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## USERRA Oxymoron: Termination as a Valid Reemployment Position, The

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## NOTE

# The USERRA Oxymoron: Termination as a Valid Reemployment Position

*Milhauser v. Minco Products, Inc.*, 701 F.3d 268 (8th Cir. 2012)

BREANNA HANCE\*

### I. INTRODUCTION

Between 2000 and 2010, more than two million United States soldiers, marines, and sailors served in Iraq or Afghanistan.<sup>1</sup> At times, nearly thirty-five percent of U.S. forces in the Middle East consisted of National Guard and Reserve military forces.<sup>2</sup> These service members – sometimes referred to as “citizen soldiers” – maintain normal civilian lives and employment but are prepared to serve their country as needed.<sup>3</sup> Unfortunately, upon return from military service, many citizen soldiers suffer adverse retaliation, discrimination, or termination at the hands of their civilian employers.<sup>4</sup> With 90,000 troops slated to return from Afghanistan by 2014, reemployment rights for returning service members are an increasing concern.<sup>5</sup>

The Uniformed Services Employment and Reemployment Rights Act (USERRA) protects uniformed service members returning to civilian employment.<sup>6</sup> For qualified service members, the act establishes a right to reemployment upon return from military service in the position the service

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1. Aaron Smith, *Job Challenges Loom for War Vets*, CNN MONEY (Mar. 22, 2012, 1:41 PM), <http://money.cnn.com/2012/03/22/news/economy/unemployment-veterans/index.htm>.

2. Jeffrey Schieberl & Charles P. Leo, *The Employers' Legal Obligations to Employees in the Military*, GRAZIADO BUS. REV. (2007), [http://gbr.pepperdine.edu/2010/08/the-employers-legal-obligations-to-employees-in-the-military/#\\_edn3](http://gbr.pepperdine.edu/2010/08/the-employers-legal-obligations-to-employees-in-the-military/#_edn3).

3. See Eve Tahmincioglu, *Veterans Return from War to Find Jobs Gone*, TODAY MONEY (June 20, 2012, 7:03 AM), [http://lifeinc.today.com/\\_news/2012/06/20/12241515-veterans-return-from-war-to-find-jobs-gone?lite](http://lifeinc.today.com/_news/2012/06/20/12241515-veterans-return-from-war-to-find-jobs-gone?lite).

4. See *id.*

5. See Smith, *supra* note 1.

6. See Uniform Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, 108 Stat. 3149 (1994) (codified as amended at 38 U.S.C. §§ 4301-4333 (2006 & Supp. 2011)).

member would have been in had he or she never left for service.<sup>7</sup> The employee's employment position – determined upon return by the “escalator principle” – may move up, down, or stay the same while the employee is on military leave.<sup>8</sup> A recent Eighth Circuit decision, *Milhauser v. Minco Products, Inc.*, clarified that in certain circumstances, even termination qualifies as a reemployment position.<sup>9</sup>

In *Milhauser*, a maintenance technician took military leave from his employer to train for his anticipated deployment to Iraq.<sup>10</sup> Subsequently, the employer suffered significant financial difficulties, and the company ordered a reduction in force.<sup>11</sup> Based on the service member's mediocre employment record, he was one of four persons terminated from his department.<sup>12</sup> The Eighth Circuit held that the service member employee was not entitled to return to the company following his required military training because, according to the escalator principle, his position of reemployment was termination.<sup>13</sup>

This Note assesses *Milhauser's* impact on reemployment claims under USERRA. Part II begins with an analysis of the facts and holding of the case. Next, Part III synthesizes the background of USERRA, provides an overview of the statute, and introduces the escalator principle. Part IV outlines the court's rationale in deciding *Milhauser*. Finally, Part V discusses the impact of *Milhauser* on USERRA reemployment claims. This Note argues that: (1) the court's reliance on USERRA regulation § 1002.194 was misplaced because the court's interpretation presents a conflict between two sections of the statute and creates burden of proof issues; (2) the *Milhauser* holding should be narrowly interpreted; and (3) the case presents several unanswered questions that will spur subsequent litigation.

## II. FACTS AND HOLDING

Douglas Milhauser brought the present action against his former employer, Minco Products, Inc. (Minco), claiming the company violated his rights under USERRA.<sup>14</sup> Milhauser worked as a maintenance technician for Minco from 2006 to 2009.<sup>15</sup> Throughout his employment with Minco, Milhauser also served as a member of the Navy Reserves and the Air Force Re-

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7. See §§ 4312-4313.

8. See *Milhauser v. Minco Prods., Inc.*, 701 F.3d 268, 271 n.2 (8th Cir. 2012).

9. See *id.* at 269-70.

10. *Id.* at 270.

11. *Id.*

12. *Id.*

13. See *id.* at 272.

14. *Id.* at 270.

15. *Id.*

serves.<sup>16</sup> Milhauser's membership in the armed services required him to take three separate military leaves of absence from Minco between 2007 and 2009.<sup>17</sup> The circumstances giving rise to litigation surrounded Milhauser's third leave of absence.<sup>18</sup>

Prior to his third military leave of absence, Milhauser's performance as a maintenance technician was "inconsistent and sometimes poor."<sup>19</sup> Several of Milhauser's colleagues expressed concerns about his attitude and the quality of his work.<sup>20</sup> On one occasion, Milhauser received a written reprimand from his supervisors.<sup>21</sup> Following the reprimand, Milhauser's supervisors reassigned several of his duties to other maintenance technicians, replacing them with more menial tasks.<sup>22</sup>

In 2008, Minco experienced a decline in customer orders; at the end of the year, the company posted its first ever annual loss.<sup>23</sup> Because the number of orders continued to decrease into 2009, Minco sought to cut costs by delaying the purchase of new equipment, reducing overtime hours for employees, and cutting employee pay.<sup>24</sup> Additionally, in March 2009, Minco reduced its workforce by cutting eighteen jobs.<sup>25</sup> Milhauser, who began his third military leave of absence that month, was not one of the employees terminated.<sup>26</sup>

Despite eliminating eighteen jobs, Minco found the savings insufficient to compensate for company losses, and the company decided to cut an additional thirty-two jobs in June 2009.<sup>27</sup> In anticipation of the June cuts, Minco requested that Milhauser's supervisor name four of the thirteen employees whom he supervised to be considered for termination.<sup>28</sup> After considering work duties, special expertise, and attitudes of his employees, the supervisor nominated Milhauser as one of the four employees to be terminated.<sup>29</sup> He believed that Milhauser had no unique area of specialization and that, therefore, Milhauser's job functions could be more easily absorbed by other em-

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16. See Appellant's Brief, *Milhauser*, 701 F.3d 268 (No. 12-1756), 2012 WL 6653255, at \*5-6; Appellee's Brief, *Milhauser*, 701 F.3d 268 (No. 12-1756), 2012 WL 2524496, at \*6-7.

