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September, 2007

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Reservists are Like Pregnant Women:

A Fertile Battleground for a Reinterpretation of USERRA

Brian Kanner*

INTRODUCTION

A reservist on duty is like a pregnant woman: both sign up for service not really knowing when or if they will ever be called to duty or how long that duty will keep them from their jobs, both have been subject to employer discrimination as a group, and both are necessary for the Nation's success and survival.¹ Both should receive the same rights.

The U.S. has come a long way from times when employers could give a birthing mother less rights and benefits than an employee injured skiing on a family vacation.² Historically, employment benefit policies could cover *every* employee hospitalization except those resulting from pregnancy.³ Employment disability benefits often excluded coverage for disabilities

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¹ See *infra* notes 179–184 and accompanying text.

² See *General Elec. Co. v. Gilbert*, 429 U.S. 125, 145–146 (1976), *superceded by statute*, The Pregnancy Discrimination Act, Pub. L. No. 95-555, *as recognized in* *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983) (disability insurance that excluded coverage of pregnant-related disabilities held not sex discrimination under Title VII).

³ See *Geduldig v. Aiello*, 417 U.S. 484, 494 (1974) (Brennan, J. dissenting), *superceded by statute*, The Pregnancy Discrimination Act, Pub. L. No. 95-555, *as recognized in* *Newport News*

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arising from childbirth while included coverage for disabilities arising from cosmetic surgery, hair transplants, vasectomies, and circumcisions.⁴ The women's rights movement successfully convinced policy makers to condemn discriminatory employment benefits like these with the passing of the Pregnancy Discrimination Act (PDA) of 1978.⁵

The U.S. has not similarly progressed for reservist rights. A reservist,⁶ called to active duty in service of his or her country in a time of need, may receive less employment rights and benefits than a skier injured on vacation. Employers may have an employment policy that pays full-salary to employees for any disability leave, including pregnancy, without offering a

Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. 669 (1983) (comprehensive disability insurance excluding pregnancy-related claims held not a violation of the Equal Protection Clause); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, at 336.

⁴ Williams, *supra* note 3.

⁵ Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)). The PDA amended Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, to include pregnancy discrimination as prohibited discrimination based on sex. The PDA affords pregnant women equal treatment in the workplace to those employees on non-pregnant disability. *Id.*

⁶ In this paper, "reservist" will refer to both members of the Army National Guard and Army Reserves, both of which function as part of the U.S. Reserve Force. *See* CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, THE FUTURE OF THE NATIONAL GUARD AND RESERVES: THE BEYOND GOLDWATER-NICHOLS PHASE III REPORT VII (JULY 2006).

comparable benefit⁷ to reservists called to duty. The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) is the act that guarantees reservists workplace non-discrimination and reemployment rights.⁸ Under the Department of Labor’s (DOL) newly issued regulations of USERRA⁹ and the Fifth Circuit’s interpretation of the Act,¹⁰ reservists are given non-seniority rights only if the employer offers them to “similarly situated” non-military employees on a “comparable” non-military leave.¹¹

The assessment for determining a reservist’s non-seniority rights is inherently disingenuous: what employee is *truly* similarly situated to a reservist called to duty and what non-military leave is *truly* comparable to the unpredictable military leave?¹² Employers are

⁷ A comparable benefit would offer payment for just the difference between the reservists’ military pay and their civilian salary for a period equal to the compensated disability leave.

⁸ 38 U.S.C. §§ 4301–4334 (2007).

⁹ 20 C.F.R. §§ 1002.1–1002.314 (2005).

¹⁰ *See Rogers v. San Antonio*, 392 F.3d 758 (5th Cir. 2004). This case is significant because of its precedential value in light of the relatively scant litigation under USERRA to date.

¹¹ 20 C.F.R. § 1002.150(a),(b) (2005). The regulations give reservists all “*seniority-based* rights and benefits” that would have been earned had the reservist remained continuously employed.

20 C.F.R. § 1002.210 (emphasis added).

¹² Both USERRA, 38 U.S.C. § 4316(b)(1)(B) and the PDA, Pub. L. No. 95-555 (codified at 42 U.S.C. § 2000e(k)) force the employer to gauge which employees are similarly situated to the protected group when determining what rights they must legally extend to the protected group. A determination of rights for a pregnant woman under the PDA is a relatively simple inquiry: one needs only to look at the employer’s general disability leave policy and offer those benefits

given the unguided onus of making this determination and may escape the liability for denying due rights by claiming non-military coworkers are not similarly situated or that the non-military leave is not comparable.¹³ Under the Department of Labor's and the Fifth Circuit's interpretations of USERRA, employers have no legal obligation to provide reservists with *all* rights and benefits the reservist would have enjoyed had he or she never left employment to serve their country.¹⁴

Perhaps comparing an activated reservist to a pregnant woman seems crude on its face. However, the similarly situated test of the new regulations presupposes that a similarly situated group in fact exists, or otherwise it would be a meaningless test.¹⁵ When forced to find *some* group that is similarly situated to reservists on a comparable leave, pregnant women on leave are the *most* similarly situated, as a group, and their leave is *most* comparable. Therefore,

to the pregnant woman, since pregnancy is a medical disability and a general leave policy is comparable and covers other disabled, thus similarly situated, employees on disability leave. CHARLES DALE, CONGRESS RESEARCH SERVICE, THE LIBRARY OF CONGRESS, 87-277A, THE JUDICIAL AND LEGISLATIVE TREATMENT OF PREGNANCY: A REVIEW OF DEVELOPMENTS FROM UNPROTECTED STATUS TO ANTI-DISCRIMINATION — EQUAL TREATMENT AND SPECIAL TREATMENT 12–13 (1987).

¹³ See *Woodall v. Amer. Airlines*, No. 3-06-CV-0072-M, slip op. at 4 (N.D. Tex. Oct. 6, 2006) (defendant employer defended against a claim for denial of non-seniority rights by claiming military leave is not comparable to non-seniority rights under a collective bargaining agreement).

¹⁴ See 20 C.F.R. § 1002.150 (2005).

¹⁵ See *generally* *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 698 (1995) (Courts should not interpret statutory language as surplusage.).

reemployed reservists should receive all rights and benefits that an employer offers to pregnant women.

The comparison is also sound based on public policy. Current policy dictates that the United States needs to offer a far more generous “social compact”¹⁶ to its reservists than what it has historically offered. The Nation’s social compact with the reserves is “the set of expectations and obligations that govern how the nation uses, compensates, and takes care of reservists and their families,” which binds both the government and employers.¹⁷ The U.S. has changed its policy on how it uses and intends to use the reserves in the future; reservists are no longer a force of last resort, but face almost guaranteed deployment.¹⁸ However, the U.S. has not updated the social compact, which may explain years of recruiting difficulty and over 16,000 complaints¹⁹ under USERRA from fiscal years 2004 to 2006.²⁰ Nevertheless, the DOL regulations on USERRA restrict reservists’ non-seniority under its similarly situated test by not offering

¹⁶ CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, *supra* note 6, at 92.

¹⁷ *Id.*

¹⁸ CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, *supra* note 6, at 93.

¹⁹ The lack of USERRA case law does not mean USERRA is not an issue; reservists filed over 16,000 complaints in just two years. The Department of Defense’s Employer Support group resolves over 95 percent of complaints without passing the complaint on the Department of Labor for possible litigation. U.S. GOV’T ACCOUNTABILITY OFFICE, MILITARY PERSONNEL: ADDITIONAL ACTIONS NEEDED TO IMPROVE OVERSIGHT OF RESERVE EMPLOYMENT ISSUES 26 (2007) [hereinafter ADDITIONAL ACTIONS NEEDED].

²⁰ *Id.* at 4. To date, reports to Congress have understated the number of reports by 80 percent because the reports did not include statistics from every agency that received complaints. *Id.* at 6.

reservists *all* rights and benefits the reservist would have received if continuously employed.²¹

Offering reservists the same non-seniority employment rights that pregnant women receive under an employers' own policies, brings the country one step closer to updating the social compact to reflect the increased burden placed on the reservists.

Not only have the DOL regulations and Fifth Circuit's interpretations of USERRA wrongly restricted reservists' rights based on policy, but also based on a plain reading of USERRA. The text of USERRA does not give a reservist only the non-seniority rights an employer offers to non-military employees on a comparable leave. USERRA gives a reservist "all seniority and *rights and benefits* that such person would have attained if the person had remained continuously employed"²² upon reemployment, which includes non-seniority benefits. The social compact of USERRA is sufficiently generous to compensate the reservists as it is written without the DOL and Fifth Circuit erroneous interpretation.

Section I explains the progression toward more rights for reservists throughout the history of reservist employment law, and then argues that the DOL and Fifth Circuit's interpretation of USERRA has broken that progression. Section II argues that pregnant women and reservists are similarly situated and that their leaves are comparable. Thus, courts should require employers, bound by the DOL's regulations and the Fifth Circuit's interpretation, to look to the rights given to pregnant women under their own policy to determine what rights they must give their reserve employees under USERRA. Section III argues that the U.S.'s social compact with the reservists must be updated because of the unprecedented reliance on the reserves for national security and highlights how the DOL and Fifth Circuit's interpretation fails to do so. Section IV,

²¹ See 20 C.F.R. § 1002.150 (2005).

²² 38 U.S.C. § 4316(a) (2007) (emphasis added).

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explains how the DOL and Fifth Circuit have incorrectly restricted reservists' rights under USERRA based on a plain reading of the statutory text.

I. USERRA

The history of reservist employment rights law is marked by a progression toward ensuring reservists more rights and security in their civilian employment, culminating in the passage of USERRA. USERRA was an attempt to clearly define and improve reservist rights amidst rising complaints resulting from employer and reservist confusion about what employment rights prior law granted.²³ However, the Fifth Circuit's and DOL regulations' interpretation of USERRA has not continued to build on these historical trends. This Comment argues, based on current policy concerns and a plain reading of USERRA, that the U.S. must continue this progression toward clearly defined, liberal rights and benefits.

A. History of the Uniformed Services Employment and Reemployment Act

USERRA prescribes the reemployment rights and protections that employers must give employees who voluntarily or involuntarily leave employment for military service.²⁴ Such rights

²³ *Veteran's Reemployment Rights Legislation: S. 843, The Uniformed Services Employment and Reemployment Rights Act of 1993 Before the Senate Committee on Veteran's Affairs*, 103rd Cong. 42 (1993) [hereinafter *Hearing on S. 843*] (prepared statement of Hary Puente-Duany, Director, Office of Veterans' Employment, Reemployment, and Training, U.S. Department of Labor).

²⁴ 38 U.S.C. §§ 4301–4334 (2007).

