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From the Desert to the Courtroom:  
The Uniformed Services Employment and Reemployment Rights Act  

ANDREW P. SPARKS*  

American servicemembers are returning from the battlefields of Afghanistan and Iraq to find that the jobs they left behind no longer exist. The Uniformed Services Employment and Reemployment Rights Act (USERRA) is supposed to guarantee that members of the armed services will not suffer adverse employment repercussions on the basis of their military service. Despite USERRA's substantial protections, servicemembers continue to fear that they will lose their jobs upon deployment or face significant reductions in pay and benefits upon returning to work. To qualify for the benefits of the statute, a servicemember must "reapply" for his old position. The Supreme Court has directed lower courts to give the statute a liberal construction for the benefit of those who have served their country. Lower courts have generally followed the Supreme Court's guidance by giving USERRA's application requirement liberal construction. However, some courts have employed overly technical interpretations of the application requirement of the Act, depriving individuals of valuable rights. This Note analyzes the relevant legislative history and case law of USERRA and its predecessor statutes, and concludes that a minority of courts have given insufficient effect to the remedial intent of the Act. This Note suggests either a judicial or legislative solution to remedy potentially harsh results for servicemembers. This Note argues in favor of the Second Circuit's interpretation of the application requirement, which provides that technical failures in the form of the application should not prevent USERRA's rehiring mandate from obligating the employer to reinstate the servicemember. An adjustment to the "application" requirement will provide clarity for employers and aid servicemembers in securing their rights under USERRA.

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INTRODUCTION

The Uniformed Services Employment and Reemployment Rights Act (USERRA)\(^1\) provides that persons serving in the uniformed services “shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of” their membership in the uniformed services.\(^3\) USERRA is the principal mechanism protecting soldiers and members of the Reserve\(^3\) from illegal employment discrimination.\(^4\) The statute enables

\(^2\) Id. § 4311(a).
\(^3\) Reservists are soldiers who volunteer to serve part time in the uniformed services. See generally U.S. Army Reserve, A Positive Investment for America: 2009 Posture Statement (2009), available at http://www.usar.army.mil/arweb/mission/ARPS/Documents/ARPS.pdf. Many of these individuals have careers and families. See generally id. For example, Dr. Jason Huang, a Johns
average American citizens to serve their country by guaranteeing their reemployment upon returning from active duty.\textsuperscript{4}

USERRA embodies a promise from Congress that members of the uniformed services will not suffer negative employment repercussions based on their military service.\textsuperscript{5} Unfortunately, USERRA has not succeeded in its goal of protecting the jobs of servicemembers. Enforcement of the statute has proved problematic. Application requirements imposed by courts have resulted in servicemembers losing their rights under the statute. The application and enforcement mechanisms of USERRA do not reflect an understanding of the substantial difficulties soldiers face when transitioning from war abroad to life back at home the United States.

This Note is divided into four Parts. Part I of this Note discusses the background of USERRA. Section A briefly outlines the history of USERRA. Section B provides an understanding of the pertinent contours of the statute, including the relevant application requirements. Section C describes the facts and circumstances surrounding the current military conflict, which offers texture for an analysis of USERRA. These facts elucidate why it is so important that USERRA be made as effective as possible.

Part II addresses USERRA’s enforcement. Section A sets forth the background of USERRA’s enforcement provisions. The statute is subject to oversight from several agencies. Actions under the statute can be brought in a number of different ways. Section B describes one legislative reaction to the perceived deficiencies in USERRA enforcement.

Part III examines applications under USERRA. Section A provides background information on the application requirements of USERRA. Section B includes an analysis of some of the important cases defining and applying a strict rule governing application requirements of USERRA. As this Note explains, much of the case law appears inconsistent with the intent of Congress. Section C analyzes the more equitable rule followed by the Second Circuit and other courts. Section D describes a compelling recent decision on USERRA’s application requirements. Section E then discusses a recent Congressional effort to improve the statute.

JASON HUANG, MD

Hopkins and University of Pennsylvania-trained neurosurgeon, volunteered to join the Army Reserve after the attacks of September 11, 2001. He was subsequently deployed to Iraq, where he provided neurosurgical care to 1200 soldiers. He is currently back working full-time at the University of Rochester Medical Center. See David S. Guzick, Jason Huang, MD: An American Tale, DEAN’S NEWSLETTER (Univ. of Rochester Med. Ctr., Sch. of Med. & Dentistry), July 22, 2008, http://www.urmc.rochester.edu/smd/newsletter/article.cfm?id=130.

\textsuperscript{4} See 38 U.S.C. § 4301(a)(1)–(3).
\textsuperscript{5} See id. § 4311(a).
\textsuperscript{6} See id. § 4301(a)(1).
Finally, Part IV contains positive suggestions for how the application dilemma could be ameliorated. Section A.1 proposes a judicial solution and finds support in a comparison of Title VII employment discrimination claims and USERRA claims. Section A.2 suggests Congressional action as a solution and looks into the future of USERRA under the Obama Administration.

I. BACKGROUND

A. A BRIEF HISTORY OF USERRA

From its early history, the United States has intermittently faced the unique problems attendant to rapid, large-scale demobilizations of soldiers. One of the most significant such occasions occurred following World War I. Rapid demobilization of millions of troops followed the signing of the armistice that brought about the end of the War. Widespread apprehension existed as to how the demobilization would occur and whether the demobilization would create profound economic disturbances.

In 1932, during this postwar period, Walter Waters and other unemployed veterans decided to travel from their home state of Oregon to Washington, D.C. They hoped to "persuade Congress to issue a payment—often called a bonus—promised to [the troops] for their service" but not due for over a decade. Waters' group inspired thousands of similarly situated unemployed veterans to travel to Washington, where they became known as the "Bonus Marchers." The Bonus Marchers camped out in parks and paraded while Congress considered their demands. At one point, 5000 to 8000 veterans marched down Pennsylvania Avenue while 100,000 spectators looked on. Congress ultimately rejected their proposal and drove the veterans out of the city.