17. *Milhauser*, 701 F.3d at 270.

18. See *id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Appellant's Brief, *supra* note 16, at \*7.

23. *Milhauser*, 701 F.3d at 270.

24. *Id.*

25. *Id.*

26. See *id.*

27. *Id.*

28. *Id.*

29. See *id.*

ployees at the company.<sup>30</sup> When Milhauser's deployment ended prematurely in June, he reported back to work and was immediately terminated.<sup>31</sup>

Milhauser subsequently brought a claim against Minco in the District Court for the District of Minnesota, claiming the company failed to provide reemployment as required by USERRA under 38 U.S.C. § 4312.<sup>32</sup> The USERRA statute requires that service members be reemployed "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 . . . ."<sup>33</sup> This idea is termed the "escalator principle."<sup>34</sup>

In response to the claim, Minco argued that changed circumstances made Milhauser's reemployment "impossible or unreasonable," which is an affirmative defense under the USERRA statute.<sup>35</sup> In the alternative, Minco asserted that it placed Milhauser in the proper reemployment position – termination – because Milhauser would have been terminated even if he had not left for service.<sup>36</sup> Following trial, but before the case was submitted to the jury, Milhauser moved for judgment as a matter of law, claiming that Minco's evidence of economic difficulties was insufficient to prove his reemployment

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30. *Id.*

31. *Id.* Milhauser's deployment ended prematurely after he suffered a severe reaction to a vaccine. *Id.* His third military leave lasted less than ninety days. Appellee's Brief, *supra* note 16, at \*7.

32. *Milhauser*, 701 F.3d at 270. Milhauser also brought a claim for discrimination on the basis of military service under 38 U.S.C. § 4311; however, the jury found Milhauser's military status was not a factor in his termination, and the finding was not contested on appeal. *Id.* at 270-71. 38 U.S.C. § 4312(a) (2006) provides:

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).

33. § 4313(a) ("[A] person entitled to reemployment under section 4312 . . . shall be promptly reemployed . . . 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.").

34. *Milhauser*, 701 F.3d at 271.

35. *See* § 4312(d)(1).

36. *Milhauser*, 701 F.3d at 270-71.

was “impossible or unreasonable.”<sup>37</sup> Milhauser argued that without sufficient proof of the affirmative defense, he was “absolutely entitled to reemployment.”<sup>38</sup> The district court disagreed and denied Milhauser’s motion.<sup>39</sup>

The court then submitted the case to the jury.<sup>40</sup> The jury instructions contained an explanation of the “escalator principle”<sup>41</sup> and indicated that it was Milhauser’s burden to show that Minco failed to reemploy him in the appropriate escalator position.<sup>42</sup> During jury deliberations, the jurors asked the judge whether layoff or termination could be a valid reemployment position under the escalator principle.<sup>43</sup> Milhauser argued that termination was not a valid reemployment position; rather, termination of a returning service member was permissible only where the defendant proved reemployment was “impossible or unreasonable.”<sup>44</sup> Minco, on the other hand, argued Milhauser’s termination was a valid reemployment position because his position would have been eliminated as a part of the company’s reduction in force, “regardless of his military service.”<sup>45</sup> The court directed the jury to its earlier instruction.<sup>46</sup> The jury returned a verdict for Minco, finding that Minco failed to prove its “impossible or unreasonable” affirmative defense, but also finding that Milhauser failed to prove Minco reemployed him in an inappropriate position.<sup>47</sup>

Following the verdict, Milhauser renewed his motion for judgment as a matter of law.<sup>48</sup> He argued that: (1) termination is not a valid reemployment position, and (2) if termination is a valid reemployment position, termination is permissible only where it occurred automatically and without

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37. *Id.* at 271.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* The jury instruction stated:

USERRA requires reemployment in the position that [Milhauser] would, with reasonable certainty, have been in had his employment not been interrupted by military service. This is called the escalator position. The principle is that the employee should be in the same position he would have been in had he not taken military leave, no better and no worse. Depending on what happened during the employee’s absence, the escalator position might be a promotion, demotion, transfer, layoff or termination.

*Id.* (alteration in original).

42. *Milhauser v. Minco Prods., Inc.*, 855 F. Supp. 2d 885, 890 (D. Minn. 2012). The jury instruction stated, “It is Mr. Milhauser’s burden to show that Minco failed to reemploy him in the escalator position or in a position which was the nearest approximation of the escalator position.” *Id.*

43. *Milhauser*, 701 F.3d at 271.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 271-72.

48. *Id.* at 272.

employer discretion.<sup>49</sup> The trial court denied the motion and entered judgment on the jury's verdict.<sup>50</sup> Milhauser appealed to the Eighth Circuit Court of Appeals, and the Eighth Circuit affirmed the district court's denial of judgment as a matter of law.<sup>51</sup> The Eighth Circuit held that termination is a valid reemployment position under USERRA's escalator principle where the employer's systematic reduction in force caused the service member's position to be eliminated and where the service member's position would have been eliminated whether or not his or her employment was interrupted by military service.<sup>52</sup>

### III. LEGAL BACKGROUND

This Part provides an introduction to reemployment rights law under USERRA by reviewing the predecessors and passage of USERRA, briefly examining relevant provisions of the statute, and introducing the escalator principle used in reemployment claims.

#### A. Background of USERRA

The concept of reemployment rights for returning service members is not a recent development.<sup>53</sup> As early as 1940, legislators passed federal laws protecting veterans' employment and reemployment rights following a period of service in the armed forces.<sup>54</sup> Today, these rights are codified in Chapter 43 of Title 38 of the United States Code.<sup>55</sup> Much of the current law involving reemployment privileges for returning service members derives from the original federal statute granting these rights.<sup>56</sup>

The pressure to create a federal statute to benefit returning service members peaked after World War I, when millions of United States troops were demobilized.<sup>57</sup> Upon their return to civilian life, many of these veterans were unable to find employment.<sup>58</sup> In 1932, Walter Waters and other unemployed veterans traveled to Washington, D.C. to persuade

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49. *See id.* In particular, Milhauser referenced automatic terminations occurring through a seniority system. *Id.*

50. *Id.*

51. *Id.* at 272-73.

52. *See id.*

53. *See* 20 C.F.R. § 1002.2 (2013).

54. S. REP. NO. 104-371 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3762, at 3777, 1996 WL 560715, at \*26.

55. *See generally* 38 U.S.C. §§ 4301-4333 (2006 & Supp. 2011).

56. *See* Andrew P. Sparks, Note, *From the Desert to the Courtroom: The Uniformed Services Employment and Reemployment Rights Act*, 61 HASTINGS L.J. 773, 777 (2010).

57. *See id.* at 776.