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were first contained in the Selective Training and Service Act of 1940,²⁵ which was eventually amended as the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VRRRA).²⁶ After the 1991 Gulf War, the government received a drastic increase in the number of inquiries and complaints regarding reservists' employment rights,²⁷ so, Congress passed USERRA to clarify the prior laws.²⁸ USERRA authorizes the Secretary of Labor to form regulations implementing the Act.²⁹ The new DOL regulations recognize the continuity of these Acts and Congress's intent to preserve previous case law to the extent that it is consistent with USERRA: "Congress emphasized USERRA's continuity with the VRRRA and its intention to clarify and strengthen that law."³⁰

²⁵ Pub. L. No. 783, 54 Stat. 885–897 (1940)(codified at 50 U.S.C. app. § 308 (1942)); *See also* Rogers v. San Antonio, 392 F.3d 758, 764 (5th Cir. 2004).

²⁶ Pub. L. No 93–508, 88 Stat. 1578 (1974), (codified at 38 U.S.C. §§ 2021–2027 and later recodified at 38 U.S.C. §§ 4301–4307).

²⁷ U.S. GOV'T ACCOUNTABILITY OFFICE, MILITARY PERSONNEL: FEDERAL MANAGEMENT OF SERVICEMEMBERS EMPLOYMENT RIGHTS CAN BE FURTHER IMPROVED, GAO-06-60, at 1 (OCT. 2005) [hereinafter IMPROVE RIGHTS]. Complaints resulting from the Gulf War increased from 1,534 in 1990 to 2,537 in 1991. *Id.* at 22.

²⁸ *Id.* at 1.

²⁹ 38 U.S.C. § 4331(a) (2007).

³⁰ 20 C.F.R. § 1002.2 (2005); Rogers v. San Antonio, 392 F.3d 758, 762 (5th Cir. 2004).

1. *A Progression Toward More Rights*

Reservist rights have progressed toward more comprehensive rights throughout the history of veteran reemployment acts, moving toward more comprehensive rights while recognizing the increasing importance of the reserve forces to our national interests.³¹ The 1940 draft applied only to civilians involuntarily called to duty³² and provided the active duty veteran returning to civilian employment with reemployment rights of “like seniority, status and pay.”³³ In 1951, these same reemployment rights were extended to those who volunteered for service to strengthen the reserves but only offered protection when returning from training duty.³⁴

In 1955, reemployment rights including seniority, status and pay, which were formerly only offered to servicemembers involuntarily called to duty, were extended to reservists returning from more than three months of active duty.³⁵ These same rights were extended for periods of less than three months in 1960.³⁶ Without these statutory reemployment guarantees, employers would be free to discharge reservists while away on active duty.

³¹ Historically, Congress has revised reservist employment statutes in response to problems identified after major conflicts. Marcel Quinn, *Uniformed Services Employment and Reemployment Rights Act (USERRA)—Broad in Protections, Inadequate in Scope*, 8 U. PA. J. LAB. & EMP. L. 237, 239 (2005).

³² Hearing on S. 843, *supra* note 23, at 42 (prepared statement of Hary Puente-Duany, Director, Office of Veterans’ Employment, Reemployment, and Training, U.S. Department of Labor).

³³ *Monroe v. Standard Oil Co.*, 452 U.S. 549, 555 (1981) (quoting 38 U.S.C. § 2021(a)).

³⁴ *Id.* (citing Pub. L. 51, ch. 144, §1(s), 65 Stat. 75, 86–87).

³⁵ *Id.* (citing the Reserve Forces Act, Pub. L. 305, ch. 665, § 262(f), 69 Stat. 598, 602).

³⁶ *Id.* (citing 38 U.S.C. § 2024(d)).

However, these protections offered no guarantee against employer misconduct after reinstatement,³⁷ and Congress responded with the Vietnam Era Veterans' Readjustment Assistant Act to ensure that no reservist would "be denied retention in employment or any promotion or other incident or advantage of employment" because of any military service obligation.³⁸ Subsequent court rulings struggled to determine what burden this standard places on employers,³⁹ and VRRRA law became increasingly confusing and unclear.⁴⁰

In 1973, the Department of Defense adopted the Total Force Policy,⁴¹ which ended the draft and created an all-volunteer U.S. military.⁴² This policy relies heavily on reserve force but

³⁷ *Id.* Thus, an employer could terminate, demote, or discriminate against a reservist shortly after the employer reinstated the reservist with like seniority, status, and pay. *Id.*

³⁸ *Monroe v. Standard Oil Co.*, 452 U.S. 549, 557 (1981) (quoting 38 U.S.C. § 2021(b)(3)).

³⁹ *See Waltermeyer v. Aluminum Co. of Amer.*, 804 F.2d 821, 823–824 (1986) (reviewing different circuits' tests for determining when a reservist had been denied an incident or advantage of employment).

⁴⁰ Hearing on S. 843, *supra* note 23, at 43 (prepared statement of Hary Puente-Duany, Director, Office of Veterans' Employment, Reemployment, and Training, U.S. Department of Labor). The VRRRA was put to the test following the 1991 Gulf War, and employer inquiries and reservist complaints indicated confusion. U.S. IMPROVE RIGHTS, *supra* note 26, at 1.

⁴¹ Hearing on S. 843, *supra* note 23, at 31 (prepared statement of Hary Puente-Duany, Director, Office of Veterans' Employment, Reemployment, and Training, U.S. Department of Labor).

⁴² This policy's intent was to call volunteer reservists instead of drafting U.S. citizens. Ryan Wedlund, *Citizen Soldiers Fighting Terrorism: Reservist Reemployment Rights*, 30 WM. MITCHELL L. REV. 797, 803 (2004).

only in the event of a major military operation.⁴³ The end of the Cold War led to significant cuts in the military's active duty force, and the reserves accounted for a growing percentage of the entire military.⁴⁴ Congress grew concerned over maintaining the quality of the ever-important reserve forces.⁴⁵ It formed an interagency committee in 1987 to improve and clarify the law and to strengthen the reserve forces, which led to USERRA's creation.⁴⁶ The number of employer inquiries and reservist complaints filed under the existing VRRRA encouraged Congress to enact USERRA in 1994.⁴⁷

⁴³ Hearing on S. 843, at 3 (statement Francis M. Rush, Jr., Principal Director, Management and Personnel, Office of the Assistant Secretary of Defense for Reserve Affairs, U.S. Department of Defense).

⁴⁴ DEPARTMENT OF DEFENSE, WILLIAM S. COHEN, SECRETARY OF DEFENSE, ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS CHAPTER 9 (1998), *available at* <http://www.dod.mil/execsec/adr98/chap9.html#top>.

⁴⁵ Hearing on S. 843, *supra* note 23, at 3 (statement Francis M. Rush, Jr., Principal Director, Management and Personnel, Office of the Assistant Secretary of Defense for Reserve Affairs, U.S. Department of Defense).

⁴⁶ *Id.*

⁴⁷ IMPROVE RIGHTS, *supra* note 26, at 1.

B. Reservists' Rights Under USERRA

The purpose of USERRA is not only to prevent employers from discriminating against reservists, but also to encourage people to enlist in the reserves. USERRA's stated purposes are:

(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.⁴⁸

To accomplish this, USERRA covers all employers,⁴⁹ and has an anti-discrimination provision that prevents an employer from denying "initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that [military] membership."⁵⁰

To achieve the purpose of minimizing the effect on reservists' civilian life, USERRA mandates that the employer return the deactivated reservist to the same position of employment the reservist would have been in, had the reservist remained continuously employed.⁵¹ Also,

⁴⁸ 38 U.S.C. § 4301(a)(1)–(3) (2007) (emphasis added).

⁴⁹ § 4303(4)(A).

⁵⁰ § 4311(a).

⁵¹ §§ 4313(a)(1)–(2). If service is greater than 90 days, the reservist must be reemployed in the same position "in which the person would have been employed if the continuous employment . . . had not been interrupted by such service, or a position of like seniority, status, and pay." § 4313(a)(2)(A). If service is less than 90 days, then the employer must reinstate the reservist to the same position and has no option of offering a "like" position. § 4313(a)(1)(A).

USERRA requires the continuation of existing health plans⁵² and prescribes rules for employers' pension plan obligations.⁵³

The employee pension benefit plans provision protects all pension plans.⁵⁴ When a reservist is reemployed, the employer must make up plan contributions for the time the reservist served.⁵⁵ The employer must treat the reservist "as not having incurred a break in service with the employer"⁵⁶ and must consider the military leave as actual working time with the employer when determining the accrual of benefits.⁵⁷ Furthermore, the employer must contribute to the reservist's fund in the same manner as it did for other employees during the service.⁵⁸

⁵² § 4317. If a reservist receives healthcare under an employer's plan, that has the option of receiving government provided healthcare or continuing the employer provided healthcare when called to active duty. § 4317(a)(1). The employer must continue coverage for the lesser of a 24-month period, which begins on the first day of duty, or the day after the reservist fails to follow reemployment procedures under § 4312(e). §§ 4317(a)(1)(A)–(B). The employer is not responsible for covering the cost of the coverage and can charge up to 102 percent of the cost. § 4317(a)(2).

⁵³ 38 U.S.C. § 4318 (2007).

⁵⁴ § 4318(a)(1)(A).

⁵⁵ § 4318.

⁵⁶ § 4318(a)(2)(A).

⁵⁷ § 4318(a)(2)(B).

⁵⁸ § 4318(b)(1). Earnings and forfeitures are not included when computing the employer's contribution. *Id.* Also, if employer contribution obligation is dependent on an employee's contribution, an employer is only obligated to pay once the employee pays.

USERRA also more generally prescribes the employment rights and benefits to which an employee on military leave is entitled while on leave and upon reemployment.⁵⁹ Section 4316(a) (“reemployment provision”)⁶⁰ grants reemployment rights and benefits:

A person who is *reemployed* . . . is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service . . . plus the *additional seniority and rights and benefits* that such person would have attained if the person had remained continuously employed.”⁶¹

Section § 4316(b) (“leave provision”)⁶² sets forth reservists’ rights and benefits *while on leave* and requires:

- (1) a person who is *absent* from a position of employment by reason of service in the uniformed services shall be—
- (A) deemed to be on furlough or leave of absence while performing such service; and
 - (B) entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.⁶³

⁵⁹ 38 U.S.C. § 4316 (2007).

⁶⁰ This Comment names 38 U.S.C. § 4316(a) the “reemployment provision” for ease of statutory interpretation.

⁶¹ § 4316(a) (emphasis added).

⁶² This Comment names 38 U.S.C. § 4316(b) the “leave provision” for ease of statutory interpretation.

⁶³ § 4316(b)(1)(A)–(B).