With the Bonus March still fresh in recent history, Congress sought to avoid another situation where veterans returning from war would suffer from mass unemployment. Acting on these concerns, Congress

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8. Id. at 50.
10. Id.
11. Id.
12. Id.
13. Id. at 85.
14. Id. at 89–90.
enacted the Selective Training and Service Act in 1940. Since this initial attempt to provide employment protections for American troops, a series of similar statutes have been enacted to meet the perceived necessities of the day. These statutes include the Military Selective Service Act of 1967 and the Vietnam Era Veterans’ Readjustment Assistance Act of 1974. These statutes have each in turn been amended and replaced by new permutations. USERRA is the modern embodiment of these past statutes. In fact, USERRA owes much of its content and structure to the original Selective Training and Service Act.

In 1994, Congress enacted USERRA in response to concerns regarding Gulf War veterans. During the first Gulf War, President George H. W. Bush ordered the first large-scale call up of reservists since the Korean War. Almost 228,000 reservists were ordered to active duty, with a further 132,000 authorized. This substantial mobilization of reserve units made the issue of job protection for reservists once again relevant.

Congress was motivated to act by largely the same purposes that were the basis of the enactment of the original 1940 Selective Training and Service Act. Congress felt that the Veterans’ Reemployment Rights Act (VRRA), USERRA’s statutory predecessor, had become antiquated and cumbersome given the greater responsibilities of reservists in “every phase of military preparedness.” Congress specifically mentioned the new nature of the extensive and diverse
training periods that reservists were experiencing. Employers and members of the armed services alike had expressed confusion and uncertainty regarding their rights under the previous statute. Congress sought to "clarify, simplify, and, where necessary, strengthen the existing veterans' employment and reemployment rights provisions." Congress wanted further to ensure that the U.S. Government would be a model employer in executing the provisions of USERRA. The Act was signed into law by President Clinton on October 13, 1994.

Congress went further to ensure that there would be continuity in its attempts to protect members of the uniformed services. Congress did so by making clear its intent that case law interpreting USERRA's statutory predecessors would be applied to USERRA. In particular, the Congressional Committee noted that previous courts had called for a liberal construction of the statute. Congress wanted the case law to be consistent.

The courts appear to have followed this general notion. In Trulson v. Trane Co., the court stated that "[t]he reemployment provisions of this act and its predecessors...are 'substantially identical' and the judicial precedents developed under the various acts are 'largely interchangeable.'" In McGuire v. United Parcel Service, the court recognized that "[t]he USERRA replaced the [VRRA], but Congress intended for case law developed under the VRRA to aid [courts] in interpreting the USERRA." Thus, courts generally seem to have understood the message that there was to be significant continuity in the application of USERRA.

B. IMPORTANT PROVISIONS OF USERRA

USERRA was designed to continue the support for servicemembers that previous statutes provided. A primary purpose of USERRA is to

27. Id.
28. See id.
29. Id.
30. Id.
32. See H.R. Rep. No. 103-65, at 19 ("[T]he Committee wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act, remains in full force and effect in interpreting these provisions. This is particularly true of the basic principle established by the Supreme Court that the Act is to be 'liberally construed.'" (citing Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946); Ala. Power Co. v. Davis, 431 U.S. 581, 584 (1977))).
33. See id.
34. Id.
35. 738 F.2d 770, 772 n.4 (7th Cir. 1984) (quoting Hanna v. Am. Motors Corp., 724 F.2d 1300, 1306 n.4 (7th Cir. 1984)).
“encourage non-career service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service.”\textsuperscript{37} Other stated purposes of the statute include “minimiz[ing] the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service” and “prohibit[ing] discrimination against persons because of their service in the uniformed services.”\textsuperscript{38}

USERRA provides in pertinent part:

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.\textsuperscript{39}

USERRA requires that an employee-servicemember called away to military service “shall be promptly reemployed” by their former employer upon discharge.\textsuperscript{40} Both public and private employers are covered by the law.\textsuperscript{41}

To obtain the benefits offered by USERRA, the servicemember must notify her employer of her intent to return to a position of employment. To do so, she must submit an application for reemployment with her former employer not later than ninety days after the completion of the period of service.\textsuperscript{42} An employee is not required to inform her employer of her intent to return to her job until after her military service has concluded.\textsuperscript{43} Significantly, the statute does not define what is meant by the phrase “application for reemployment.”\textsuperscript{44} Nor does the legislative

\textsuperscript{38.} Id. § 4301(a)(2)-(3).
\textsuperscript{39.} Id. § 4311(a). The “uniformed services” include the Army, Navy, Marine Corps, Air Force, Coast Guard, Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve, Coast Guard Reserve, Army National Guard, Air National Guard, and the Commissioned Corps of the Public Health Service, as well as persons designated by the President in times of war. See U.S. DEPT OF LABOR, VETERANS’ EMPLOYMENT & TRAINING SERV., A NON-TECHNICAL RESOURCE GUIDE TO THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA) 4-5 (2005).
\textsuperscript{40.} 38 U.S.C. § 4313(a).
\textsuperscript{41.} Id. § 4303(4)(a); see also Andrew P. Morrise, The Public-Private Security Partnership: Counterterrorism Considerations for Employers in a Post-9/11 World, 2 HASTINGS BUS. L.J. 427, 434-37 (2006).
\textsuperscript{43.} 20 C.F.R. § 1002.32 (2009); Bryce G. Murray & E. Fredrick Preis, Jr., Final Military Leave Regulations Issued by DOL, CORP. COUNS., Apr. 2006, at 7.
\textsuperscript{44.} See 38 U.S.C. §§ 4312(a)(3), 4303.
history appear to provide much useful information as to what constitutes a proper "application." As a result, courts have been left to fill the gap in interpreting and applying this provision of USERRA.