58. *See id.*

Congress to issue veterans' bonus checks that were not due for another decade.<sup>59</sup> In addition to camping in parks and leading parades, these "Bonus Marchers" led a march of 5,000 to 8,000 veterans down Pennsylvania Avenue in front of 10,000 spectators.<sup>60</sup> Although Congress ultimately rejected the Bonus Marchers' proposal, Congress sought to avoid future protests involving masses of unemployed veterans.<sup>61</sup> In 1940, Congress passed the Selective Training and Service Act, which granted federal employment and reemployment rights to veterans.<sup>62</sup>

The Selective Training and Service Act stated that any person who left a position of employment for training or service in the armed forces was entitled to restoration in "such position or to a position of like seniority, status, and pay."<sup>63</sup> This right was conditioned upon both the employee remaining qualified to perform the duties of his position and the employer's circumstances being such that reemployment was not impossible or unreasonable.<sup>64</sup> Additionally, the act prohibited the United States government and private employers from discharging a returning service member from such position "without cause within one year after such restoration."<sup>65</sup>

Following passage of the Selective Training and Service Act, Congress enacted several other pieces of legislation to protect the employment and reemployment rights of members of the armed services, including the Military Selective Service Act of 1967 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974.<sup>66</sup> These acts essentially served as "new permutations" of the Selective Training and Service Act, retaining much of its content and structure.<sup>67</sup> For example, under the Veterans' Reemployment Rights Act (VRRRA),<sup>68</sup> which governed military employment and reemployment rights from 1974 to 1994, a service member who left a position of employment to complete military service was entitled restoration "to such position or to a position of like seniority, status, and pay," so long as the service member was still "qualified to perform the duties of such position."<sup>69</sup> VRRRA further mandated that the employer "give such person such status in his employment

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59. *Id.*

60. *Id.*

61. *Id.*

62. Selective Training and Service Act of 1940, Pub. L. No. 76-783, § 8, 54 Stat. 885, 890-92 (1940) (repealed 1948); *see also* David Ogles, Comment, *Life During (and After) Wartime: Enforceability of Waivers Under USERRA*, 79 U. CHI. L. REV. 387, 389 (2012).

63. § 8(b), 54 Stat. at 890.

64. *Id.*

65. § 8(c), 54 Stat. at 890.

66. Sparks, *supra* note 56, at 777.

67. *Id.*

68. Vietnam Era Veterans' Readjustment Assistance Act of 1974, Pub. L. No. 93-508, § 404, 88 Stat. 1578, 1594 (1974); *see also* 20 C.F.R. § 1002.2 (2013).

69. 38 U.S.C. § 2021(a)(2)(A)(i) (1976).



as he would have enjoyed . . . in such employment continuously from the time of such person's entering the armed forces until the time of such person's restoration to such employment, or reemployment."<sup>70</sup>

Although Congress believed VRRRA effectively served the interests of armed services personnel and employers, by 1988 the statute presented two significant problems.<sup>71</sup> First, Congress found the statute "complex and sometimes ambiguous" as to the parties' rights and responsibilities, inviting confusion and misinterpretation.<sup>72</sup> For example, employers were uncertain which of the various services and types of training triggered reemployment rights.<sup>73</sup> A second problem with VRRRA was that implementation of the military's "Total Force" policy, which increased reserve members' responsibility for every phase of military preparedness, antiquated certain provisions of the act.<sup>74</sup> For example, the policy requires extended periods of training – a factor not addressed by VRRRA.<sup>75</sup> Because of the foregoing complications, in 1988, representatives from the Departments of Labor, Defense, Justice, and the Office of Personnel Management formed an executive branch task force to promulgate suggested revisions to chapter 43.<sup>76</sup>

The task force sought "to clarify, simplify, and . . . strengthen the existing veterans' employment and reemployment rights provisions."<sup>77</sup> Suggestions promulgated by the task force eventually formed the basis for USERRA,<sup>78</sup> which became law on October 13, 1994.<sup>79</sup> Congress stressed that the body of case law that developed under VRRRA remained in full force

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70. § 2021(b)(2).

71. See H.R. REP. NO. 103-65 (1993), reprinted in 1994 U.S.C.C.A.N. 2449, at 2451, 1993 WL 235763, at \*18.

72. *Id.*

73. See H.R. REP. NO. 103-65, 1993 WL 235763, at \*19.

74. S. REP. NO. 103-158 (1993), 1993 WL 432576, at \*39. Under the "Total Force" policy, the Department of Defense shrunk the size of the active forces and increased the size of the cheaper-to-maintain reserve forces. *Role of the Reserves in the Total Force Policy: Hearing Before the Subcomm. on Readiness, & the H. Comm. on Armed Servs.*, 101st Cong. 1 (1989) (statement of Richard A. Davis, Dir., Army Issues Nat'l Sec. & Int'l Affairs Div.), available at <http://www.gao.gov/assets/110/102373.pdf>. Because reservists are now the primary source of personnel to supplement active forces during military emergencies, the policy calls for reserve forces to "be equal partners to their active counterparts in peacetime as well as wartime and must be as ready as their active counterparts." *Id.* at 2.

75. See H.R. REP. NO. 103-65, 1993 WL 235763, at \*19.

76. S. REP. NO. 103-158, 1993 WL 432576, at \*39.

77. H.R. REP. NO. 103-65, 1993 WL 235763, at \*18.

78. *Id.*

79. Uniform Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, 108 Stat. 3149 (1994) (codified as amended at 38 U.S.C. §§ 4301-4333 (2006 & Supp. 2011)); see also 20 C.F.R. § 1002.3 (2013).

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and effect to the extent that it was consistent with USERRA provisions.<sup>80</sup> The purposes of the revised act were:

(1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;

(2) to minimize 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

(3) to prohibit discrimination against persons because of their service in the uniformed services.<sup>81</sup>

USERRA's specific employment protections for returning service members are outlined in more detail below.<sup>82</sup> The revised statute retains the rights guaranteed by its predecessors while also providing the clarity and currency that Congress sought.<sup>83</sup>

*B. Overview of USERRA Provisions*

This section provides an overview of the coverage and force of USERRA, and it introduces the two general safeguards provided to qualified service members under the statute – the right to reemployment and protection from adverse employment action.<sup>84</sup> Broadly, USERRA protects members of the uniformed services who return to their previous place of employment following leave for service obligations.<sup>85</sup> USERRA's general provision provides:

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

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80. 20 C.F.R. § 1002.2.

81. 38 U.S.C. § 4301.

82. *See infra* Part III.B.

83. 20 C.F.R. § 1002.2.

84. *See* §§ 4311-4312.