1. *What are the Rights and Benefits at Stake?*

Wages or salary for work performed are not considered “rights and benefits” under USERRA.⁶⁴ USERRA does not require employers to pay reservists’ salary or wages while the reservists are on leave because the government provides active duty compensation.⁶⁵

The statute defines seniority as “longevity in employment together with any benefits of employment which accrue with, or are determined by, longevity in employment.”⁶⁶ An example includes shifting bidding preferences determined by length of employment.⁶⁷ Another example of benefit based on seniority is severance pay that increases with time spent working for a particular company.⁶⁸

A non-seniority benefit is a benefit that does not accrue with, and is not determined by, longevity in employment.⁶⁹ Non-seniority rights include benefits that

⁶⁴ § 4303(2). “[R]ights and benefits’ means any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract . . . policy, plan.” *Id.*

⁶⁵ *See Monroe v. Standard Oil Co.*, 452 U.S. 549, 562 n.13 (1981) (Reservist rights do not include the right to double compensation.).

⁶⁶ § 4303(12).

⁶⁷ *See Woodall v. Amer. Airlines*, No. 3-06-CV-0072-M, slip op. at 4 (N.D. Tex. Oct. 6, 2006) (pilots’ claim for lost pay due to the inability to bid on flights “commensurate with levels of seniority”).

⁶⁸ *Accardi v. Pennsylvania R.R. Co.*, 383 U.S. 225, 229–230 (1966).

⁶⁹ *See* § 4303(12).

employees receive for simply being on a payroll, such as profit sharing payments based on company performance, educational assistance, child care, scholarships, monetary and non-monetary holiday bonuses,⁷⁰ and some legally mandated benefits.⁷¹ Non-seniority rights also include paid leaves that are not compensation for time actually worked⁷² such as paid jury duty leave, bereavement leave, line of duty injury leave,⁷³ medical disability leave, paternity leave, maternity leave.⁷⁴

Benefits that depend on the absence of a particular event, such as bonuses for perfect attendance and safety bonuses, are also non-seniority rights.⁷⁵ Perfect attendance

⁷⁰ E-mail from H. Lane Dennard, Adjunct Professor of Law, to Brian Kanner, Emory Law Journal Candidate (Feb. 27, 2007, 2:26:42 PM EST) (on file with the author).

⁷¹ *See* Regulations under the Uniformed Services Employment and Reemployment Act of 1994, 70 Fed. Reg. 75,263 (Dec. 19, 2005) (to be codified at 20 C.F.R. pt. 1002) (Reservists may be entitled to Family Medical Leave Act rights under USERRA).

⁷² *See supra* note 76 and accompanying text.

⁷³ *See* *Rogers v. San Antonio*, 392 F.3d 758, 771 (5th Cir. 2004) (question of material fact as to whether jury duty, bereavement, or line of duty injury leave are comparable to military leave). According to one study, over 90 percent of employers offer paid holidays, jury duty, and bereavement leave. SHAWN FEGLEY, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, 2006 BENEFITS: SURVEY REPORT 46 (2006).

⁷⁴ E-mail from H. Lane Dennard, Adjunct Professor of Law, to Brian Kanner, Emory Law Journal Candidate (Feb. 27, 2007, 2:26:42 PM EST) (on file with the author).

⁷⁵ *See* Regulations under the Uniformed Services Employment and Reemployment Act of 1994, 70 Fed. Reg. 75,263 (Dec. 19, 2005) (to be codified at 20 C.F.R. pt. 1002).

requires a lack of absence and a safety bonus requires lack of a safety violation, neither of which depends on length of service.⁷⁶

Vacation can either be a “form of short-term compensation for worked performed,”⁷⁷ which would not be a protected right or benefit under USERRA,⁷⁸ or it can be a non-seniority right.⁷⁹ If paid vacation time is dependent on the length of an employee’s service, then it is a form of deferred compensation for time actually worked.⁸⁰ If a vacation accrues automatically when an employee is on the company payroll, then the vacation is a non-seniority right because it is not based on longevity in employment.⁸¹

2. Restricting These Rights Against the Progression Toward More Liberal Rights

This comment argues that Section 4316(a) describes a reservist’s reemployment rights and benefits and § 4316(b) describes a reservist’s rights while absent.⁸² According to the leave

⁷⁶ *See Id.*

⁷⁷ *See id.* (citing *Foster v. Dravo*, 420 U.S. 92 (1975)).

⁷⁸ *See supra* note 75 and accompanying text; *Foster*, 420 U.S. at 100–101.

⁷⁹ *See Foster*, 420 U.S. at 101.

⁸⁰ *See id.* (Court denied veteran’s claim for accrued vacation during military leave because employer’s vacation policy varied with time that an employee worked.). Thus, if vacation functions as a seniority right, it is a form of compensation.

⁸¹ *See id.* (Court held that a reservist could accumulate vacation while on military leave only when “vacations were intended to accrue automatically as a function of continued association with the company.”); *Kiddler v. Eastern Airlines*, 469 F. Supp. 1060

⁸² *See infra* Section IV.

provision, an *absent* reservist receives only non-seniority benefits that the employer offers to other employees of the same seniority, status, and pay while on leave.⁸³ However, under the reemployment provision, a reemployed reservist receives all seniority rights and benefits that the reservist had at the beginning of service.⁸⁴ The reservist also receives “the additional seniority and rights and benefits,” including non-seniority benefits, that the reservist “would have attained if the person had remained continuously employed.”⁸⁵

This dichotomy makes sense given that a reservist is under no obligation to return to employment after service and it creates very little obligation for the employer while the reservist is away.⁸⁶ However, if the reservist chooses to return to employment, the employer must offer reemployment and minimize the disadvantages of the reservist’s service by giving more rights and benefits.⁸⁷ This reemployment benefits provision functions identically to the USERRA provisions that specify an employer’s pension obligation:⁸⁸ The employer has no actual

⁸³ See *supra* note 63 and accompanying text.

⁸⁴ See *supra* note 61 and accompanying text.

⁸⁵ See *supra* note 61 and accompanying text.

⁸⁶ Under 38 U.S.C. § 4316(b)(1)(B), an employer must only maintain the reservist as an employee on leave status and offer the non-seniority rights that the employer offers to similarly situated employees. The employer can only abandon these rights if the employee provides written notice of intent not to return. § 4316(b)(2)(A)(ii).

⁸⁷ See 38 U.S.C. § 4312 (2007); § 4316(a).

⁸⁸ See *supra* notes 65–68 and accompanying text.

obligation to the reservist while that reservist is on leave, but the employer must make up the accrued rights and benefits upon reemployment.⁸⁹

However, the Fifth Circuit and Department of Labor’s regulations interpret § 4316 differently. They effectively ignore the significance of the on leave and reemployment distinction contained in § 4316. They interpret the reemployment benefits provision as a seniority rights provision that gives only seniority rights and interpret the leave provision as a non-seniority rights provision that gives only non-seniority rights.⁹⁰ This interpretation ignores the language in the § 4316(a) reemployment provision that includes “seniority and rights and benefits.”⁹¹ Thus, reservists are not entitled to receive the non-seniority rights and benefits they would have received had they been continuously employed. Their non-seniority leave rights are restricted to only those non-seniority leave rights that their employer offers to similarly situated employees on a comparable leave.⁹²

Under the predecessor to the VRRRA, the Supreme Court rejected the rule that employers must treat reservists as having remained continuously only when determining seniority rights.⁹³

⁸⁹ Compare 38 U.S.C. § 4316(a) with § 4318(a)(2)(A)–(B), (b)(1).

⁹⁰ See *infra* notes 109–115 and accompanying text.

⁹¹ See § 4316(a).

⁹² 20 C.F.R. §§ 1002.149–1002.150 (2005). A requirement of “comparable leave” is also absent from 38 U.S.C § 4316(b)(1)(B).

⁹³ See *Foster v. Dravo*, 420 U.S. 92, 99 n. 7 (1975) (citing *Eager v. Magma Copper Co.*, 389 U.S. 323 (1967)). In *Foster*, the Supreme Court discussed its prior *per curiam* decision to grant a reservist holiday pay already earned, which he would have received had he not served and merely remained on the company pay roll. *Id.* at 99 (citing *Eager*, 389 U.S. 323). The reservist

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Furthermore, it has required employers to treat reservists as having remained continuously when determining non-seniority rights.⁹⁴ Thus, the Fifth Circuit and DOL's interpretation of USERRA, which forbids treating a reservist as continuously at work when determining non-seniority rights, goes against Supreme Court precedent under the VRRRA. Therefore, the interpretation breaks USERRA's continuity with the prior reservist employment acts, in spite of the DOL's recognition that continuity should exist.⁹⁵

Furthermore, the DOL and Fifth Circuit have interpreted USERRA against its plain meaning, detracting from the clarity of reservist employment rights law, which is contrary to the intended effect of USERRA. Additionally, denying reservists' non-seniority rights runs against the progression toward more rights for reservists, which is wrong based on public policy.⁹⁶

was required to be at work continuously for three months to receive the holiday pay and there were no exceptions for any absences. *Id.* (citing *Eager*, 389 U.S. 323). *Foster* stated that the decision treated the reservist as if he never left employment when determining the non-seniority right. *Id.* (citing *Eager*, 389 U.S. 323). The Court also stated that the *per curiam* decision implicitly rejected the dissent's position that this treatment only applies to seniority rights. *Id.* (citing *Eager*, 389 U.S. 323).

⁹⁴ *Id.* at 99, n. 7.

⁹⁵ *See supra* note 30 and accompanying text.

⁹⁶ *See infra* Section III.

C. The Fifth Circuit and the Department of Labor's Interpretation of USERRA

1. The Fifth Circuit Interpretation

The Fifth Circuit decision, *Rogers v. San Antonio*,⁹⁷ is significant because it is the only case to analyze USERRA § 4316, and it is creating precedent.⁹⁸ The Fifth Circuit decided the case before the DOL's regulations were effective, but after they were proposed.⁹⁹

In *Rogers v. San Antonio*, the Fifth Circuit held that the § 4316(a) reemployment provision applies the escalator principle to seniority rights and "seniority-based rights."¹⁰⁰ The escalator principle¹⁰¹ is the idea that a reinstated employee "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 the position continuously during the war."¹⁰² Courts originally used this principle to determine a reservist's seniority in relation to reemployment position.¹⁰³ The test was not formulated to determine reemployment benefits.¹⁰⁴

⁹⁷ *Rogers v. San Antonio*, 392 F.3d 758, 764 (5th Cir. 2004).

⁹⁸ *See Woodall v. Amer. Airlines*, No. 3-06-CV-0072-M, slip op. at 4 (N.D. Tex. Oct. 6, 2006) (citing *Rogers* for the proposition that seniority is determined by the escalator principle).

⁹⁹ The *Rogers* court cites to the DOL's proposed regulations, but only in footnotes. *See, e.g., Rogers*, 392 F.3d at 762 n.7 ("We cite these non-binding Proposed Regulations for their persuasive authority only.").

¹⁰⁰ *Rogers*, 392 F.3d at 764 (emphasis added).

¹⁰¹ *Fishgold v. Sullivan Drydock and Repair Corp.*, 328 U.S. 275, 284–285 (1946).