To qualify for the protections of USERRA, a servicemember must meet a number of additional statutory criteria. The servicemember (1) cannot have been dishonorably discharged; 46 (2) nor can he have been dismissed by sentence of a court-martial; 47 (3) the absence must be due to service; 48 (4) advance notice (orally or in writing) must be given to the employer; 49 (5) cumulative period(s) of service while employed by the employer must not exceed five years; 50 and (6) application for reemployment must be timely. 51

As this discussion of the pertinent statutory requirements demonstrates, compliance with USERRA is not necessarily easy. There are numerous places where a servicemember may make a mistake. A relatively minor mistake may disqualify an individual from receiving benefits. 52 This Note will argue that courts must take into account USERRA's numerous hurdles to eligibility and the totality of the circumstances involved in a soldier's transition from war abroad to life at home in America. This Note proposes that once a servicemember has qualified under the statute, the actual form of their application for reemployment should not be material.

C. THE MODERN CONUNDRUM

With the election of Barack Obama on November 4, 2008, America's defense strategy was expected to undergo substantial change. 53 President Obama recognizes the value of the work done by the men and women serving in the uniformed services. In a speech on defense strategy, then-Senator Obama proclaimed:

[O]ur country's greatest military asset is the men and women who wear the uniform of the United States.

. . . .

. . . [W]hen we do send our men and women into harm's way, we must also clearly define the mission, prescribe concrete political and military objectives, seek out the advice of our military commanders,

46. 38 U.S.C. § 4304(1).
47. Id. § 4304(3).
48. Id. § 4312.
49. Id.
50. Id.
51. Id.
52. See infra Part III.B.
evaluate the intelligence, plan accordingly, and ensure that our troops have the resources, support, and equipment they need to protect themselves and fulfill their mission.\textsuperscript{54}

Based on the rhetoric of such speeches, commentators perceived that the policies of the Obama Administration would differ dramatically from those of the Bush Administration.\textsuperscript{55} More than a year into his presidency, it remains to be seen how the new Administration will carry out its stated goals of ensuring that American troops have proper support.

It appears that the policies of the previous President, George W. Bush, are proving difficult for his successor to unwind. The Bush Administration’s strategy for protecting the homeland relied heavily on the blood and sweat of the American reservist. Between September 11, 2001, and January 20, 2009, Bush’s Administration called up 689,358 reservists for active duty.\textsuperscript{56}

Under President Obama, the Executive Branch continues to rely on the important work done by reservists. Since his inauguration on January 20, 2009, President Obama’s Administration has called up another 40,453 reservists for active duty.\textsuperscript{57} While the number of reservists called for active duty appears relatively stable, the current Administration’s long-term strategy with respect to reservists is unclear.

One notion remains clear: As illustrated by the figures above, reservists play an integral role in the modern military. Reservists comprise approximately forty-six percent of America’s total available military force.\textsuperscript{58} Members of the reserve serve in thousands of locations across the world.\textsuperscript{59} Since September 11, 2001, America’s reservists have been involved in a number of conflicts including Operation Enduring Freedom, Operation Iraqi Freedom, and Operation Noble Eagle.\textsuperscript{60}

The strategy of relying on reservists, essentially begun by President Bush and followed by President Obama, has had significant ramifications. It should be noted though that President Bush’s strategy

\textsuperscript{55} Sanger, supra note 53.
may have had its roots in the Clinton Administration, where the use of reservists in the armed services increased by a factor of thirteen.\textsuperscript{61} Regardless of its origins, however, President Bush's heavy reliance on reservists is virtually unprecedented in American military history.\textsuperscript{62} Modern trends indicate that reliance on reservist forces continues to increase: use of reserve forces by the military is likely to continue due to cost effectiveness and fundamental changes in military structure and purpose.\textsuperscript{63}

The most significant ramifications of large-scale mobilizations of reservists occur in the reservists' work and family life. The family lives of millions of Americans are disrupted when loved ones are called to duty. In recent history, reservists were regarded simply as weekend warriors, who had normal jobs and relatively normal lives, mainly being activated for natural disasters and other emergencies.\textsuperscript{64} Given the long-term strategy of increasing reliance on reserve forces, disruptions to reservists' work and family lives will likely continue.

Increasing reliance on reserve forces strains the families of servicemembers. Reservists leave families at home who are forced to cope with numerous difficulties in the absence of loved ones. The Department of Defense (DOD) has acknowledged the special burden borne by reservists' families.\textsuperscript{65} The DOD has stated that reducing stress on military personnel and their families is a top priority.\textsuperscript{66} A government guarantee of reemployment is one method of reducing that stress.

Members of the armed forces make considerable sacrifices, not only during their military deployments, but also in terms of career prospects. Despite their sacrifices, servicemembers are returning to work after substantial deployments only to find that the jobs they left no longer exist.\textsuperscript{67} Many are finding that they are being offered less than what they had before. In some cases, servicemembers experience dramatic


\textsuperscript{62} See \textit{id.} at 800–04.

\textsuperscript{63} See \textit{id.} at 801.


\textsuperscript{65} U.S. DEP't OF DEF., \textit{supra} note 59, at 75.

\textsuperscript{66} Id.

\textsuperscript{67} See \textit{infra} Part III.B.
reductions in pay and opportunities. Other servicemembers have lost their businesses by giving precedence to their service over their own personal lives. Some white-collar professionals have been forced to take fifty percent pay reductions.

USERRA was designed to counteract some of the negative consequences of military service outlined above. Importantly, USERRA is supposed to guarantee reemployment. However, reservists continue to fear that they will lose their jobs upon deployment. Regardless of the causes of the substantial uncertainties in the lives of servicemembers, it is important that they receive all possible assistance when transitioning back to life in the United States.

Continued support for our all-volunteer military force is crucial to a number of important military objectives, such as the modernization of the military into a “21st Century Total Force.” The lengthy and irregular warfare predicted to occur in the future will require soldiers with considerable technical acumen. The types of troops required to fight modern battles are technologically astute. These soldiers are likely to be drawn from the technology sector, meaning that many of them are likely to have stable jobs and advanced degrees. A shift towards highly complex “net-centric” warfare can only be maintained by a robust, educated, and supported military reserve.