85. *See* §§ 4301-4333; *see also* *Clegg v. Ark. Dep't of Corr.*, 496 F.3d 922, 930 (8th Cir. 2007). The Act does not, however, protect certain persons who served in the uniformed services but whose entitlements to benefits were terminated upon the occurrence of certain events, such as dishonorable or bad conduct discharge. 38 U.S.C. § 4304.

employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.<sup>86</sup>

The term “uniformed services” includes the Armed Forces, Army National Guard, Air National Guard, and other categories designated by the President during times of war or national emergencies.<sup>87</sup> The phrase “service in the uniformed service” refers to voluntary or involuntary performance of a duty in the uniformed services that was performed under competent authority, including, “active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty,” fitness exams for duty, and funeral honors duties.<sup>88</sup>

USERRA supersedes all state laws, contracts, policies, or other agreements that reduce or eliminate the rights and benefits enumerated in chapter 43.<sup>89</sup> To further clarify USERRA, Congress authorized the Secretary of Labor to prescribe regulations implementing the act’s provisions.<sup>90</sup> Because Congress enacted USERRA to protect members of the uniformed services, courts construe the act’s provisions broadly, in favor of military beneficiaries.<sup>91</sup>

USERRA sections 4311(b) and 4312 interact to protect returning service members in two distinct ways.<sup>92</sup> First, section 4312 grants an affirmative right to reemployment for employees who serve in the uniformed services.<sup>93</sup> The section states that “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 . . . .”<sup>94</sup> To bring a USERRA claim under section 4312, the employee need only show: “[1] proper notice to his employer [prior to] departure, [2] a service period of less than five years, [3] a timely request for reemployment [along with] proper documentation, and [4] separation from military service under ‘honorable conditions.’”<sup>95</sup>

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86. § 4311(a).

87. § 4303(16).

88. § 4303(13).

89. § 4302(b).

90. § 4331(a).

91. *See, e.g.*, *Maxfield v. Cintas Corp.* No. 2, 427 F.3d 544, 551-52 (8th Cir. 2005); *Hill v. Michelin N. Am., Inc.*, 252 F.3d 307, 312-13 (4th Cir. 2001); *McGuire v. United Parcel Serv., Inc.*, 152 F.3d 673, 676 (7th Cir. 1998).

92. *See Clegg v. Ark. Dep’t of Corr.*, 496 F.3d 922, 930 (8th Cir. 2007).

93. *See* § 4312(a). The provision also contains certain notification and time requirements. *Id.*

94. *Id.*

95. *Petty v. Metro. Gov’t of Nashville & Davidson Cnty.*, 687 F.3d 710, 716-17 (6th Cir. 2012).

Reemployment claims are “without question as to the employer’s intent,”<sup>96</sup> and an employee does not need to prove his employer discriminated against him in order to be eligible for reemployment.<sup>97</sup>

Section 4312(d) explains limited situations in which an employer is not required to reemploy a returning service member.<sup>98</sup> Such exceptions to reemployment, or affirmative defenses, include:

(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.<sup>99</sup>

The employer carries the burden to prove the above affirmative defenses by a preponderance of the evidence.<sup>100</sup> These affirmative defenses “must be construed narrowly against an employer who seeks to avoid reemployment” due to USERRA’s broad construction in favor of returning service members.<sup>101</sup>

The second protective provision, section 4311(b), protects returning service members by making it illegal for employers to discriminate or take adverse employment action against persons who served in the armed forces upon their return.<sup>102</sup> Discrimination claims under USERRA require the plaintiff to show that military service was a “motivating factor” in the employer’s decision to take adverse action against him or her.<sup>103</sup> One court summarized the interaction between sections 4311 and 4312 by explaining, “[i]n short, § 4312 requires an employer to rehire covered employees; § 4311 then operates to prevent employers from treating those employees differently after they are rehired . . . .”<sup>104</sup> In other words, section 4312 entitles a person to immediate reemployment but does not prevent the employer from terminating the person

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96. *Jordan v. Air Prods. & Chems., Inc.*, 225 F. Supp. 2d 1206, 1208 (C.D. Cal. 2002).

97. 20 C.F.R. § 1002.33 (2013).

98. 38 U.S.C. § 4312(d)(1).

99. *Id.*

100. § 4312(d)(2).

101. KATHRYN PISCITELLI & EDWARD STILL, *THE USERRA MANUAL* §4:2 (2013).

102. *See* 38 U.S.C. § 4311(b).

103. *See* § 4311(c).

104. *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 304 (4th Cir. 2006); *see also Clegg v. Ark. Dep’t of Corr.*, 496 F.3d 922, 930 (8th Cir. 2007).

the next day; however, the employee is not without protection because section 4311 then acts to protect the employee as soon as he or she is reemployed.<sup>105</sup>

### C. The Escalator Principle

USERRA not only provides members of the uniformed services with rights to reemployment upon returning from service, but the act also mandates certain employment *positions* upon return.<sup>106</sup> Section 4313 includes a detailed outline of rules commanding the employment position to which a person is entitled.<sup>107</sup> The rules are categorized by duration of one's period of service, disability, and qualification for the position.<sup>108</sup> For a person whose period of service was less than 91 days, for example, section 4313 states that he shall be "promptly" reemployed:

(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.<sup>109</sup>

Courts termed the requirement that an employer treat an employee as if he or she remained continuously employed the "escalator principle."<sup>110</sup> One author commented that the escalator principle is the "touchstone of USERRA reemployment law."<sup>111</sup> The escalator principle was first discussed in the 1946 Supreme Court decision *Fishgold v. Sullivan Drydock & Repair Corp.*<sup>112</sup> Explaining that a veteran should not be penalized because of his absence from his civilian job, the Court stated:

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105. See *Hart v. Family Dental Grp.*, 645 F.3d 561, 563 (2d Cir. 2011).

106. See § 4313(a).

107. See § 4313.

108. See *id.*

109. See § 4313(a)(1).

110. See, e.g., *Milhauser v. Minco Prods., Inc.*, 701 F.3d 268, 271 (8th Cir. 2012); see also 20 C.F.R. § 1002.191 (2013). See generally Ryan Wedlund, *Citizen Soldiers Fighting Terrorism: Reservists' Reemployment Rights*, 30 WM. MITCHELL L. REV. 797, 817-18 (2004) (analyzing courts' usage of USERRA's escalator principle).

111. Wedlund, *supra* note 110, at 809.

112. 328 U.S. 275, 284-85 (1946).

He must be restored to his former position “or to a position of like seniority, status, and pay.” . . . He shall be “restored without loss of seniority” and be considered “as having been on furlough or leave of absence” during the period of his service for his country, with all of the insurance and other benefits accruing to employees on furlough or leave of absence. Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war.<sup>113</sup>

The escalator metaphor imagines the employee on a particular step of an escalator (his employment position upon leave), which may move up or down during military leave.<sup>114</sup> When the employee returns from leave, he is placed back onto this same “step,” which may have moved up or down while he was gone.<sup>115</sup> Courts since *Fishgold* continue to use this escalator metaphor.