¹⁰² *Id.*

¹⁰³ *See id.*

¹⁰⁴ *See Id.*

The court held that the § 4316(a) reemployment provision is the embodiment of this escalator principle applied to benefits, which led the court to the conclusion that the § 4316(a) reemployment provision deals *only* with seniority rights.¹⁰⁵ The court concluded that the escalator protection under the § 4316(a) reemployment provision does not apply to non-seniority rights at all.¹⁰⁶

The court also concluded that the § 4316(b) leave provision grants only non-seniority rights.¹⁰⁷ The court held the § 4316(b) leave provision stipulates that absent reservists are only entitled to equality with “employees having similar seniority, status, and pay who are on *comparable* non-military leaves of absence . . . in effect at anytime during the uniformed service.”¹⁰⁸ Therefore, a reservist receives a particular non-seniority right only if an employer offers that right to a similarly situated employee on a comparable non-military leave.

Ultimately, this test focuses on whether a right is a seniority right or a non-seniority right and ignores an inquiry as to whether an employee is on leave or being reemployed.

2. *The DOL's Interpretation*

Like the Fifth Circuit's interpretation, the DOL's new regulations under USERRA interpret § 4316 so that the § 4316(a) reemployment benefits provision exclusively grants

¹⁰⁵ *Rogers v. San Antonio*, 392 F.3d 758, 764 (5th Cir. 2004).

¹⁰⁶ The *Rogers* court determined missed upgrade opportunities, bonus day leave, perfect attendance leave, and jury duty leave, among others, were non-seniority rights not subject to the escalator principle. *See id.* at 771.

¹⁰⁷ *Id.* at 764.

¹⁰⁸ *Id.* (emphasis added).

seniority-based rights and benefits and that the § 4316(b) leave provision grants only non-seniority based rights and benefits.¹⁰⁹ Unlike the Fifth Circuit, the regulations recognize USERRA’s on leave and reemployment distinction.¹¹⁰ Consistent with the plain language of USERRA’s § 4316(b) leave provision, an absent reservist may receive only non-seniority rights under the regulations.¹¹¹ However, reemployment obligations include seniority rights but exclude non-seniority rights.¹¹²

Essentially, the DOL’s regulations only apply the escalator principle to seniority rights¹¹³ and entitle reservists only to the non-seniority rights offered to similarly situated employees that are on a comparable form of leave.”¹¹⁴ The preamble of the DOL regulations emphasizes the

¹⁰⁹ Uniformed Services Employment and Reemployment Rights Act of 1994, as Amended, 70 Fed. Reg. 75,262 (Dec. 19, 2005).

¹¹⁰ The regulations specify seniority rights under “Subpart D—Rights, Benefits, and Obligations of Persons Absent from Employment Due to Service,” 20 C.F.R. §§ 1002.149–1002.17, and non-seniority rights under “Subpart E—Reemployment Rights and Benefits,” §§ 1002.180–1002.267.

¹¹¹ Subpart D excludes any mention of a seniority right. *See* 20 C.F.R. §§ 1002.149–1002.171 (2005).

¹¹² Subpart E excludes any mention of a non-seniority right. *See* 20 C.F.R. §§ 1002.180–1002.267 (2005).

¹¹³ § 1002.210.

¹¹⁴ §§ 1002.150(a)–(b).

limiting nature this provision has on the employer's non-seniority rights and benefits obligation.¹¹⁵

a. *The Effects of Excluding Non-Seniority Rights from the § 4316(a) Reemployment Provision*

To illustrate the effect of precluding the escalator principle's application to non-seniority rights by offering those rights only if they are offered to similarly situated employees on a similar leave: suppose an employer offers a \$100 monthly education benefit to all employees on the pay roll with school-aged children, regardless of whether the employees takes a leave of absence during the month. The employer offers up to twelve weeks of unpaid disability leave, but continues paying the monthly stipend to the employees on the leave. This would be a non-seniority benefit because it accrues regardless of longevity of employment.

Assuming an employee on disability leave is similarly situated to a reservist and the leaves are comparable, the employer must continue paying this monthly stipend to a reservist on a three-month leave for active duty. The employer must continue paying because it is offering the non-seniority benefit to a similarly situated employee on non-military leave.¹¹⁶ Nevertheless,

¹¹⁵ See Uniformed Services Employment and Reemployment Rights Act of 1994, as Amended, 70 Fed. Reg. 75,253 (“[T]he employer is obligated to provide non-seniority benefits *only to the extent* that the employer provides such benefits to similarly situated employees on comparable non-military . . . leave.” (emphasis added.)).

¹¹⁶ See 20 C.F.R. §§ 1002.149–1002.150 (2005).

an employer may try to deny a reservist's leave right by arguing the employees are not similarly situated or the leave is not comparable.¹¹⁷

However, suppose the employer offers this monthly educational stipend, regardless of time worked for the first third of the month, but only if the employee is present for a full week preceding the payment. The stipend is still a non-seniority benefit because it accrues regardless of longevity in employment, since an employee can miss any number of days during the first third of the month and still qualify.¹¹⁸ Suppose this employer will not pay the stipend to the employee on disability leave or any other leave.

Under the DOL's regulations, an employer has no obligation to pay this educational stipend to a returning reservist who was at work the first three weeks but missed just one workday in the last week prior to the stipend payment. Even though that reservist would have received the stipend had he or she never left to defend the country, the employer has no obligation to offer non-seniority rights to a reservist seeking reemployment, ever. The regulations do not include non-seniority rights under the § 4316(a) reemployment provision, so the reservist would not receive the non-seniority educational stipend under the escalator principle.¹¹⁹ Ultimately, the reservist will never recoup this stipend under the regulations

¹¹⁷ See *supra* note 125 and accompanying text.

¹¹⁸ See *Waltermeyer v. Aluminum Co. of Amer.*, 804 F.2d 821, 825 (1986) (holding work performed a week prior to a holiday merely established eligibility under an employer policy that required a full week of work prior to a holiday as a precondition to holiday pay).

¹¹⁹ 20 C.F.R. § 1002.210.

because reservists only receive non-seniority rights on leave if the employer offers them to similarly situated, non-military employees,¹²⁰ and this employer does not do so.

This classification system virtually ignores USERRA’s distinction between on leave and reemployment rights.¹²¹ The inquiry should not begin with a “benefit by benefit” analysis,¹²² as the DOL’s inquiry requires. Under the DOL’s inquiry, an employer must first look at the nature of each individual benefit to determine whether a reservist automatically receives it based on its classification of seniority. If the employer determines the benefit is a seniority benefit, then the reservist automatically receives it. If the employer determines a benefit is a non-seniority benefit, then it must look to its own policies toward non-military employees to decide both whether the reservist is similarly situated and whether the leave is comparable.

Under USERRA’s distinction of rights based on a reservist’s absence and reemployment, the employer more intuitively begins the benefit analysis with whether the reservist is on leave or being reemployed. If the reservist is on leave, USERRA mandates the employer must simply examine its leave policy toward non-military employees “having similar seniority, status, and pay” as the reservist, and give the reservist only the non-seniority benefits offered to this group. When an employer offers no leave benefits to that group, the reservist gets only military benefits. However, if the reservist is seeking reemployment, the employer must simply give the reservist “all seniority and rights and benefits that such person would have attained” if he or she did not

¹²⁰ See §§ 1002.149–1002.150.

¹²¹ Compare 38 U.S.C. § 4316(a) (“a person who is reemployed under this chapter”) with § 4316(b)(1) (“a person who is absent from a position”).

leave to serve the country.¹²³ Upon reemployment, the reservist in the last hypothetical should receive the accrued value of the monthly education stipends upon reemployment because that reservist would have received the stipend if it were not for military service.

b. *Similarly Situated Employee*

The DOL regulations give no guidance to employers on how to determine whether a non-military employee is similarly situated to a reservist for the purpose of establishing whether a reservist is entitled to non-seniority rights.¹²⁴ Under this disingenuous similarly situated inquiry, employers can argue against giving reservists non-seniority rights by claiming non-military coworkers are inherently not similarly situated or that the non-military leave is inherently not comparable.¹²⁵ What employee is *truly* similarly situated to a reservist called to duty and what non-military leave is *truly* comparable to the unpredictable military leave? However, the DOL's similarly situated test of the new regulations presupposes that a similarly situated group in fact exists, or otherwise it would be a meaningless test.¹²⁶

¹²³ § 4316(a).

¹²⁴ See 20 C.F.R. § 1002.150(a) (2005).

¹²⁵ See generally American Airlines Reply Brief in Support of its Motion for Dismissal of Plaintiff's Complaint, and, Alternatively, to Strike at 1, Woodall v. Amer. Airlines, No. 3-06CV-0072M (N.D. Tex. Jun. 27, 2006) (employer arguing union service, jury duty, and sick leave are not comparable to military leave under employees collective bargaining agreement).

¹²⁶ See generally Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687, 698 (1995) (Courts should not interpret statutory language as surplusage.).

II. RIDING THE SKIRT TAILS OF THE WOMEN’S RIGHTS MOVEMENT

This section applies the themes of the women’s “special rights” activists to fight for reservists’ rights. Women’s special rights activists argue women have inherent differences from men; so treating men and women “equally” does not create equality.¹²⁷ Therefore, to achieve equality, women should receive special rights to accommodate those differences.¹²⁸

Likewise, reservists have inherent differences compared to non-reservists. Providing reservists with equal leave rights to non-military employees does not create equality between the groups. Reservists need special rights to achieve equality with non-reservists. Therefore, employers’ existing non-military leave policies should not determine reservists’ non-seniority rights because a non-military employee is not truly “similarly situated” and no leave is really comparable. However, given that the current regulations require such an inquiry and assume that it can be done, pregnant women and reservists are most similarly situated and their leaves are most comparable.

A. *Similarly Situated on Similar Leave: A Disingenuous Analysis*

1. *The Pregnancy Discrimination Act*

Much like the reservists’ fight for rights,¹²⁹ the fight for pregnant women’s rights has been marked by a progression toward more comprehensive rights as society recognized the

¹²⁷ Ann C. Scales, *Towards a Feminist Jurisprudence*. 56 IND. L. J. 375, 431 (1980–1981).

¹²⁸ *Id.*

¹²⁹ *See supra* Section A.

important role women played in our nation's workplace.¹³⁰ Pregnant women were historically treated inferiorly compared to other people with medical disabilities, and were often subject to state or employer forced unpaid leave policies and were often terminated.¹³¹ By 1970, women represented an unprecedented large proportion of the workforce and a fast-growing number of them had children.¹³² This presence in the workforce brought attention to the discrimination of pregnant women that employers had long practiced in the U.S., which led to litigation to fight for pregnant women's rights in the workplace.¹³³ The fight culminated in the passing of the 1978 Pregnancy Discrimination Act (PDA),¹³⁴ which amended Title VII of the Civil Rights Act of 1964¹³⁵ to include discrimination of pregnancy as discrimination based on sex.¹³⁶

¹³⁰ See DALE, *supra* note 13, at 1.