On the other side of the coin, employers are also faced with significant challenges in following the substantial mandate of USERRA. Long and repeated deployments of important employees can create thorny compliance problems for employers. Additionally, a company will be loath to appear unpatriotic. The impact is particularly acute on industries that tend to have employees in the military reserve, such as the


70. See id.

71. See id.


73. U.S. DEP’T OF DEF., supra note 59, at 19.

74. See id. at 75.

75. See id. at 19, 75.

76. See id. at 58–59.

77. See id. at 63; see also id. at 80–81 (outlining its “Information Age Human Capital Strategy”).
airlines, emergency-response, police, and fire departments. Lengthy absences of key personnel leave capability gaps that are difficult to address. Additionally, employers are forced to bear significant costs training the newly hired replacement employees.

During this crucial period of its existence, USERRA has achieved mixed success. Some soldiers facing discrimination have had their rights vindicated under the statute. Still, roughly seventy percent of reservists who said they had problems getting rehired (or other employment difficulties) did not seek redress. Given persisting doubts regarding its efficacy, more should be done to bolster the statute. Ultimately, it is important to recognize that this issue is here to stay because of the military’s continuing reliance on reservists.

II. USERRA ENFORCEMENT

A. BACKGROUND ON USERRA ENFORCEMENT

Congress provided for a variety of mechanisms to enforce the provisions of USERRA. The National Committee of Employer Support of the Guard and Reserve (ESGR) is one of the primary mechanisms established by the United States government to assist soldiers in their employment conflicts. The ESGR was established in 1972 “to assist in the resolution of conflicts arising from an employee’s military commitment.” The DOD Directive establishing the ESGR calls for the organization to “promote both public and private understanding of the National Guard and Reserve in order to gain U.S. employer and community support for the Reserve components as demonstrated through implementing personnel programs, policies, and practices that encourage employee and citizen participation in National Guard and Reserve.” The ESGR provides a number of tips for National Guard and Reserve members. The ESGR suggests that candor with one’s boss and

79. See id.
80. See id.
81. See Greenhouse, supra note 69, at 14.
82. President Obama’s decision to send 21,000 more troops to Afghanistan underscores this proposition. See Peter Baker & Elisabeth Bumiller, Plan to Boost Afghan Forces Splits Advisers, N.Y. TIMES, Sept. 27, 2009, at 1.
83. See ESGR FACTSHEET, supra note 58, at 2.
84. Id. at 1.
knowing one’s rights under federal law will help soldiers achieve positive outcomes. The most amicable form of USERRA enforcement appears to be a method advocated by the ESGR. Reservists can show appreciation for their supportive employers by nominating their bosses for Patriot Awards. This type of informal, positive admonishment may sometimes be all it takes for employers to comply with USERRA’s mandates. The ESGR gives out four different awards: the Patriot Award, the Pro Patria Award, the Above and Beyond Award, and the Employer Support Freedom Award. Such forms of “soft” enforcement encourage employers to support their reservist employees in non-confrontational ways.

If “soft” enforcement methods are unavailing, employees can make a complaint with the Department of Labor (DOL) or commence a private lawsuit to enforce their rights under USERRA. USERRA claimants can file a complaint with the Veterans’ Employment and Training Service (DOL-VETS), an agency of the Department of Labor. The service investigates and refers cases to the Attorney General of the United States for consideration of litigation on the claimant’s behalf. Cases where a federal agency is the employer go to the Office of Special Counsel, which can act as counsel for the federal employee in an enforcement action before the Merit Systems Protection Board. Enforcement by government agency has been problematic. It can often take years for USERRA cases to proceed. A recent Governmental Accountability Office study showed that the DOL did not

87. See id at 2.
92. See id. § 4324(a).
“consistently notify claimants” of their right of referral when DOL-VETS was not successful in resolving the claim.\textsuperscript{94} DOL-VETS also lacks an internal review mechanism to oversee unresolved claims.\textsuperscript{95} Sometimes it is fastest and most advantageous for the soldier to proceed with a private lawsuit.\textsuperscript{96}

\textbf{B. LEGISLATIVE RESPONSE TO ENFORCEMENT PROBLEMS}

The House of Representatives recently passed the Improving SSCRA and USERRA Protections Act of 2008.\textsuperscript{97} Introduced by Representative Herseth Sandlin of South Dakota, the Act would encourage courts to grant injunctive relief, when appropriate, to veterans filing claims against state or private employers under USERRA.\textsuperscript{98} The Act also seeks to extend USERRA protections to students.\textsuperscript{99} Additionally, a prevailing servicemember suing under USERRA would be awarded attorney’s fees.\textsuperscript{100} This ups the ante for employers seeking to deny employees benefits owed under USERRA.

This legislation was spurred by testimony from an attorney describing a situation where a court denied a servicemember a request for injunctive relief against an employer.\textsuperscript{101} The reporting Committee agreed that it was important to statutorily underline the equitable relief powers that courts already possess, and included language specifically highlighting the courts’ ability to grant equitable relief where appropriate.\textsuperscript{102}

These developments show that, despite its long history, defects still exist in USERRA. Modern circumstances are challenging the statute in new ways.\textsuperscript{103} Record numbers of claims under the statute are forcing Congress to take another look. In 2001, the DOL opened 895 new

\begin{footnotesize}
94. See U.S. \textit{Gov’t Accountability Office}, \textit{supra} note 90, at 4–5.
95. \textit{See id.} at 15.
98. \textit{See H.R.} 6225.
99. \textit{Id.}
100. \textit{Id.}
102. \textit{See id.}
\end{footnotesize}
cases. In 2007, the number of unique cases had risen to 1455. The DOL received more than 16,000 USERRA complaints between 2004 and 2007. Complicating this issue is the fact that modern USERRA cases are "increasingly complex and often involve multiple employment issues." The Improving SSCRA and USERRA Protections Act of 2008 evinces a desire and willingness on the part of some members of Congress to further the protections of USERRA. Congress should take further steps.