For example, the Supreme Court held in *Tilton v. Missouri Pacific Railroad Co.* that employees who went on military leave were entitled to seniority benefits mirroring those they would have attained had they never left for military service.<sup>116</sup> In *Tilton*, a railroad company employer, pursuant to a collective bargaining agreement, internally upgraded three employees from carmen helpers to carmen mechanics.<sup>117</sup> These employees were each working toward certain mechanic seniority benefits when they were called to military service; such seniority benefits vested only upon completion of 1,040 days of work as a mechanic.<sup>118</sup> While these three men were on military leave, the employer promoted several additional carmen helpers to carmen mechanics.<sup>119</sup> Each of these later-promoted men completed their full 1,040 days of work to attain seniority mechanic status prior to the three original employees.<sup>120</sup> The Supreme Court held that under the escalator principle the returning service member employees, each upon return and completion of their full 1,040 work days as a mechanic, were entitled to seniority mechanic status superior to the employees who were promoted after them because, had these individuals not taken military leave, their seniority would have vested first.<sup>121</sup>

In *Serricchio v. Wachovia Securities*, the Second Circuit found a violation of USERRA section 4313 under the escalator principle.<sup>122</sup> In *Serricchio*,

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113. *Id.* (citations omitted).

114. *Milhauser*, 701 F.3d at 271 n.2.

115. *Id.*

116. 376 U.S. 169, 181 (1964).

117. *Id.* at 172-73.

118. *Id.* at 173.

119. *Id.*

120. *Id.*

121. *See id.* at 181-82.

122. 658 F.3d 169, 183 (2d Cir. 2011).

an employee returned to his job at a bank following military leave.<sup>123</sup> The bank reemployed the service member and compensated him at the same commission rate he earned prior to his leave; however, the bank refused to reassign the employee his former book of clients, which contained over 130 clients and managed over nine million dollars in assets, instead assigning him to several smaller accounts with less funding.<sup>124</sup> The Second Circuit agreed with the district court that the employee's reemployment position did not offer "the same opportunities for advancement, working conditions and responsibility" under the escalator principle.<sup>125</sup>

The Secretary of Labor's 2005 USERRA regulations also explicitly recognize the escalator principle.<sup>126</sup> Section 1002.191 in Chapter 20 of the Code of Federal Regulations (C.F.R.) states:

As a general rule, the employee is entitled to reemployment in the job position that he or she would have attained with reasonable certainty if not for the absence due to uniformed service. This position is known as the escalator position . . . . The escalator principle requires that the employee be reemployed in a position that reflects with reasonable certainty the pay, benefits, seniority, and other job perquisites, that he or she would have attained if not for the period of service.<sup>127</sup>

It is important to note that the escalator position may move up or down.<sup>128</sup> USERRA regulation 1002.194 provides, "[t]he Act does not prohibit lawful adverse job consequences that result from the employee's restoration on the seniority ladder. Depending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated."<sup>129</sup> For example, the regulation notes that if an employee's job classification was laid off during leave and such layoff continued after the employee's reemployment, the employer should reinstate the employee in layoff status.<sup>130</sup> Depending on the escalator principle, a reemployment position may implicate "transfer to another shift or location, more or less strenuous working conditions, or changed opportunities for advancement."<sup>131</sup>

Several cases demonstrate adverse job consequences under the escalator principle. For example, in *Woodward v. New York Health & Hospitals Corp.*, the Eastern District of New York held that an employer's reinstatement of a

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123. *Id.* at 176-77.

124. *Id.* at 177, 183.

125. *See id.* at 183.

126. *Id.* at 272.

127. 20 C.F.R. § 1002.191 (2013).

128. § 1002.194.

129. *Id.*

130. *Id.*

131. *Id.*

service member into a different employment division was permissible.<sup>132</sup> The court reasoned that the reemployment position was of similar pay and seniority and remained a managerial-level position that used the employee's "skills and qualifications."<sup>133</sup> The opinion further justified any change in the employee's work tasks as due to the employer's staffing needs and tight budget.<sup>134</sup> Similarly, the Western District of Missouri granted a summary judgment in favor of an employer where a returning service member's truck route was eliminated during his leave.<sup>135</sup> Upon the service member's return, the employer assigned the employee to a different route based on a collective bargaining agreement.<sup>136</sup> The court agreed with the employer's argument that the employer complied with the escalator principle and USERRA requirements by "offering [the employee] job(s) at locations where he undisputedly would have been entitled to work had he been continuously employed."<sup>137</sup>

In sum, Congress developed a special niche in federal law to protect uniformed service members who return to civilian employment. Safeguards under USERRA include an affirmative right to reemployment, protection from adverse employment action, and a certain position of employment upon return from service. It was within this framework that the Eighth Circuit took up *Milhauser v. Minco*.

#### IV. INSTANT DECISION

Using a de novo standard of review, the Eighth Circuit held that termination is a valid reemployment position under USERRA's escalator principle, and therefore, *Milhauser* was not entitled to judgment as a matter of law.<sup>138</sup>

The court began its analysis with a brief introduction to the "escalator principle."<sup>139</sup> It referenced the principle's source, 28 U.S.C. § 4313(a)(1)(A), which requires employers to reemploy returning service members "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."<sup>140</sup> Citing the Supreme Court decision of *Fishgold v. Sullivan Drydock & Repair Corp.*, the court clarified that a returning service member is "not necessarily [entitled] to the same position he or she held on departure."<sup>141</sup> Instead, the majority noted, the escalator principle

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132. 554 F. Supp. 2d 329, 355-57 (E.D.N.Y. 2008).

133. *Id.* at 357.

134. *Id.* at 356-57.

135. *Hogan v. United Parcel Serv.*, 648 F. Supp. 2d 1128, 1132 (W.D. Mo. 2009).

136. *Id.* at 1134-35.

137. *Id.* at 1144.

138. *Milhauser v. Minco Prods., Inc.*, 701 F.3d 268, 272-73 (8th Cir. 2012).

139. *Id.* at 272.

140. *Id.* (quoting 38 U.S.C. § 4313(a)(1)(A) (2006)).

141. *Milhauser*, 701 F.3d at 272 (citing *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946)).



entitles the employee to congruent “pay, benefits, seniority, and other job perquisites” of the position the service member would have attained had he not left for service.<sup>142</sup>

The Eighth Circuit next addressed Milhauser’s contention that termination cannot be a “position of employment” under USERRA.<sup>143</sup> The court cited three separate sources of law contravening Milhauser’s argument.<sup>144</sup> First, the court noted that the statute from which the escalator principle is derived requires an employer to look at an employee’s career trajectory as if it “had not been interrupted by” military service.<sup>145</sup> Second, it cited the Department of Labor’s USERRA regulation section 1002.194 that states, “Depending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated.”<sup>146</sup> Finally, the majority acknowledged that other courts have recognized termination as a valid position of employment, citing *Derepkowski v. Smith-Lee Co.*<sup>147</sup> Therefore, the court concluded, the idea of termination as a “position of employment” is consistent with USERRA.<sup>148</sup>

The court lastly commented on Milhauser’s alternative argument that, if termination is a “position of employment” under USERRA, it is only permissible if the employee would have been terminated automatically.<sup>149</sup> The court noted that Milhauser argued this ground for judgment as a matter of law only

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142. *Id.* (quoting 20 C.F.R. § 1002.191 (2013)).