¹³¹ Alison A. Reuter, *Subtle But Pervasive: Discrimination Against Mothers and Pregnant Women in the Workplace*, 33 FORDHAM URB. L.J. 1369, 1373–1374 (2006).

¹³² Williams, *supra* note 3 at 335, 335 n. 40.

¹³³ DALE, *supra* note 13, at 1.

¹³⁴ Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)). Congress passed the PDA in reaction to the decision in *General Electric Company v. Gilbert*, 429 U.S. 125, 136 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, which held that the exclusion of pregnancy from a comprehensive disability benefits plan was not discrimination on the basis of sex. Williams, *supra* note 3, at 347.

¹³⁵ 42 U.S.C. § 2000e-2 (2007).

¹³⁶ Title VII prohibits any employment discrimination based on an “individual’s race, color, religion, sex, or national origin[.]” 42 U.S.C. § 2000e-2.

The language of the PDA creates a test much like the DOL's rule, which gives reservists a non-seniority right only if an employer offers one to a similarly situated employee on a comparable leave.

The language redefining Title VII's definition of sex discrimination states:

[W]omen affected by pregnancy, birth, or related medical conditions shall be treated *the same* for all employment-related purposes, including receipt of benefits under fringe benefits programs, as other persons not so affected but *similar* in their ability or inability to work.¹³⁷

The dominant interpretation of the PDA when it was enacted¹³⁸ was that it prohibits disparate treatment, and treats pregnancy “as a physical event comparable to other physical events which befall workers.”¹³⁹ To prove disparate treatment, a pregnant woman must prove that a “similarly situated” non-pregnant person was granted a benefit.¹⁴⁰ Like the DOL's rules for non-seniority rights, the PDA places no burden on the employer to provide pregnancy benefits unless the employer offers rights and benefits to similarly situated employees.¹⁴¹

Another interpretation of the PDA developed shortly thereafter arguing that treating a pregnant woman “the same” requires special rights to accommodate their differences with other

¹³⁷ 42 U.S.C. § 2000e(k) (emphasis added).

¹³⁸ Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action, and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513, 515, 518 (1983).

¹³⁹ Williams, *supra* 3, at 348.

¹⁴⁰ Krieger & Cooney, *supra* note 135, at 520.

¹⁴¹ Scales, *supra* note 123, at 403; Krieger & Cooney, *supra* note 139, at 518.

employees.¹⁴² A debate ensued, and Feminists disagreed over the PDA's effectiveness in achieving equal rights for women.¹⁴³ States began passing laws requiring employers to provide special rights to pregnant women, above the accepted dictates of the PDA, and feminists split over whether to support or discourage such legislation.¹⁴⁴

The dispute was a feud between “equal treatment” theorists and “special treatment” theorists.¹⁴⁵ Equal treatment theorists contend that pregnancy is equal to other disabilities and creates the same needs for the employee.¹⁴⁶ Proponents of this view seek to totally eliminate laws that treat women differently than men because of historical discriminatory laws.¹⁴⁷ They believe pregnant employees should receive only the same treatment given to other disabilities and view equality as synonymous with equal treatment, in accord with the limited rights granted by the PDA.¹⁴⁸

“Special treatment” theorists view pregnancy as a unique condition different from other disabilities and argue that pregnancy creates an “‘extra’ condition” that men will never suffer, which creates a “men plus pregnancy category” for women.¹⁴⁹ Because women carry an extra

¹⁴² See Krieger & Cooney, *supra* note 135, at 518; Scales, *supra* note 126, at 406.

¹⁴³ See *infra* notes ---- [special vs. equal treatment]

¹⁴⁴ Krieger & Cooney, *supra* 139, at 515.

¹⁴⁵ See Williams, *supra* 3, at 327–328.

¹⁴⁶ *Id.* at 326.

¹⁴⁷ Krieger & Cooney, *supra* 139, at 537.

¹⁴⁸ *Id.* at 515.

¹⁴⁹ Williams, note 3, at 366.

burden, laws must compensate women for the difference in burdens to create equality.¹⁵⁰ Special treatment theorists believe women are forced to operate in institutions designed for men that do not accommodate women's inherent differences.¹⁵¹ They view special treatment accommodations as necessary to effectuate equality of effect and opportunity.¹⁵² Therefore, they disagree with limiting pregnant women's rights under the PDA to only those rights employers give to similarly situated employees.

They argue that an analysis that determines pregnant women's rights based on a comparison to non-pregnant employees relies on "strained analogies" to inherently dissimilar male characteristics.¹⁵³ No male is truly similarly situated to a pregnant woman like no regular employee is truly similarly situated to a reservist. Therefore, the same danger exists for pregnant women under the PDA as for reservists under the DOL's regulations: if an employer offers leave benefits to a non-reservist or non-pregnant women, the employer can always argue that the employee is not similarly situated and the leave is not comparable.¹⁵⁴

Ultimately the special treatment activists won part of the debate over the bounds of the PDA in *California Federal Savings and Loan Association v. Guerra*.¹⁵⁵ In *Guerra*, the Court held a "special treatment" state law that required up to four months of unpaid leave to pregnant

¹⁵⁰ *Id.* at 367.

¹⁵¹ Krieger & Cooney, *supra* 139, at 545, 554

¹⁵² *Id.* at 545, 554. Special treatment activists contend equal treatment of men and women result in a discriminatory effect since men will never become pregnant. *Id.* at 515.

¹⁵³ *Id.* at 538–539.

¹⁵⁴ *Id.* at 521.

¹⁵⁵ *Ca. Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 292 (1987).

women, was not illegal under the PDA.¹⁵⁶ The Court acknowledged that the law did not require employers to treat women preferentially to men; “it merely establishes benefits that employers must, at a minimum, provide to pregnant workers.”¹⁵⁷ However, the PDA’s requirement that pregnant women be treated “the same” did not prohibit other laws requiring special treatment.¹⁵⁸

Nevertheless, the courts never required employers to offer affirmative benefits to pregnant women under the PDA.¹⁵⁹ Women continued to suffer employment disadvantages resulting from employers treating pregnant women no differently men under employment policies designed for men.¹⁶⁰

2. *The FMLA*

Congress began working on the Family Medical Leave Act of 1993 (FMLA)¹⁶¹ before the Supreme Court decided *Guerra*.¹⁶² Lawmakers sought to make pregnancy leave a requirement

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 291.

¹⁵⁸ *Id.* at 293–294.

¹⁵⁹ See Melissa Feinberg, *After California Federal Savings & Loan Association v. Guerra: The Parameters of the Pregnancy Discrimination Act*, 31 ARIZ. L. REV. 141, 151–152 (1989).

¹⁶⁰ Pub L. No. 103–03, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2612–2654 (2007)); Jennifer Yatskis Dukart, *Geduldig Reborn: Hibbs a Success (?) of Justice Ruth Bader Ginsburg’s Sex-Discrimination Strategy*, 93 CAL. L. REV. 541, 565 (2005).

¹⁶¹ Dukart, *supra* note 160, at 565.

¹⁶² Joanna L. Grossman, *Job Security without Equality: The Family Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL’Y 17, 42 (2004).

for employers after the 1984 district court decision in *Guerra*, which held that the equal treatment requirement of the PDA prohibited state laws from requiring pregnancy leave.¹⁶³

Congress drafted the FMLA on gender-neutral terms so that employers would not discriminate against women, since both were entitled to protected leave, and to allow fathers to take on childrearing responsibilities.¹⁶⁴ Nevertheless, the need to “accommodate motherhood” was the motivating factor in drafting this legislation.¹⁶⁵

The FMLA provides both men and women twelve weeks of unpaid leave in a twelve-month period for the birth of a child or newborn care.¹⁶⁶ Like USERRA, a covered employee generally does not receive any benefits while on leave unless they are provided under the employer’s policy to employees on other forms of leave.¹⁶⁷ The FMLA requires employers to return the pregnant woman to the same or equivalent position with equivalent pay and benefits as the pregnant woman had when she left for leave.¹⁶⁸ Unlike USERRA, the covered employee is not entitled to the accrual seniority while on leave.¹⁶⁹ But, the FMLA requires employers treat

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ 29 U.S.C. § 2612(a)(1)(A) (2007). The FMLA also provides leave for an employee with a serious health condition or to care for a family member with a serious health condition. § 2612(a)(1)(A)–(D).

¹⁶⁷ § 825.209(h). (While the covered employee is on leave, the employer must continue health plan coverage. § 825.209(c).

¹⁶⁸ § 825.100(c).

¹⁶⁹ § 825.215(d)(2).

employees as if present at work when determining any bonus that contemplates an absence of occurrence, such as bonuses for perfect attendance or perfect safety.¹⁷⁰

The progression from the PDA to the *Guerra* decision to Congress's enactment of the FMLA, has created a legal atmosphere where employers are no longer able to overtly discriminate against pregnant employees. However, employers are not under an obligation to put pregnant women in the condition they would have been had they never left.¹⁷¹ Still, the current legal framework allows state law and employer policy to offer special benefits to women under *Guerra*, allowing the women's rights movement to seek greater rights than those mandated by law.

3. *A Similar Fight for Rights*

The same conditions constrain the reservists' plight for rights under the DOL's regulations and the pregnant woman's plight for rights. A reservist's call to active duty is an "extra condition," like pregnancy, that non-reservists will never suffer. Reservists are forced to operate, much like pregnant employees, in institutions with policies that were designed without consideration of their inherent differences: the possible call to duty to defend our nation for an unpredictable period of time. Furthermore, the similarly situated on similar leave analysis relies on the same strained analogies to inherently dissimilar employees who will never be affected by

¹⁷⁰ § 825.215(c)(2).

¹⁷¹ Pregnant women are not in the same position because they do not accrue any rights under the FMLA. § 825.215(d)(2). Furthermore, the FMLA only covers employers with more than fifty employees, § 825.104(a), and over forty percent of the work force is not eligible for protection under the FMLA, Grossman, *supra* note 167, at 37.

the extra condition of active duty. An employer could always prevail by arguing the leave offered to the non-military employee is dissimilar to military leave because of the leave's purpose or the leave's length. Ultimately, the law has not evolved to remove these barriers for either the reservist or the pregnant woman because neither group is genuinely treated as having an extra condition, privy to special treatment.