III. APPLICATIONS UNDER USERRA

A. BACKGROUND ON THE APPLICATION REQUIREMENTS OF USERRA

To qualify for benefits under the Act, a servicemember must satisfy a number of criteria in making an application for reemployment. These requirements have proved a trap for the unwary veteran. Specifically, to obtain relief under USERRA, an employee must "apply" for reemployment. Contrary to the Supreme Court's expressed intentions that the statute is to be liberally construed, many veterans face unduly difficult courtroom battles to gain relief under USERRA. Courts appear to have neglected the well-known cannon of statutory construction which provides that remedial statutes are to be interpreted and applied in light of their remedial purposes.

In Fishgold v. Sullivan Drydock & Repair Corp., the Supreme Court analyzed the Selective Training and Service Act. The Court stated that "[t]his legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need."
Subsequent case law suggests that the Court has continued to adhere to this proposition. Specifically, the Court has reiterated its understanding of Congress's intent by stating that

the Act evidences Congress' desire to minimize the disruption in individuals' lives resulting from the national need for military personnel. It seeks to accomplish this goal by guaranteeing veterans that the jobs they had before they entered the military will be available to them upon their return to civilian life.

These statements reflect an acknowledgment of the substantial burdens servicemembers shoulder. The Court has been emphatic in its pronouncements advocating for liberal interpretation of the statute.

The statute does not define "application for reemployment." Nor has the Supreme Court ruled on this issue. No bright-line test has been developed. Instead, the general approach followed by courts is that "a case-by-case determination is required, focusing on the intent and reasonable expectations of both the former employee and the employer, in light of all the circumstances." In determining whether "adequate notice" has been provided within the meaning of the Act, a court will examine "the size of the firm, the number of employees, the length of time the returning veteran has been away, and a myriad of other factors." The burden of proof is on the plaintiff servicemember to show that she made a proper application. The plaintiff bears this burden at summary judgment.

B. A STRICT RULE GOVERNING APPLICATIONS UNDER USERRA

Despite the statements of the Supreme Court, some courts employ hyper-technical analyses when adjudicating USERRA claims. The most recent case from the Seventh Circuit analyzing applications under USERRA is Baron v. United States Steel Corp. In Baron, the court ruled on a case determining what constituted a sufficient application

116. Id. at 583.
119. McGuire v. United Parcel Serv., 152 F.3d 673, 676-77 (7th Cir. 1998) (emphasis omitted); see also Erickson, 108 M.S.P.R. 494, 500 (2008), aff’d in part & rev’d in part, 571 F.3d 1364 (Fed. Cir. 2009).
120. Shadle v. Superwood Corp., 858 F.2d 437, 440 (8th Cir. 1988).
121. See, e.g., id.; Trulson v. Trane Co., 738 F.2d 770, 772-73 (7th Cir. 1984).
124. 649 F. Supp. 537; see also Jacklin, supra note 118, at 585.
under USERRA's predecessor statute. John R. Baron, a young World War II veteran, returned to his place of employment following an honorable discharge from the U.S. Army Air Corps. He went to the employment office and told them that he was seeking employment, but also that he planned to apply to college. Baron said that he did not think he would be accepted.

The court denied Baron relief under the Act, holding that an application may not be conditioned upon the occurrence of another event. The rule, as applied in Baron, presumes a level of forethought and planning that is belied by the circumstances veterans face. Engaging in warfare is a traumatic event, often causing severe mental and emotional difficulties. A soldier's life is fraught with instability. Rules that force servicemembers to speak only in terms of certainties run counter to a sympathetic understanding of the challenges soldiers face. The Baron court employed overly technical arguments in the face of an equitable situation. In characterizing Baron's application as a "mere inquiry," the court imposed an unduly harsh interpretation of the application requirement.

Relying partly on Baron, the Eight Circuit reached a similar result in Shadle v. Superwood Corp. Upon receiving his honorable discharge, Luther Shadle traveled back to his previous place of employment. He presented himself at his former jobsite and asked for a job application. He requested to see the personnel manager and also the plant manager, but was told they were unavailable. His telephone calls went unreturned. The court held that these acts were not enough to constitute a sufficient application. Nevertheless, the court acknowledged that it was "obvious that Shadle intended to apply for reemployment."

126. Id.
127. Id. at 541.
128. Id.
129. Id. at 541-42.
132. See 858 F.2d 437, 440 (8th Cir. 1988).
133. Id. at 438.
134. Id.
135. Id.
136. Id.
137. Id. at 440.
138. Id. at 439 (emphasis added).
Presumably, under the Shadle court’s reasoning, all an employer needs to do is to not respond to the inquiries of a recently returned veteran. This understanding of USERRA departs from the goal that the statute is to be liberally construed.\(^\text{139}\) Indeed, the Supreme Court has stated that “no practice of employers...can cut down the...benefits which Congress has secured the veteran under the Act.”\(^\text{140}\) Yet the Shadle rule did precisely that: an employer’s practice of unreasonably ignoring a returning employee’s requests nullified the benefits owed to the veteran.

Judge Gibson, dissenting in Shadle, weighed in with verve. He questioned how the majority could acknowledge Congress’s intent that the statute be liberally construed, but then abruptly depart from that understanding.\(^\text{141}\) He saw the majority’s rule as erecting “unduly burdensome requirement[s]” for returning veterans.\(^\text{142}\) Judge Gibson succinctly described the situation in Shadle:

[Shadle] traveled to defendant’s plant, presented himself at the proper place to make application, and requested a formal written application form. He was not given the application. He later called the plant asking to speak to the personnel manager and the plant manager, who knew he had gone into the Navy, but was again rebuffed.

We should not require more.\(^\text{143}\)

Judge Gibson’s view represents a commonsense understanding of the sufficiency of an application under USERRA. Servicemembers, often unaware of the full extent of their rights, should not be required to do more than Mr. Shadle did. Moreover, Judge Gibson’s view reflects a more accurate understanding of the difficulties veterans face when returning from service.