143. *Id.* at 272-73.

144. *See id.*

145. *Id.* at 272 (quoting 38 U.S.C. § 4313(a)(1)(A) (2006)).

146. *Id.* at 272-73 (alteration in original) (quoting 20 C.F.R. § 1002.194) (internal quotation marks omitted).

147. *Id.* at 273. The court cited only one thirty-year-old case from the Eastern District of Wisconsin to support its assertion that “other courts” hold termination is a valid reemployment position. *Id.*; *see Derepkowski v. Smith-Lee Co.*, 371 F. Supp. 1071 (E.D. Wis. 1974). In that case, the employer transferred its operations from Wisconsin to New York, paying seniority-based severance benefits to employees terminated at the time of transfer. *Derepkowski*, 371 F. Supp. at 1071. When the plaintiff-employee returned from military leave, the employer offered him a position in New York but did not offer him seniority-based severance pay, which was offered to all other employees. *Id.* The employer argued it did not have to pay severance benefits because the statute [VRRRA] required the employer to restore the service member to a “position” before any other benefits had to be paid; in this case, the employer argued, no restoration to reemployment was possible due to changed circumstances. *Id.* at 1072. The court said that under the statute the employer must “restore the plaintiff to the ‘status’ he would have enjoyed had he been present in the defendant’s employ rather than in military service – the ‘status’ being that of a terminated employee eligible for severance pay.” *Id.* (emphasis added). Ultimately, the court held the offer of a position in New York without an offer of severance benefits constituted an offer inferior to other employees and was impermissible. *Id.*

148. *Milhauser*, 701 F.3d at 272-73.

149. *Id.* at 273.

post-verdict, not pre-verdict.<sup>150</sup> Citing *Rockport Pharmacy, Inc. v. Digital Simplistics, Inc.*, the majority stated that “a party may not advance postverdict grounds for judgment as a matter of law when it should have raised the issues earlier in the trial.”<sup>151</sup> The court found Milhauser did not adequately preserve the issue, and therefore, it could not reach the merits of Milhauser’s second argument on appeal.<sup>152</sup>

Because the Eighth Circuit found sufficient support for the assertion that termination is a valid employment position under the escalator principle, the court upheld the district court’s denial of Milhauser’s motion for judgment as a matter of law.<sup>153</sup>

## V. COMMENT

While *Milhauser v. Minco* appears an obvious application of established law to fact, the case presents several concerns that will likely impact future veteran reemployment claims. The Eighth Circuit essentially opened the door to litigation involving termination as a reemployment position under USERRA sections 4312 and 4313.<sup>154</sup> This Part argues that: (1) the court’s holding exacerbates a burden of proof conflict between section 4312(d) affirmative defenses and section 4313 reemployment positions under the escalator principle; (2) courts should narrowly interpret *Milhauser*’s holding; and (3) courts and employers need additional guidance on when employers can validly terminate service members because of “reduction in force” cuts.

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150. *Id.*

151. *Id.* at 273 (citing *Rockport Pharmacy, Inc. v. Digital Simplistics, Inc.*, 53 F.3d 195, 197 (8th Cir. 1995)).

152. *Id.*

153. *Id.* at 272-73. Judge Shepherd concurred in the opinion, arguing the court did not need to reach the issue of whether termination was a valid employment position. *Id.* at 273-74 (Shepherd, J., concurring). In his opinion, the issue presented involved the adequacy of the jury instruction. *See id.* Because Milhauser did not object to the jury instruction, nor raise the issue of the jury instruction on appeal, Judge Shepherd argued the court could not consider the issue of termination as a valid reemployment position on appeal. *See id.*

154. While regulation 1002.194 states that under certain circumstances, “the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated,” few court decisions provide guidance in determining to what “circumstances” the regulation refers. 20 C.F.R. § 1002.194 (2013). The court in *Milhauser* claims other courts have upheld termination as a position of reemployment; however, the majority cites only a district court case from Wisconsin, which held the employee’s position of reemployment was termination with severance pay after his entire factory had been shut down and all employees – including the plaintiff – were given the option of transfer or termination with severance pay. *See Milhauser*, 701 F.3d at 273 (referencing *Derepkowski v. Smith-Lee Co.*, 371 F. Supp. 1071 (E.D. Wis. 1974)); *see also* discussion *infra* Part V.C.

A. *Exacerbated Conflict Between Section 4312(d) and Section 4313*

The *Milhauser* court's reliance on one misplaced regulation renders 4312(d)'s affirmative defenses meaningless and confuses the burden of proof for future USERRA reemployment claims.<sup>155</sup> By reviewing the statutory language and legislative history of USERRA, this Part argues that the "escalator position" under section 4313 can move up or down; however, it cannot go "all the way" down. Rather, to justify termination as a valid reemployment position, the employer must still prove one of the affirmative defenses under section 4312(d) by a preponderance of the evidence.

As previously discussed, returning service members are required to satisfy four simple elements to avail themselves of USERRA's unqualified right to reemployment.<sup>156</sup> Once these elements are satisfied, the employer must prove that employment was "impossible or unreasonable" based on changed circumstances<sup>157</sup> to warrant a failure to reemploy the service member.<sup>158</sup> Under the court's decision in *Milhauser*, however, the employer can justify failing to reemploy a service member by merely arguing termination was his or her reemployment position.<sup>159</sup> By placing the burden on the plaintiff to prove he or she was reemployed in the incorrect escalator position, the court essentially absolved the employer from having to prove its affirmative defense by a preponderance of the evidence.<sup>160</sup> If the above result were an accurate reading of the statute, then section 4312(d) would be largely insignifi-

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155. *Milhauser* argued this point to the district court but it was rejected due to a technicality. See *Milhauser v. Minco Prods., Inc.*, 855 F. Supp. 2d 885, 901-02 (D. Minn. 2012) ("Even if *Milhauser* is correct, to the extent that he is arguing that *Minco's* economic problems and reductions in force are only appropriately considered under the affirmative defense provision, he has waived this argument.").