A plain reading of USERRA eliminates the barriers to rights for reservists that the PDA and the FMLA have failed to remove for pregnant women by giving special treatment. Sections 4302 and 4316(a) of USERRA¹⁷² establish that Congress intended to grant the special treatment of reservists when compared to non-military employees. Special treatment would change the institutional policies to accommodate reservists. Section 4316(a) clearly grants reservists the escalator principle to all rights and benefits upon reemployment without reference to the employer's policies toward non-military employees,¹⁷³ thus allowing for the special treatment of reservists. Section 4302 establishes "[n]othing in this chapter shall supersede, nullify or diminish any Federal or State law . . . contract, agreement, policy . . . that establishes a right or benefit more beneficial to . . . a right or benefit provided for such person in this chapter."¹⁷⁴ Therefore, § 4302(a) allows other regulations to provide special treatment above and beyond USERRA, further promoting special treatment. Furthermore, applying the escalator principle to all rights and benefits under § 4316(a) alleviates the possibility that reservists will suffer reemployment disadvantages solely because of their membership in the reserves and clearly avoids a disingenuous similarly situated comparison—something the FMLA has failed to do.

¹⁷² 38 U.S.C. § 4302, 4316(a) (2007).

¹⁷³ *See supra* note 61 and accompanying text.

¹⁷⁴ § 4302(a).

Nevertheless, the DOL's regulations and the Fifth Circuit interpret USERRA against its plain meaning regarding reemployment benefits. Reservists only receive non-seniority rights if the employer offers them to similarly situated employees on a comparable leave. Thus, the same institutional constraints that the FMLA and PDA failed to eliminate for pregnant women rights remain on reservists' rights.

However, the women's rights movement has succeeded in breaking pregnant women free from these institutional constraints in some instances by convincing individual employers to accommodate their differences beyond legal mandates.¹⁷⁵ In a survey of human resource professionals, thirty-two percent indicated that their employers offered paid family leave and twenty percent offered more parental leave than the FMLA required.¹⁷⁶ If reservists ride the skirt tails of these pregnant women, then they will receive the same rights.

B. If You Can't Beat Them, Join Them

1. How to Join

Reservists are most similarly situated to pregnant women with like position and pay on leave and reservists' leave is most comparable to pregnant women's leave. Thus, under the § 4316(b) leave provision, any employer with a female employee must offer reservists the non-seniority leave benefits that the employer gives to pregnant women. Because many employers have pregnancy leave benefits that offer leave benefits above and beyond legal mandates, many reservists will receive non-seniority rights while on leave.

¹⁷⁵ See generally SHAWN FEGLEY, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, 2006 BENEFITS: SURVEY REPORT (2006).

¹⁷⁶ *Id.* at 3.

The DOL regulations do not provide guidance on what factors to consider when determining whether an employee is similarly situated.¹⁷⁷ USERRA's § 4316(b) leave provision gives reservists the non-seniority rights an employer offers "to employees having similar seniority, status, and pay who are on furlough or leave of absence."¹⁷⁸ The requirement of similar seniority and pay seems to simply require the reservist to compare him or herself to an employee with a similar job in the company to determine non-seniority benefits.

However, USERRA does not define status. The status test could be applied narrowly so that status relates to a reservist's position in a company, irrespective of status as a reservist. This would likely require another mechanical analysis comparing relative positions, in the company, of the reservist and non-reservist. For example, if the reservist is a part-time employee, the employer may convince the court that a reservist does not have similar status compared to a full-time employee.

However, if an employer argues that no employee is similarly situated to the reservist because of the employee's status as a reservist, then the status inquiry is no longer simply about positions within the company. This argument that no employee is similarly situated opens the door for the reservist to prove that pregnant women occupy a similar status, and, therefore, reservists should receive all non-seniority benefits afforded to pregnant women.

Reservists on duty are similarly situated to pregnant women with similar seniority and pay. Members of both classes sign up for service,¹⁷⁹ and neither group knows when or if they

¹⁷⁷ See 20 C.F.R. § 1002.150(a) (2005).

¹⁷⁸ 38 U.S.C. § 4316(b)(1)(B) (2007).

¹⁷⁹ See *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 136 (1976), *superceded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (Pregnancy is not a disease and is

will be called to duty.¹⁸⁰ As a national policy, the U.S. wants to encourage both pregnancy¹⁸¹ and membership in the reserves¹⁸² because both are necessary for the Nation's survival.¹⁸³

often “voluntarily undertaken.”). To establish reservists and pregnant women are similarly situated, this Comment forgoes discussion of pregnancy by rape or military enlistment because of economic duress. This Comment recognizes there are serious exceptions to the majority situation of “voluntary service,” but merely endeavors to find commonality between the majorities of the two groups, as a class.

¹⁸⁰ Whether a woman is trying to conceive or merely engaging in recreational sex, pregnancy is far from a predictable outcome. Similarly, whether the reservist signed up for service hoping to be eventually deployed or merely for extra monthly income, an actual call to active duty is outside the reservist's control.

¹⁸¹ *General Electric Company v. Gilbert*, 429 U.S. 125, 136 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (pregnancy is a “desired condition”). The United States labor force is aging. Professor H. Lane Dennard, Adjunct Professor of Law, Class Presentation on Downsizing in the Labor Force (PowerPoint presentation on file with the author). Encouraging childbirth is a way to solve this problem. Furthermore, FMLA was enacted to encourage the motherhood bond of parent and child. Grossman, *supra* note 167, at 43.

¹⁸² Some reserve forces have more than 20 percent of their forces within two years from retirement eligibility, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, *supra* note 6, at XVI, and recruitment has been increasingly difficult, *see infra* notes 222–227. Additionally a purpose of USERRA is to promote membership in the service. 38 U.S.C. § 4301(a)(1).

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Moreover, both groups occupy unique roles defined by their memberships and are forced to operate in institutions with standards that were not designed to account for the unique roles.¹⁸⁴

Therefore, reservists and pregnant women are similarly situated.

The preamble to the DOL regulations recognizes the difficult task employers have in determining whether any two similarly situated employees' leaves are comparable.¹⁸⁵ So, the DOL has provided "guidance" in § 1002.150(b).¹⁸⁶ Section 1002.150(b) states "duration of the leave *may be* the most significant factor to compare."¹⁸⁷ Additionally, purpose of the leave and the ability of the employee to choose when to take the leave are other factors to consider according to the regulations.¹⁸⁸

Leaves relating to pregnancy and reservists' active duty leave are comparable under the DOL's regulations. Although not all employers are subject to the FMLA, the FMLA serves as a solid legal baseline for comparing pregnancy and military leave. Pregnancy leave and military

¹⁸³ See CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, *supra* note 6, at 6–7 (Our military cannot sustain our foreign military obligations without "drawing significantly and routinely" on the Reserves over the next ten to fifteen years.); Williams, *supra* note 3, at 354 n. 114 (1984–1985) ("Without such 'volunteers,' [pregnant women] there would be no labor force at all.").

¹⁸⁴ See *supra* notes 149–154.

¹⁸⁵ Uniformed Services Employment and Reemployment Rights Act of 1994, 70 Fed. Reg. 75,264 (Dec. 19, 2005) (to be codified at 20 C.F.R. §§ 1002.1–1002.314).

¹⁸⁶ Uniformed Services Employment and Reemployment Rights Act of 1994, 70 Fed. Reg. 75,264 (Dec. 19, 2005) (to be codified at 20 C.F.R. §§ 1002.1–1002.314).

¹⁸⁷ 20 C.F.R. § 1002.150 (2005) (emphasis added).

¹⁸⁸ 20 C.F.R. § 1002.150 (2005).

leave are of comparable duration. Weekend training is comparable to FMLA protected short leaves of absence for prenatal care.¹⁸⁹ Yearly two-week Reserves training is comparable to the FMLA protected maternity leave where the mother chooses to take leave just for the birth of the child with a short health recovery time. Finally, a reservist's call to active duty for an unknown time is like every pregnancy because every pregnancy can have unexpected complications resulting in required leave for an indefinite period.

The FMLA provides up to twelve weeks of job-protection in any twelve-month period¹⁹⁰ and USERRA provides five years of protection for active duty leave.¹⁹¹ In a five-year period, an employee can take fifteen months of leave under the FMLA for the five years of USERRA protection.¹⁹² The DOL regulations provide that the leave must be comparable, not exact.¹⁹³ Although USERRA provides employment rights protection far longer than the FMLA, they are comparable in that the FMLA provides for the longest statutorily protected employment rights besides USERRA—no statutorily defined leave is more comparable.¹⁹⁴

Pregnancy leave and military leave serve similar purposes. The first stated purpose of the FMLA is “to balance the demands of the workplace with the needs of families, to promote

¹⁸⁹ See 29 C.F.R. § 825.114(a)(2)(ii) (2006). If two statutorily defined leave periods protect similar periods, then the leaves by definition are of similar duration.

¹⁹⁰ 29 C.F.R. § 825.100 (2006). This is equal to three months in one year.

¹⁹¹ 38 U.S.C. § 4312(c).

¹⁹² The FMLA will provide three months of leave a y

¹⁹³ See 29 C.F.R. § 1002.150(b).

¹⁹⁴ At the very least, the employer should be obligated to give reservists 12 weeks of FMLA rights per year of military service.

stability and economic security of families and to promote the national interests in preserving family integrity.¹⁹⁵ Two purposes of USERRA are 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”¹⁹⁶ and “to minimize the disruption of lives of persons performing service[.]”¹⁹⁷ Both pregnancy leave and military leave’s purpose is to protect national interests through the protection of the protected employee’s job security and are therefore similar.

Last, both pregnancy leave and military leave involve the same ability to choose whether to take the leave. As argued above, both reservists and pregnant women sign up for service not knowing when or if they will be called to service. Whether either group must actually take a prolonged leave is out of their direct control. Because military and pregnancy leave are of similar duration, for a similar purpose, and involve the same ability to choose, they are comparable leaves under 20 C.F.R. § 1002.150. Therefore, pregnant women satisfy the DOL’s regulations similarly situated analysis, and

2. The Real Life Denial of Rights

Because of the little existing case law, it is difficult to determine how often employers offer a non-seniority right to non-military employees but deny the right to reservists. The scant case law also makes it difficult to determine how often employers tell reservists that no employee is similarly situated or that no leave is comparable.

¹⁹⁵ 29 U.S.C. §2610(b)(1).

¹⁹⁶ § 4301(a)(1).

¹⁹⁷ § 4301(a)(2).

However, many reservists do return home from service and face employers that deny them their rights under USERRA. Reservists filed 16,000 complaints for violations of their USERRA employment rights during fiscal years 2004 to 2006,¹⁹⁸ and this number does not account for all the USERRA violations that reservists experience upon reemployment.¹⁹⁹ In a 2004 survey, over a quarter of reservists reported that they had never been briefed on USERRA,²⁰⁰ making it impossible for those reservists to know their rights and whether those rights have been violated. Furthermore, when reservists believed their employers violated their rights, less than a quarter of the reservists actually sought assistance for their USERRA problem.²⁰¹ Thus, the absence of USERRA case law does not suggest that employers are complying with the Act.²⁰²

¹⁹⁸ ADDITIONAL ACTIONS NEEDED, *supra* note 19, at 4. This statistic does not indicate if the agency determined whether the complaint had merit.