C. The More Equitable Majority Rule

The approach taken by the court in Shadle appears to be the minority view of the application requirements of USERRA. Many courts have taken a more liberal approach to the statute,\(^\text{144}\) following the guidance of the Supreme Court in Fishgold.\(^\text{145}\) The most recent ruling on the application requirement of USERRA in the Ninth Circuit comes from Thomas v. City & Borough of Juneau.\(^\text{146}\) Thomas exemplifies the more equitable approach to the analysis of a sufficient application under

\(^\text{139}\) Id.; id. at 440 (Gibson, J., dissenting); see also supra notes 109–16 and accompanying text.
\(^\text{141}\) Shadle, 858 F.2d at 440 (Gibson, J., dissenting).
\(^\text{142}\) Id.
\(^\text{143}\) Id. at 440–41.
\(^\text{145}\) 328 U.S. at 285.
USERRA. In *Thomas*, the plaintiff was employed as a canine control officer for over two years. The plaintiff followed all of the statutory formalities including giving proper notice to his employer. "Undisputed evidence" showed that the employer was "aware" that the plaintiff was seeking to be rehired. The court held that "no further action on [the plaintiff's] part was required to trigger a legal obligation on the part of the [employer] to rehire him."

Several years prior to *Thomas*, the Northern District of California also analyzed the sufficiency of employment applications under USERRA. In *Taylor v. Southern Pacific Co.*, the court considered the case of a locomotive fireman who left his position to enter the armed forces. In holding the plaintiff's application sufficient, the court warned against private employers "thwart[ing] the clear purpose of the Act by imposing their own superfluous requirements" on an employee's application.

The holdings of *Thomas* and *Taylor* are not necessarily exceptional. The Second Circuit has held that where a returning servicemember's application for reemployment puts the employer "on ample notice of his claim" to reemployment, "technical failure[s]" in the form of the application that do not prejudice the employer will not prevent USERRA's rehiring mandate from binding the employer. This rule reflects an equitable understanding of the difficulties servicemembers face when returning to the workplace. Servicemembers have been denied reemployment despite substantial efforts to reapply. Technical failures in an application should not diminish an employer's liability when the employer is aware that a servicemember seeks reemployment.

In the powerful Second Circuit case *Martin v. Roosevelt Hospital*, a doctor was forced to litigate against his hospital employer. Dr. Donald Martin accepted a position as third assistant resident in surgery at the highly regarded Roosevelt Hospital in New York City. Shortly after he began work, Dr. Martin was ordered to serve two years of active duty

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147. See id. at 306-07.
148. Id. at 305.
149. Id.
150. Id. at 307.
151. Id.
153. Id. at 607-08.
154. Id. at 609.
156. See, e.g., id. at 159; *infra* Part III.D.
157. For the most recent case from the Eleventh Circuit, see *Duey v. City of Eufaula*, No. 79-149, 1979 WL 1936, at *5 (M.D. Ala. Oct. 31, 1979), holding that "technical failure[s]" in an employment application do not preclude reemployment rights.
158. 426 F.2d at 157-58.
159. Id. at 157.
with the Navy. Dr. Martin made several communications with the hospital while he was deployed, indicating his interest in reemployment. "upon completion of his service." Within the ninety-day statutory period following his discharge from the Navy, Dr. Martin submitted an employment application to the hospital, but it was for a "position to which he was not entitled under the statute."

The hospital argued that Dr. Martin failed to make an "application for reinstatement" during the ninety-day time window specified by the statute. This technical failure could have barred the plaintiff from any recovery under a strict reading of the statute as in Shadle and Baron. Nevertheless, the court looked past the technical failure. The court thought that "[i]t would be out of keeping with the broadly protective purpose of the statute to deny its benefits because Dr. Martin did not, during the ninety days following discharge, repeat the request which the hospital had already twice rejected." The court applied a liberal construction to the timely application provision of the statute and held for the plaintiff on the issue.

D. THE CASE OF MICHAEL SERRICCHIO

The debate over the sufficiency of an application under USERRA continues. The competing rules outlined above constitute the framework of modern-day analysis regarding applications under USERRA. One emotive example of the battle being fought in courtrooms across America is the case of Michael Serricchio.

Michael Serricchio was living his dream as a stockbroker in Stamford, Connecticut. The first in his family to graduate college, he loved talking about stocks and analyzing the market. However, in the fall of 2001, Serricchio was called up for active duty. By the time Serricchio returned to work two years later, a new company, Wachovia Securities, LLC, had taken over his former employer's brokerage business. Instead of permitting Serricchio to resume his old job, Wachovia asked him to make "cold calls to potential clients" for substantially less money.

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160. Id.
161. Id. at 157–58.
162. Id. at 158–59.
163. Id. at 158.
164. Id. at 159.
165. Id. at 159–60.
167. Id.
169. Id. at 103.
170. Belluck, supra note 166.
Serricchio sought a remedy in court. In December 2003, with the aid of counsel, Serricchio sent a letter to Wachovia requesting his reinstatement. To support his family during the lawsuit, Serricchio managed a tanning salon while his wife worked as a sales assistant and for the post office.

At trial, Wachovia contended that Serricchio never applied for reinstatement. They asserted that Serricchio only proffered a "conditional request" to be reemployed. A conditional request is insufficient under Baron. The court, instead, chose to distinguish Serricchio's case from Baron. Serricchio's letter included a list of things needing to be remedied by Wachovia in connection with reinstatement. The court viewed his "conditions" more as "red flag[s]" and held that his letter was a sufficient application as a matter of law.

The Serricchio court had to strain to distinguish Baron from Serricchio's case. It considered the Second Circuit rule that "where a returning servicemember's application for reemployment puts the employer 'on ample notice of his claim' to reemployment, 'technical failure[s] in the form of the application which do not prejudice the employer will not prevent USERRA's rehiring mandate from binding the employer." The court weighed both sides of the argument. If the court had adopted the defendant's argument, Serricchio would have lost all his rights under the statute, simply for having included additional requests in his reinstatement application.

