status, and pay consistent with circumstances of such person's case.
(4) In the case of a person who
(A) is not qualified to be employed in
(i) 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
(ii) in the position of employment in which such person was employed on the date of the commencement of the service in the uniformed services for any reason (other than disability incurred in, or aggravated during, service in the uniformed services), and
(B) cannot become qualified with reasonable efforts by the employer, in any other position which is the nearest approximation to a position referred to first in clause (A)(i) and then in clause (A)(ii) which such person is qualified to perform, with full seniority.
(b)
(1) If two or more persons are entitled to reemployment under section 4312 in the same position of employment and more than one of them has reported for such reemployment, the person who left the position first shall have the prior right to reemployment in that position.
(2) Any person entitled to reemployment under section 4312 who is not reemployed in a position of employment by reason of paragraph (1) shall be entitled to be reemployed as follows:
(A) Except as provided in subparagraph (B), in any other position of employment referred to in subsection (a)(1) or (a)(2), as the case may be (in the order of priority set out in the applicable subsection), that provides a similar status and pay to a position of employment referred to in paragraph (1) of this subsection, consistent with the circumstances of such person's case, with full seniority.
(B) In the case of a person who has a disability incurred in, or aggravated during, a period of service in the uniformed services that requires reasonable efforts by the employer for the person to be able to perform the duties of the position of employment, in any other position referred to in subsection (a)(3) (in the order of priority set out

in that subsection) that provides a similar status and pay to a position referred to in paragraph (1) of this subsection, consistent with circumstances of such person's case, with full seniority.

6. § 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited.

(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 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.

7. § 4316. Rights, benefits, and obligations of persons absent from employment for service in a uniformed service.

(a) 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 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.

(b)

(1) Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be—

(A) deemed to be on furlough or leave of absence while performing such service; and
(B) entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.
(2)
(A) Subject to subparagraph (B), a person who—
(i) is absent from a position of employment by reason of service in the uniformed services, and
(ii) knowingly provides written notice of intent not to return to a position of employment after service in the uniformed service,
is not entitled to rights and benefits under paragraph (1)(B).
(B) For the purposes of subparagraph (A), the employer shall have the burden of proving that a person knowingly provided clear written notice of intent not to return to a position of employment after service in the uniformed service and, in doing so, was aware of the specific rights and benefits to be lost under subparagraph (A).
(3) A person deemed to be on furlough or leave of absence under this subsection while serving in the uniformed services shall not be entitled under this subsection to any benefits to which the person would not otherwise be entitled if the person had remained continuously employed.
(4) Such person may be required to pay the employee cost, if any, of any funded benefit continued pursuant to paragraph (1) to the extent other employees on furlough or leave of absence are so required.
(5) The entitlement of a person to coverage under a health plan is provided for under section 4317.
(6) The entitlement of a person to a right or benefit under an employee pension benefit plan is provided for under section 4318.
(c) A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause—
(1) within one year after the date of such reemployment, if the person's period of service before the reemployment was more than 180 days; or
(2) within 180 days after the date of such reemployment, if the person's period of service before the reemployment was more than 30 days but less than 181 days.
(d) Any person whose employment with an employer is interrupted by a period of service in the uniformed services shall be permitted, upon request of that person, to use during such period of service any vacation, annual, or similar leave with pay accrued by the person before the commencement of such service. No employer may require any such person to use vacation, annual, or similar leave during such period of service.
(e)
(1) An employer shall grant an employee who is a member of a reserve component an authorized leave of absence from a position of employment to allow that employee to perform funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.
(2) For purposes of section 4312 (e)(1) of this title, an employee who takes an authorized leave of absence under paragraph (1) is deemed to have notified the employer of the employee's intent to return to such position of employment.

8. *Petty v. Metropolitan Government of Nashville-Davidson*, 538 F.3d 431 (6th Cir.2008), *cert. denied,* --- U.S. ---, 129 S.Ct. 1933, 173 L.Ed.2d 1057 (2009).

9. Throughout this article, unless otherwise specified, it is presumed that no violation of either Section 4311 or Section 4316 has occurred.

10. *Hart v. Family Dental Group P.C. and Kenneth Epstein*, No. 07-222 (D. Conn. Feb. 11, 2010), *appeal docketed*, No. 10-1008 (2nd Cir. March 18, 2010).

11. FDG's 180 argument will be considered in the section below.

12. 38 U.S.C. § 4312 (a).

13. *Id.*

14. *Wrigglesworth v. Brumbaugh,* 121 F.Supp.2d 1126, 1133-39 (W.D.Mich.2000); *Jordan v. Air Prods. & Chems., Inc.*, 225 F.Supp.2d 1206, 1208 (C.D.Cal.2002).

15. *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 304 (4th Cir.2006).

16. *Id.* at 303.

17. *Id.* at 304, quoting *Soliman v. Gonzales*, 419 F.3d 276, 283 (4th Cir.2005) (quoting *Cooper Indus. v. Aviall Servs., Inc.,* 543 U.S. 157, 125 S.Ct. 577, 160 L.Ed.2d 548 (2004)).)."

18. *Id.* at 303; 20 C.F.R. § 1002.33 (2006).

19. *Id.*

20. 20 C.F.R. § 1002.22 (2006).

21. 20 CFR § 1002.33 3 (2006).

22. *Gummo v. Vill. of Depew,* 75 F.3d 98, 105 (2d Cir.1996).

23. *Francis*, 452 F.3d at 305.

24. 38 USC § 4313(a)(2)(A).

25. *Wright v. Cayan*, 827 F.2d 999 (2d Cir. 1987); *D'Ulisse-Cupo v. Board of Directors of Notre Dame High Scholl*, 202 Conn. 206, 520 A.2d 217 (1987).

26. 38 USC § 4312(d)(1)(c).

27. *Id.*

28. *Id.*

29. *United States v. Markey*, 393 F.3d 1132, 1136 (10th Cir.2004).

30. *Maxfield v. Cintas Corp. No. 2(I)*, 427 F.3d 544, 551-52 (8th Cir.2005).

31. 20 C.F.R. § 1002.194 (2006).

32. 38 USC § 4316.

33. *Wrigglesworth v. Brumbaugh,* 121 F.Supp.2d at 1133-39; *Jordan v. Air Prods. & Chems., Inc.*, 225 F.Supp.2d at 1208 (C.D.Cal.2002); *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d at 304.

34. 38 U.S.C. §§ 4312 and 4313.

35. *Id.*

36. *Id.*

37. *Francis*, 452 F.3d at 304-305.

38. 38 U.S.C. §§ 4316.

39. Section 4313 and those enumerated in 20 C.F.R. § 1002.194.

40. Of course, presuming that the employer has not argued any Section 4312 defense, e.g., hardship.

41. S8 USC § 4301(a).