156. See *supra* note 95 and accompanying text.

157. Or another one of the affirmative defenses listed in section 4312(d). See 38 U.S.C. § 4312(d) (2006).

158. See *supra* note 98 and accompanying text.

159. See *supra* note 148 and accompanying text.

160. After *Milhauser*, the employer can now assert termination was the service member's escalator position of reemployment, and the burden is on the plaintiff to show the reemployment position is wrong. See *Milhauser v. Minco Prods., Inc.*, 701 F.3d 268, 271-72 (8th Cir. 2012). In this situation, the service member would then be responsible for proving the financial conditions, termination practices, position availability, etc. of the employer; this is a difficult burden on the plaintiff, who is in a worse position than the employer to have this information. See *Milhauser*, 855 F. Supp. 2d at 902-03. *Milhauser* argued this point in the lower court and the court concluded, "the law clearly requires consideration of these factors somewhere, and *Milhauser* provided no assistance to the Court as to where consideration of those factors belonged." *Id.* at 904.

cant.<sup>161</sup> The court in *Milhauser* came to its illogical conclusion relying mainly on USERRA regulation section 1002.194,<sup>162</sup> which states that the escalator principle may result in a service member's termination.<sup>163</sup>

Fortunately, there is a more logical way to reconcile sections 4312(d) and 4313 – by assuming the escalator can move an employee's position up or down but not “all the way” down to termination.<sup>164</sup> Several details support that this is the correct interpretation of the statute. First, the plain language of section 4313 – the basis for the escalator principle – states that the service member is entitled to a “position of *employment*”; hence, the statute is unambiguous that the position must be one of employment, not unemployment.<sup>165</sup> Second, to hold that section 4313 permits an employer to terminate an employee without the employer proving its burden under section 4312(d) would render the latter provision “superfluous, void, or insignificant,” contrary to an important canon of statutory construction.<sup>166</sup> This note's suggested understanding of the statute, however, gives both sections meaning – the escalator principle controls when there is a reemployment position and the affirmative defenses control when there is no reemployment position.

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161. *See, e.g., Milhauser*, 855 F. Supp. 2d at 901-02 (referencing *Milhauser's* claim that such an interpretation would make § 4212(d)'s affirmative defenses “superfluous”).

162. *Milhauser*, 701 F.3d at 272-73. The court also relied on *Derepkowski v. Smith-Lee Co.*, 371 F. Supp. 1071 (E.D. Wis. 1974). *Id.* at 273. *Derepkowski* is clearly distinguishable because in that case: (1) it was beneficial for the claimant's escalator position to be termination, (2) the main contention involved severance benefits, not the escalator position, and (3) the employer clearly discriminated in the case by treating the service member different than other employees. *See supra* note 147 and accompanying text.

163. 20 C.F.R. § 1002.194 (2013).

164. *Milhauser* also proposed this solution to the district court. *See Milhauser*, 855 F. Supp. 2d at 892-95.

165. 38 U.S.C. § 4312(a) (2006) (emphasis added); *see also* *United States v. Wiltberger*, 18 U.S. 76, 95-96 (1820) (“The intention of the legislature is to be collected from the words they employ. . . . The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words . . .”). The district court did not find this argument persuasive and instead relied on the Department of Labor's regulations. *See Milhauser*, 855 F. Supp. 2d at 893.

166. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citations omitted) (“It is ‘a cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’”); *see also Milhauser*, 855 F. Supp. 2d at 901-02 (“*Milhauser* now argues that an interpretation that allows termination to be a possible reemployment position under section 4313 of USERRA renders the affirmative defense provision under section 4212(d) superfluous . . . . Even if *Milhauser* is correct, . . . he has waived this argument.”).

Third, the stated purposes of the statute indicate that the legislature intended to protect service members.<sup>167</sup> The proposed reading of the statute, which requires an employer to prove a reemployment position was impossible or unreasonable before terminating the service member, acts to protect service members; however, the court's reading of the statute, which requires the returning service member to prove he was not reemployed in the appropriate position, actually harms service members because they are in a worse position than the employer to have information regarding the employer's policies, finances, and available positions.<sup>168</sup>

Finally, reviewing the legislative history, it does not appear the legislature intended termination to be a reemployment position. For example, a report on USERRA from the House of Representatives notes that section 4312(a) provides an "unqualified right" to reemployment and, other than failing to prove the requirements under 4312(a), "[t]he only other exceptions to the unqualified right to reemployment would be the provisions in subsection (d)."<sup>169</sup> Additionally, while the House and Senate reports do refer to the escalator positions of "layoff" (requiring placement on recall status) and "expiration" (for temporary employees only), they do not mention termination as an employment position or state who is required to prove the appropriate employment position.<sup>170</sup> Moreover, both the House and Senate reports refer to reduction in force cuts under section 4312(d)'s affirmative defenses rather than in their discussions of the escalator principle.<sup>171</sup> Based on the foregoing

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167. See *supra* note 102 and accompanying text.

168. Requiring the returning service member to prove that a position was available, when the employee has less knowledge of the business practices/structure than the corporation itself, is clearly contrary to the stated purpose to protect these service members. See *supra* note 160 and accompanying text.

169. H.R. REP. NO. 103-65 (1993), reprinted in 1994 U.S.C.C.A.N. 2449, at 2457-58, 1993 WL 235763, at \*24-25.

170. See H.R. REP. NO. 103-65, 1993 WL 235763, at \*30-31. ("This could be the same position or a higher, lower, or lateral (e.g., a transfer) position or even possibly layoff or severance status . . . depending on what has happened to the employment situation in the servicemember's absence."); S. REP. NO. 103-158 (1993), 1993 WL 432576, at \*52-53 ("The Committee notes that, depending on the employment situation during the individual's period of service in the uniformed services, the escalator can move up, down, or laterally. In case of a layoff, the returning servicemember may be placed in a recall status. As noted earlier, in the case of a temporary employee, the term of the position may have expired.")

171. See H.R. REP. NO. 103-65, 1993 WL 235763, at \*25 ("The very limited exception of unreasonable or impossible, which is in the nature of an affirmative defense, and for which the employer has the burden of proof . . . is only applicable 'where reinstatement would require creation of a useless job or where there has been a reduction in the work force that reasonably would have included the veteran.'"); S. REP. NO. 103-158, 1993 WL 432576, at \*49 ("New section 4312(d) would excuse an employer from having to reemploy a person if the employer's circumstances had so changed as to make that reemployment impossible or unreasonable . . . . The Com-

observations, it is likely that the legislature intended the escalator to go up and down, but not all the way down; to go all the way down to termination (for example, based on a reduction in force), proof of an affirmative defense should be required.

Thus, it appears that either the court in *Milhauser* misread USERRA regulation § 1002.194 or the regulation is simply inconsistent with the act. One possible way the court could have misinterpreted the regulation is by assuming the employer has no burden in cases where the escalator principle results in termination. To the contrary, the regulation could convey that termination is an appropriate escalator position where the employer first proves termination is a valid “step” on the escalator by meeting the requirements of section 4312(d). Alternatively, it is possible that the court misread the agency’s use of the term “termination” in the regulation;<sup>172</sup> perhaps the regulation refers only to termination or “expiration” of a *temporary* employment position, such as a seasonal job, as discussed in the legislative history.<sup>173</sup>

Alternatively, one could argue that the Eighth Circuit correctly interpreted the agency’s regulation in section 1002.194 but that the Department of Labor misinterpreted the USERRA statute when it adopted the regulation. Under these circumstances, regulation 1002.194 may not survive *Chevron* deference<sup>174</sup> because either the statute is unambiguous and needs no interpretation or the Department of Labor’s interpretation of the statute is not reasonable because it creates a statutory conflict. Whether the court’s reliance on USERRA regulation 1002.194 was misplaced due to a misinterpretation or due to the regulation itself being incorrect, it is apparent that the Eighth Cir-

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mittee does not intend to require the creation of a useless job or mandate reinstatement where there has been a reduction in the work force that reasonably would have included the veteran.”). This is echoed in the USERRA regulations. See 20 C.F.R. § 1002.139 (2013).