The Baron rule almost caused Serricchio's claim to falter, but the court managed to avoid its application. Far preferable to this maneuvering would be an adjustment to the rule promulgated in Baron. The Serricchio court had the opportunity to follow Second Circuit precedent. Other reservists are not as fortunate. Reservists face difficult obstacles in jurisdictions constrained by Baron and Shadle. Because the application issue continues to be confronted in courtrooms across the United States, a global resolution is needed. This Note will later explore two solutions to this Gordian knot.

171. Id.
172. Serricchio, 556 F. Supp. 2d at 103.
173. Belluck, supra note 166.
174. Serricchio, 556 F. Supp. 2d at 104.
175. Id.
176. See 649 F. Supp. 537, 541 (N.D. Ind. 1986); see also Serricchio, 556 F. Supp. 2d at 105.
177. See Serricchio, 556 F. Supp. 2d at 105; Barron, 649 F. Supp. at 541.
178. Serricchio, 556 F. Supp. 2d at 105.
179. Id.
180. Id. at 104-05 (quoting Martin v. Roosevelt Hosp., 426 F.2d 155, 159 (2d Cir.1970)).
181. See id.
E. CONGRESSIONAL ACTION

In 2004, Congress acted to amend USERRA by enacting the Veterans Benefits Improvements Act (VBIA). The VBIA added an additional requirement that "[e]ach employer shall provide to persons entitled to rights and benefits under [USERRA] a notice of the rights, benefits, and obligations of such persons and such employers under [USERRA]." The DOL has created a poster for employers to post to comply with the VBIA’s new statutory requirements.

This subsequent development shows that servicemembers needed assistance in conforming to the statutory requirements. Employees lacked knowledge about how to comply with USERRA’s numerous statutory requirements. The DOL poster was designed to remedy the lack of knowledge that employees may have had regarding their rights under the statute. While the VBIA demonstrates that Congress is moving in the right direction, more can be done to resolve the genuine uncertainties soldiers face when returning home from war.

IV. THE WAY FORWARD

A. TWO POSSIBLE SOLUTIONS

As discussed above, it appears that courts have largely followed Congress’s mandate in applying past case law to new cases arising under USERRA. These rulings demonstrate an understanding that the statute is to be "liberally construed." Courts acknowledge the motivations underlying USERRA, but sometimes depart from that understanding in applying the law. Veterans have been left high and dry, despite efforts to reapply to their jobs.

Intricate and unnecessary requirements should not be allowed to vitiate the rights conferred to veterans under USERRA. Veterans who have served their country should not be subject to the vagaries of their local jurisdiction in the face of the Supreme Court’s expressed intent. There are two possible solutions to fix the application requirements of USERRA. The first solution would be judicially created. The process would be that once an employer becomes aware that a servicemember seeks reemployment, the employer becomes obligated to rehire the

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185. See id.
187. See supra Part III.B.
188. See, e.g., Shadle v. Superwood Corp., 858 F.2d 437, 440 (8th Cir. 1988) (holding that veteran’s failure to inform employer that he was seeking reemployment foreclosed his claim).
servicemember. The second solution proposes that Congress should amend USERRA. Congress could create a presumption: when a servicemember approaches an employer to make an “application for reemployment,” the application is presumed sufficient.

1. Solution One: Judicial Action

The first possible solution to correcting the minority rule exemplified by Baron is that when an employer becomes aware that a servicemember seeks reemployment, the employer becomes obligated to rehire the servicemember. This was the method employed by the court in Thomas, as well as a number of other courts. The burden on the returning servicemember would be minimal in that he would only have to show that the employer was aware of his desire to be rehired.

A servicemember would be able to meet such a burden by showing some degree of contact between himself and the employer. Telephone calls, visits to the place of employment, and inquiries with staff would be sufficient to show that an employer was aware that the servicemember was seeking reemployment. Issues of fact relating to whether the servicemember made an application would be relatively straightforward under this rubric.

This solution is likely superior to “Solution Two,” discussed below, because it would be relatively easy for courts to institute. Appellate judges could easily correct past decisions by relying on the exact statements of the Supreme Court. Allegations of disrespect for stare decisis would be tempered and countered by the clear legislative history of USERRA and its statutory predecessors.

Judges of all ideological stripes would be able to get behind this relatively simple adjustment in the law. Strengthening labor laws in favor of veterans would be palatable to a majority of judges. One does not have to be “pro-military” or a “hawk” to respect and appreciate the sacrifices made by veterans. Furthermore, this change in the law would likely not make USERRA litigation any more expensive or burdensome to the courts. Litigation relating to applications likely would not change significantly because parties would be able to meet their burdens on this issue by pointing to simple things like telephone records and correspondence.

194. See supra notes 109–16 and accompanying text.
In fact, this change could simplify the current system. The change would eradicate cases where employers were successfully able to dodge phone calls and other valid inquiries. The focus of the litigation would shift to more substantive issues, rather than technical application standards. Ultimately, this solution also has the advantage of not requiring cost-laden congressional action.

a. Comparing USERRA and Title VII Demonstrates That Congress Favors a Lenient Application Standard

A comparison of the USERRA and Title VII employment discrimination burden-shifting frameworks adds further support to the argument that courts should overrule past inequitable precedents. The comparison helps demonstrate that USERRA and its predecessor statutes have been interpreted incorrectly. In a standard Title VII employment discrimination suit, the employee always has the burden of persuasion. Once "the employee establishes a prima facie case of discriminatory animus, the employer only has the burden of producing 'some legitimate, nondiscriminatory reason for the employee's [termination]." The burden will then transfer "back to the employee to show that 'the employer's stated reason for terminating him was in fact a pretext.'"