¹⁹⁹ IMPROVE RIGHTS, *supra* note 26 at 1.

²⁰⁰ DEFENSE MANPOWER DATA CENTER, MAY 2004 STATUS OF FORCES SURVEY OF RESERVE COMPONENT MEMBERS: TABULATION OF RESPONSES 362, question 143 (2004).

²⁰¹ *Id.* at 370, question 148 (2004). This assistance statistic even included those reservists who turned to their employer to remedy the problem. *See Id.* at 372.

²⁰² The Department of Defense's Employer Support group resolves over 95 percent of complaints without passing the complaint on the Department of Labor for possible litigation. ADDITIONAL ACTIONS NEEDED, *supra* note 19, at 26. Furthermore, the American Bar Association determined that private attorneys often refuse USERRA litigation because the resulting judgments and settlements are not usually large. IMPROVE RIGHTS, *supra* note 26, at 9 (OCT. 2005).

Employer denial of reservist rights under USERRA will likely remain an issue. Evidence exists indicating a positive relationship between the military's use of the reserves and the number of USERRA complaints that reservists file.²⁰³ Over 150,000 reservists remain abroad and are yet to come home, and the military intends to draw significantly on the reserves well into the future to fulfill the nation's foreign obligations.²⁰⁴ Under these conditions, the number of reservists returning home seeking USERRA reemployment rights will likely remain high, along with the number reservists who believe that their employers are denying them their rights.

III. UPDATING OUR SOCIAL COMPACT WITH THE RESERVES

Perhaps testimony of Michele Comeau-Dumond, a Persian Gulf War veteran herself and military spouse, illustrates the all-too-common hardship of a reservist called to Active Duty:

My story and family are not unique . . . They get a call any hour, night and day, and are expected to respond. The families rush around to wash clothes, pack bags, wives hold back their own tears and wipe away those of their children . . . I fell behind monthly payments on every bill . . . when 2 months earlier I had a perfect credit history and had never missed a payment . . . You are probably thinking we pay your spouse for military service . . . In my family alone we have lost \$12,000 for one year while my spouse is serving. In a family that makes under \$50,000 a year, that is a large reduction in our income.²⁰⁵

Reservists face almost guaranteed deployment since September 11, 2001, which is unprecedented in the history of the Army Reserves.²⁰⁶ Nevertheless, the U.S. has not

²⁰³ IMPROVE RIGHTS, *Supra* note 26, at 4 (OCT. 2005).

²⁰⁴ *See infra* note ---- and accompanying text [policy argument].

²⁰⁵ *Uniformed Services and Reemployment Rights Act: Hearing Before the House Subcommittee on Benefits of the Committee on Veterans' Affairs*, 108th Cong. 7-10 (2003).

²⁰⁶ CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, *supra* note 6, at 93.

updated its social compact²⁰⁷ with reservists to compensate them for this increased burden, which may explain recruiting problems and over 16,000 USERRA complaints during fiscal years 2004–2006.²⁰⁸ In the interest of national security, the U.S. must update its social compact with the reservists to maintain the health of the Army Reserves.

A. *The Change in Use of the Reserves*

The United States Army Reserves and National Guard (NG) are more important today to the future and success of our national security and foreign endeavors than ever in our Nation's history.²⁰⁹ The reserves provide roughly half of the 315,000 soldiers deployed internationally²¹⁰ and account for 44 percent of the total military force.²¹¹ Our military cannot sustain our foreign military obligations without “drawing significantly and routinely” on the reserves over the next ten to fifteen years.²¹² Such a reliance on the reserves is unprecedented and represents a

²⁰⁷ See *supra* note 16 and accompanying text.

²⁰⁸ ADDITIONAL ACTIONS NEEDED, *supra* note 19, at 4.

²⁰⁹ CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, *supra* note 6, at VIII.

²¹⁰ DEPARTMENT OF DEFENSE, DONALD H. RUMSFELD SECRETARY OF DEFENSE, ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS 31 (2005). In 2005, the NG had 113,000 troops and the Army Reserves had 47,000 troops deployed internationally in support of operations in Iraq, Afghanistan, North Korea, and other theaters. *Id.* In 2006, over 150,000 NG members were called to active duty. CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, *supra* note 6, at XVII.

²¹¹ ADDITIONAL ACTIONS NEEDED, *supra* note 19, at 9.

²¹² CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, *supra* note 6, at 6–7.

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“paradigm shift” because the reserves were historically formed as an army of last resort, called upon only in the event of a major war.²¹³ In the 1980’s, the reserves averaged roughly 1 million man-days of duty.²¹⁴ However, since September 11, 2001, the reserves have averaged roughly 63 million man-days and tours of duty are averaging 342 days, double the longest deployment average in our Nation’s history.²¹⁵ The Department of Defense reports that successful recruitment and retainment programs are essential to maintain the “viability” of an all-volunteer military—failure of which reinstates the draft.²¹⁶

B. *The Need for Change*

Despite this dramatic shift toward a more active use of the reserves, the social compact has not significantly changed since the Cold War era where reservists expected only a possibility of active duty once in a thirty-year career.²¹⁷ A call to active duty can cause grave detriment to a

²¹³ *Id.*, at 8

²¹⁴ *Id.* at 2. During 1996 to 2000, the average man-days of duty increased from 1 million man-days of duty to 13.5 million to enforce peacekeeping missions in Haiti and Bosnia. *Id.*

²¹⁵ CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, *supra* note 6, at 2, 92. The average tour of duty during Desert Storm was 156 days. *Id.*

²¹⁶ DONALD H. RUMSFELD, DEPT. OF DEFENSE, ANNUAL REPORT TO THE PRESIDENT AND CONGRESS 32 (2005).

²¹⁷ CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, *supra* note 6, at 92. This study reported:

The U.S. military cannot do all it is asked to do without relying on the Reserve Component. If the Reserve Component is not re-envisioned to support the significant role it is being asked to play as part of the operational force, it will

reservist's family financial security—a situation that is far from rare.²¹⁸ A 2004 survey reported that 22 percent of reservists returning to an employer had a worse experience than they had expected.²¹⁹ The Center for Strategic and International Studies (CSIS), a non-partisan global policy think tank, reports reservists and their families seek greater predictability, training, compensation and benefits in return for the shift to practically guaranteed deployment and longer tours of duty.²²⁰ The CSIS blames increasing dissatisfaction among reservists, their spouses,²²¹

begin to falter—the question is merely when it will happen. . . . It is not an overstatement to say that as goes the health of the Reserve Component, so goes the health of the all-volunteer force.

²¹⁸ DAVID S. LOUGHRAN ET AL., NAT'L DEF. RESEARCH INST., ACTIVATION AND THE EARNINGS OF RESERVISTS xvii (2006); CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, *supra* note 6, at 107. According one study, 17 percent of activated reservists experience a loss in earnings on military pay, 6 percent lose more than \$10,000, and 11 percent lose more than 10 percent of their base yearly earnings. LOUGHRAN, *supra*. A self-report survey study found that as many as 3/5 of the reservists suffered earnings loss. *Id.* at xvi. However, that survey did not account for tax exemptions that apply to some reservist pay. *Id.*

²¹⁹ DEFENSE MANPOWER DATA CENTER, *supra* note 200, at 360, question 142.

²²⁰ CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, *supra* note 6, at 93.

²²¹ A Department of Defense survey study showed spousal support for remaining in the reserves decreased 20 percent from May 2003 to May 2004, which the study classified as a “significant difference” in support. ANITA R. LANCASTER ET AL., DEFENSE MANPOWER DATA CENTER, U.S. DEPARTMENT OF DEFENSE RETENTION TRENDS, figure 5 (2004).

and families on the “disconnect” between these new expectations resulting from the new role of the reserves and the current, outdated social compact.²²²

An inadequate social compact may explain the tremendous recruiting difficulties and shortfalls the reserves have experienced.²²³ The newest recruits sign up under the outdated social contract probably considering the increased possibility of deployment. However, increased mobilization has damaged recruiting efforts,²²⁴ which hints that the social contract insufficiently compensates reservists for the risk of leaving a civilian job. The Army Reserve and NG shrunk in size from 2004 to 2005 and failed to achieve their congressionally authorized number of troops because of recruitment difficulties.²²⁵ Significant recruitment problems began for the Reserves in fiscal year 2005 when the Reserves failed to meet its lowest new recruit goal in nearly a decade by 16 percent.²²⁶ The Army has reacted by adding roughly 1500 more

²²² CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, *supra* note 6, at 93.

²²³ The NG shrunk from 350,000 troops in 2003 to 333,000 in 2005 and the Army Reserves decreased from 204,000 troops in 2004 to 189,000 in 2005. CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, *supra* note 6, at 37, 20.

²²⁴ LAWRENCE KAPP, CONGRESSIONAL RESEARCH SERV., RECRUITING AND RETENTION: AN OVERVIEW OF FY2004 AND FY2005 RESULTS FOR ACTIVE AND RESERVE COMPONENT ENLISTED PERSONNEL 6 (June 30, 2005).

²²⁵ CONGRESSIONAL BUDGET OFFICE, RECRUITING, RETENTION, AND FUTURE LEVELS OF MILITARY PERSONNEL XIII (Oct. 2006).

²²⁶ *Id.* The recruitment problems for the NG began two year prior in fiscal year 2003 when it only 82 percent of its goal. U.S. GOV'T ACCOUNTABILITY OFFICE, MILITARY PERSONNEL: PRELIMINARY OBSERVATIONS ON RECRUITING AND RETENTION ISSUES WITHIN THE U.S. ARMED

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recruiters to the field, increasing retirement age, increasing signing bonuses,²²⁷ and lowering quality of recruitment standards.²²⁸

Despite these changes, the recruitment problems have continued to date,²²⁹ and are below the recruitment numbers needed to reach pre-2004 overall numbers by the year 2010.²³⁰

Furthermore, the reserves experienced increasing difficulty signing prior career servicemembers

FORCES, GAO-05-419T, at 7 (Mar. 2005) (Testimony of Derek B. Stewart, Dir., Def.

Capabilities and Man.), *available at* <http://www.gao.gov/new.items/do5419t.pdf>.

²²⁷ Donna Miles, *Innovative Programs Help Army Maintain Recruiting Comeback*, American Forces Press, Jan. 10, 2006, *available at*

http://www.defenselink.mil/news/Jan2006/20060110_3893.htm; DONALD H. RUMSFELD, DEPT.

OF DEFENSE, ANNUAL REPORT TO THE PRESIDENT AND CONGRESS 32 (2005).

²²⁸ CONGRESSIONAL BUDGET OFFICE, RECRUITING, RETENTION, AND FUTURE LEVELS OF MILITARY PERSONNEL 7 (OCTOBER 2006).