172. See § 1002.194 (“Depending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even *terminated*.”) (emphasis added).

173. See *supra* note 170 and accompanying text.

174. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). In *Chevron*, the Court stated:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

*Id.* at 842-43.

cuit failed to adequately review the regulation and the potential statutory conflict it creates.

The *Milhauser* court's unwavering reliance on USERRA regulation 1002.194 was an error. Reviewing the statutory language and legislative history, it appears that termination of a returning service member should only be permissible where the employer can prove, by a preponderance of the evidence, an affirmative defense under USERRA section 4312(d) that justifies a failure to reemploy. By holding otherwise, the court encourages a conflict between USERRA sections 4312(d) and 4313 and blurs the line between the claimant's and the employer's burden of proof.

### B. Narrow Interpretation

Regardless of whether the decision was consistent with the USERRA statutes, *Milhauser* is precedent and demonstrates that uniformed service personnel are not absolutely protected from termination under USERRA.<sup>175</sup> Consequently, the decision gives employers more "flexibility in addressing workplace needs."<sup>176</sup> Employers must remember, however, that the facts of *Milhauser* are distinct and that the case provides only a limited exception to the general rule of reemployment and the general prohibition of termination.<sup>177</sup> The court's conclusion was contingent upon several specific facts that favored Minco's position and persuaded the court that *Milhauser* was not disadvantaged because of his military service.<sup>178</sup>

Three factors were especially pertinent. First, *Milhauser* had a history of poor work performance, which was adequately documented with a paper trail.<sup>179</sup> For example, not only did his coworkers complain about his work ethic, but *Milhauser*'s supervisors also gave him a warning and reassigned several of his job duties prior to his third military leave.<sup>180</sup> Second, Minco presented evidence of the company's poor economic circumstances surround-

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175. See *Milhauser v. Minco Prods., Inc.*, 701 F.3d 268, 272 (8th Cir. 2012); see also Charlie Plumb, *Limits on Reemployment Rights Under USERRA*, MCAFEE & TAFT (Jan. 22, 2013), <http://www.mcafeetaft.com/Resources/Attorney-Articles/Articles/Limits-on-reemployment-rightsunderUSERRA.aspx>.

176. Sindy Warren, *Can You Terminate an Employee Covered by USERRA?*, WARREN & ASSOCIATES BLOG (Jan. 22, 2013), <http://sindywarren.com/blog/page/4/>.

177. See *id.*

178. See Brooke A. Colaizzi, *Is Firing an Employee the Same as Reemploying Him?*, LEXICOLOGY (Jan. 2, 2013), <http://www.lexology.com/library/detail.aspx?g=c0cf4745-2f23-4b07-9f57-62a4249b37ad>; George R. Wood, *Eighth Circuit Rules That Termination of Employment Can Be a Proper Reinstatement Under the Uniformed Services Employment and Reemployment Rights*, LEXICOLOGY (Dec. 11, 2012), <http://www.lexology.com/library/detail.aspx?g=d36ab010-fbdb-40b2-ae1096720e7e93bb>.

179. See *Milhauser*, 701 F.3d at 270.

180. See *id.*; see also Colaizzi, *supra* note 178.

ing Milhauser's termination,<sup>181</sup> such that the jury found Milhauser's employment position would have been terminated whether or not he left for military obligations.<sup>182</sup> For example, the company presented evidence regarding: various ways it attempted to save money prior to laying off employees – by reducing overtime hours, delaying the purchase of new equipment, and cutting pay; a systematic way of determining which employment positions needed to be cut; and objective criteria for why Milhauser was a candidate for termination.<sup>183</sup> A third relevant and critical fact in the holding of *Milhauser* was that none of the other terminated employees were provided any benefits or opportunities that were not provided to Milhauser, such as an opportunity to bid or seek other employment opportunities within the company.<sup>184</sup> Thus, Milhauser was not at a disadvantage compared to other similarly situated employees who remained at Minco rather than taking leave for service.<sup>185</sup>

In sum, *Milhauser* holds that in certain situations, termination can be a valid reemployment position under the escalator principle.<sup>186</sup> The situations permitting termination, however, likely require significant circumstantial evidence, like the *Milhauser* case. The less evidence an employer presents of past work-related deficiencies of the service member, poor economic circumstances for the employer, and consistent opportunities with other terminated employees, the less likely the court will find the employee's legitimate escalator position was termination. Accordingly, *Milhauser's* holding should be narrowly interpreted.

### C. Future "Reduction in Force" Terminations

*Milhauser* is also informative in assessing the subject of future reduction in force terminations under USERRA. For example, the court left open the question whether reductions in force must be automatic in order to constitute a valid reemployment position. Other questions one might ask in future litigation are: What constitutes an "automatic" reduction in force? What happens when the company requires mandatory reduction in force cuts, but all employees are relatively evenly qualified? When is a reduction in force justified such that termination is considered a valid option for returning service members? Is the service member entitled to a right of first refusal when/if the position opens again? These questions will likely be the subject of subsequent USERRA reemployment litigation.

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181. *Milhauser*, 701 F.3d at 271.

182. *Id.* at 272.

183. *Id.* at 270.

184. See Wood, *supra* note 178. In this case, there were no opportunities presented to any terminated employees.

185. For a better contrast, compare the fact patterns of *Milhauser* to those in *Derepkowski v. Smith-Lee Co.* See *supra* notes 147, 162 and accompanying text.

186. *Milhauser*, 701 F.3d at 272-73.



## VI. CONCLUSION

With 90,000 troops slated to return from Afghanistan by 2014, reemployment rights for returning service members are an increasing concern.<sup>187</sup> USERRA provides protection for returning service members by requiring their civilian employers to reemploy them in the same position they would have been in had they never left.<sup>188</sup> *Milhauser* makes clear that this reemployment position may be termination.<sup>189</sup> Because *Milhauser* had strong circumstantial evidence regarding a valid reduction in force, however, its holding is likely narrow. Courts in the future will have to reconcile the conflict endorsed by *Milhauser* between USERRA sections 4312(d) and 4313, and subsequent litigation will need to address unanswered questions regarding when a service member can be validly terminated due to discretionary reductions in force.

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187. See Smith, *supra* note 1.

188. See 38 U.S.C. § 4313 (2006).

189. See *Milhauser*, 701 F.3d at 272-73.