Under USERRA, the burden shifting framework differs in important ways. The servicemember employee "does not have the burden of demonstrating that the employer's stated reason is a pretext." Rather, "the employer must show... that the stated reason was not a pretext; that is, 'the action would have been taken in the absence of [the employee's military] service.'" In including this provision, Congress has expressly legislated that employers shall bear the burden of proving this element in USERRA cases.

It is highly significant that Congress mandated that the burden shifting framework under USERRA differ from that of a typical employment discrimination claim under Title VII. This act by Congress shows that it is plausibly more sympathetic to claimants under USERRA than under regular Title VII actions. Congress considered the situation of possible plaintiffs under USERRA and determined that they were not

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195. See, e.g., Velasquez-Garcia v. Horizon Lines of P.R., Inc., 473 F.3d 11, 17 (1st Cir. 2007).
196. Id. (alteration in original) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).
197. Id. (quoting Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 161 (1st Cir. 1998)).
198. See David Lowe & Andrew Lee, Military Leave and the Workplace at War: USERRA Overview and 2008 Update, in 137TH ANNUAL INSTITUTE ON EMPLOYMENT LAW 629, 636–37 (Reginald C. Govan et al. eds., 2008).
199. Velasquez-Garcia, 473 F.3d at 17.
200. Id. (alteration in original) (quoting 38 U.S.C. § 4311(c) (2006)).
to be held to as rigorous a burden of proof framework as other claimants in analogous situations.

The sentiments motivating the inclusion of this burden-shifting framework favor a more lenient application standard. A statute must be read consistently.\textsuperscript{201} In light of the fact that Congress made it easier for USERRA claimants to prove their cases, it is likely that Congress would be in favor of shifting the burden to the employer to show that the employee did not make a proper application. It is possible that Congress made an express omission in not including similar statutory language in this section of the statute. However, that is unlikely given the overall remedial intent of the statute\textsuperscript{202} and statements by members of Congress that USERRA is to be liberally construed.\textsuperscript{203}

The unique burden shifting framework included in USERRA adds weight to the argument that complicated application requirements are not consistent with the intent of Congress.\textsuperscript{204} For the effectuation of the statute to be consistent, the application requirements should be changed in favor of servicemember employees. Once an employer becomes aware that an employee seeks reemployment, the employer should be obligated to rehire its employee.

2. \textit{Solution Two: A Legislative Correction}

A second possible solution would be for Congress to amend USERRA. USERRA could be amended to state that when a servicemember asserts that she has made an application, a presumption arises that the application is sufficient. This solution is similar to the solution outlined above, but it would be a more explicit statement from Congress that past precedents should be abrogated.

Presumptions exist in all areas of the law. Presumptions typically serve to assist courts in managing circumstances in which it is difficult to present direct proof.\textsuperscript{205} Presumptions arise "out of considerations of public policy, probability, and fairness," and are helpful in "allocating the burdens of proof of parties."\textsuperscript{206} Presumptions serve a variety of purposes and could be highly useful in this situation.

This proposed solution would explicitly transfer the burden of proof to the employer to show that the application was somehow deficient. As an affirmative defense, the employer could point to problems on the physical application form. This solution would be consistent with past statements by members of Congress advocating for a liberal, pro-veteran

\begin{itemize}
\item \textsuperscript{201} See Clark v. Martinez, 543 U.S. 371, 380–81 (2005).
\item \textsuperscript{202} 38 U.S.C. § 4301(a)(1).
\item \textsuperscript{204} See id.
\item \textsuperscript{205} See, e.g., Basic Inc. v. Levinson, 485 U.S. 224, 241–49 (1988) (discussing the "fraud on the market theory" of U.S. securities laws).
\item \textsuperscript{206} Id. at 245.
\end{itemize}
It would also be consistent with the comparison to Title VII discussed above.

Moreover, amending USERRA could be a politically savvy move for the Obama Administration. President Obama could make a strong pro-military statement by strengthening the reemployment laws for veterans at a time of war. During the 2008 campaign, President Obama promised to create a Military Families Advisory Board to provide a conduit for military families’ concerns to be brought to the attention of senior policymakers and the public. Focusing on USERRA would surely be worthy of the new Board’s time and resources.

However, as noted above, this would also be difficult to put into effect as congressional action is laden with costs. A more direct approach would be for certain members of Congress to take a public stand on the issue and encourage liberal construction of the statute. Ultimately, a legislative amendment could be the best way to address the application problem because courts have varied so much in their interpretations of the statute. This would be a way for Congress to implement a uniform rule across the board, thus making a strongly pro-veteran statement during a time of war.

CONCLUSION

The problem addressed by this Note is significant to the lives of thousands of men and women who volunteer to serve in the uniformed services. Soldiers returning from deployments have been deprived of their rights under USERRA by overly technical interpretations of the application requirements of the Act. This Note argues in favor of the Second Circuit’s interpretation of the application requirement, which provides that technical failures in the form of the application should not prevent USERRA’s rehiring mandate from binding the employer. The proposed solutions to this problem require either judicial or congressional action to cement a pro-veteran standard.

Given the state of the economy, healthcare, and the fact that two concurrent wars are being fought in Afghanistan and Iraq, the Obama Administration understandably has a busy agenda. Nevertheless, problems with USERRA do not appear to be going away. Claims
continue to be filed under USERRA and reservists continue to be deployed.\footnote{See supra Part I.C.}


The Obama Administration has signaled its intent to continue to invest in an advanced twenty-first century military.\footnote{Whitehouse.gov, Issues: Defense, http://www.whitehouse.gov/issues/defense (last visited Jan. 12, 2010).} To further its stated goals of providing more support for the members of the American military,\footnote{Senator Barack Obama, Remarks at the Chicago Council on Global Affairs, supra note 54.} the Obama Administration and the Military Families Advisory Board—once established—should work with Congress to bolster USERRA. The creation of a presumption of a sufficient application will go a long way in aiding the plight of the embattled American servicemember. Ultimately, amending USERRA to strengthen its reemployment guarantee would dovetail perfectly with the President’s recent efforts to strengthen the military.