²²⁹ The Reserves failed to meet its recruitment goal for fiscal year 2006 by 5 percent and already has recruiting problems in fiscal year 2007. Press Release, U.S. Department of Defense, No. 1009-06, DoD Announces Recruiting and Retention for FY 2006 (Oct. 10, 2006),

<http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=10057>; Press Release, U.S.

Department of Defense, No. 1267-06, DoD Announces Recruiting and Retention for November 2006 (Dec. 12, 2006), <http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=10283>

(Reserves only reached 79 percent of its November 2006 recruiting goal.).

²³⁰ CONGRESSIONAL BUDGET OFFICE, RECRUITING, RETENTION, AND FUTURE LEVELS OF MILITARY PERSONNEL XIV (OCTOBER 2006).

who are “bedrock of the reserves,” and the reserves have an alarmingly low number of captains, warrant officers, women and married personnel because of recruitment problems.²³¹

The United States must update its “social compact” with its citizen-soldiers if the reserves are to be successful in achieving the troop level necessary to support its foreign obligations, ensure national security,²³² and to avoid a draft.²³³ Given the prospects of virtually guaranteed deployment, as a nation the U.S. must design policies so that deployment will not negatively impact reservists’ civil life. A plain reading of USERRA does just that; it guarantees reservists *all* rights and benefits, upon reemployment, the reservist would have earned had he or she remained continuously employed. However, the DOL and Fifth Circuit’s interpretation of the statute has restricted the rights given by USERRA, which is unacceptable in light of the critical need to update our social compact with our reservists.

IV. USERRA’S PLAIN MEANING

The language of the statute is clear. Reading the sections together, § 4316(a) describes a reservist’s reemployment rights and benefits and § 4316(b) describes a reservist’s rights while absent. According to the leave provision, an *absent* reservist receives only non-seniority benefits that the employer offers to other employees of the same seniority, status, and pay while on

²³¹ CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, *supra* note 6, at 100–101, 105.

Additionally, a significant percentage of the Reserves are within two years of retirement eligibility. *Id.*

²³² *Id.* at 93.

²³³ *See supra* note 216 and accompanying text.

leave.²³⁴ However, under the reemployment provision, a reemployed reservist receives “the additional seniority and rights and benefits,” including non-seniority benefits, that the reservist “would have attained if the person had remained continuously employed.”²³⁵

Like the Fifth Circuit and the DOL’s interpretation, the House and Senate compromise that accompanied the passage of USERRA describes these provisions against the plain language of the passed legislation.²³⁶ When the compromise was explaining the House Bill, it distinguished the § 4316 provisions based on reemployment and leave rights, consistent with the plain language.²³⁷ The House Bill’s § 4316 is what made it into USERRA. Curiously, when the compromise was describing that same language in terms of the House and Senate agreement, it described the same language differently.²³⁸ It described the § 4316(a) reemployment provision as the provision that describes a reservist’s seniority rights and the § 4316(b) leave provision as the provision describing non-seniority rights.²³⁹

The Supreme Court has long held that the veteran reemployment “legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour

²³⁴ 38 U.S.C. § 4316(b)(1)(B) (2007).

²³⁵ § 4316(a).

²³⁶ See 2493 JOINT EXPLANATORY STATEMENT ON H.R. 995, 103rd Congress, (1994) *reprinted in* 1994 U.S.C.C.A.N. 2493.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

of great need.”²⁴⁰ The Court has instructed courts “to construe the separate provisions of the Act as parts of an organic whole and give each as liberal a constructions for the benefit of the veteran as a harmonious interplay of the separate provisions permit.”²⁴¹ A plain reading of the § 4316 provisions achieves the most liberal construction.

Furthermore, the most persuasive evidence of the purpose of a statute is the language itself.²⁴² “The law *is* what the law *says*,”²⁴³ and USERRA says that reemployed reservists receive “the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.”²⁴⁴

A. The ONLY Distinction: Rights While on Active Duty and Rights Upon Return

A plain reading differentiates § 4316(a) from § 4316(b) by rights an employer must give a reservist when returning to reemployment, granted by § 4316(a), versus rights the reservist is

²⁴⁰ Uniformed Services Employment and Reemployment Rights Act of 1994, as Amended, 70 Fed. Reg. 75,246 (quoting *Fishgold v. Sullivan Drydock and Repair Corp.*, 328 U.S. 275, 285 (1946)).

²⁴¹ *Fishgold v. Sullivan Drydock and Repair Corp.*, 328 U.S. 275, 285 (1946).

²⁴² *U.S. v. Amer. Trucking Ass’ns.* 310 U.S. 534, 533 (1940). If the language is sufficiently clear, not absurd, or contrary to the overall purpose of the statute, then courts use the words themselves to determine the meaning of the statute. *U.S. v. Amer. Trucking Ass’ns.* 310 U.S. 534, 533–534 (1940).

²⁴³ *Bank One Chicago v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996) (Scalia, J., concurring in part).

²⁴⁴ 38 U.S.C. § 4316(a) (2007).

entitled to while away deemed on leave, governed by § 4316(b). The § 4316(a) reemployment provision introduces the rights it governs with “a person who is reemployed...is entitled to...[.]”²⁴⁵ while the § 4316(b) leave provision introduces the rights it governs with “a person who is absent from a position of employment by reason of service...shall be...[.]”²⁴⁶

Given that the § 4316(b) leave provision gives absent employee rights and makes no mention of rights upon return from duty, § 4316(b) clearly determines what rights the reservist is entitled to while the reservist is on active duty.²⁴⁷ The § 4316(b) leave provision’s subparagraphs grant non-seniority rights and mandate that employers give the reservist leave status. If the § 4316(b) leave provision is strictly a non-seniority rights provision, then it totally disregards paragraph structure because non-seniority rights appear in a subparagraph under the description “a person who is absent by reason of service.”²⁴⁸

Not only must a reader disregard paragraph structure to conclude the distinction is based on seniority and non-seniority rights, the reader must disregard § 4316(a) reemployment provision’s plain language: “additional seniority and rights and benefits.”²⁴⁹ This language includes more rights than just seniority rights; therefore it cannot be a seniority provision. It must be a provision that mandates “what a person *reemployed* under this chapter is entitled

²⁴⁵ § 4316(a).

²⁴⁶ *See* § 4316(b).

²⁴⁷ *See* § 4316(b)(1)(A).

²⁴⁸ § 4316(a).

²⁴⁹ *Id.*

to.”²⁵⁰ Therefore, § 4316(a) is a reemployment provision that entitles the reservist to all rights and benefits the reservist would have received had he or she never left for military duty.

B. Reservists Get All Rights and Benefits upon Reemployment

Upon reemployment, USERRA gives the reservist whatever “seniority and other rights and benefits determined by seniority” that the reservist was entitled to before leaving for active duty, plus the “additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.”²⁵¹ Merely reading the statute yields the conclusion that a reservist is entitled to rights and benefits *separate* from seniority upon reemployment. Congress could have modified the second use of “rights and benefits” in § 4316(a) with “determined by seniority[,]” as it did after the first use of “rights and benefits[.]”²⁵² Instead, Congress clearly separated seniority with the conjunction “and” from other rights and benefits and did not supply any indication that the word “seniority” should modify “rights and benefits” in the phrase “seniority and rights and benefits.” Clearly, if Congress wished to grant “only additional seniority rights and benefits,” or “additional seniority and rights and benefits as determined by seniority” it could have done so. Thus, § 4316(a) applies the escalator principle to the reservist’s seniority *and* rights and benefits.

Furthermore, § 4303, the “definitions” section, defines “rights and benefits” separately from “seniority.”²⁵³ For the purpose of USERRA, seniority includes “benefits of employment

²⁵⁰ *Id.*

²⁵¹ 38 U.S.C. § 4316(a).

²⁵² *See* 38 U.S.C. § 4316(a).

²⁵³ *Compare* 38 U.S.C. § 4303(2) *with* § 4303(12)

which accrue with, or are determined by, longevity in employment.”²⁵⁴ “Rights and Benefits” under § 4303(2) include “any advantage, profit, privilege, gain, status . . . (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or employer policy, plan or practice”²⁵⁵ Thus, the language in § 4316(a) granting reservists “additional seniority and rights and benefits” literally grants two different types of rights under the definitions specified in § 4303: seniority rights and non-seniority rights.

C. The Leave Guarantee of §4316(b)

Section 4316(b) leave provision *guarantees* the reservist any non-seniority leave benefit that the employer offers to other non-military employees on non-military leave. Essentially, this is a guarantee of equality—that *while* on leave, the reservist will receive at least the same rights the employer offers to non-military employees on leave.

For example, a company has a non-seniority benefit of sharing a percentage of its profit monthly, regardless of employee performance. To receive this benefit the employee must work the third and fourth day of the month. The employer accepts no exceptions. Under this condition, the reservist on a 6-month leave will not receive the benefit while on leave under the § 4316 leave provision because no similarly situated employee receives this non-seniority benefit. This logically protects the employer from a reservist who does not seek reemployment. However, when reemployed, the employer must pay the reservist for the accrued benefit because the § 4316(a) reemployment provision demands that the employer treat the reservist as if the reservist was continuously employed for all rights and benefits.

²⁵⁴ 38 U.S.C. § 4303(12)

²⁵⁵ 38 U.S.C. § 4304(2)

Suppose an employer credits money toward a similarly situated employees' paychecks while on a 12 week medical leave. Then the employer must give the reservists the monthly profit share while the reservist is on military leave because § 4316(b) leave provision requires that a reservist receive the non-seniority benefits similarly situated employees receive.

D. The Non-Existent Leave Comparison

There is no language in USERRA requiring the military leave to be similar to the non-military leave for the reservist to receive the non-seniority leave benefits under the § 4316(b) leave provision as the Fifth Circuit and DOL have required. The § 4316(b) leave provision gives reservists the non-seniority right that employers give "to employees having similar seniority, status, and pay who are on furlough or leave of absence." This language does not contain "similar leave of absence" or "comparable leave of absence," or the like.

Therefore, the § 4316(b) leave provision requires only that the non-military employees be of similar seniority, status, and pay when assessing whether the reservist is entitled to the non-military leave benefits. This language mandates that the reservist should receive all non-seniority leave benefits given to similarly situated employees on any leave. This plain reading eliminates the superficial comparison of various forms of leave to non-military leave.

V. CONCLUSION

The way the United States treats the country's reservists needs to change. The large number of complaints under USERRA and the Army Reserve's recruiting problem indicates that the social compact, as currently enforced, insufficiently compensates the reservists. The United States Government and employers must take action to ensure that the social compact

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compensates reservists for the greater personal and family sacrifice they endure resulting from the Nation's unprecedented reliance on them. Enforcing USERRA based on its plain language guarantees that employers fulfill their part of the social compact.

Perhaps military service is such a foreign experience to most people in the workforce that they cannot empathize with a reservist's fight for rights. A comparison to pregnant women was an attempt to bring the argument closer to home.