The Uniformed Services Employment and Reemployment Rights Act and Washington State's Veteran's Affairs Statute: Still Short on Protecting Reservists from Hiring Discrimination

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Come back home to the refinery
Hiring man says "Son if it was up to me"
Went down to see my V.A. man
He said "Son, don't you understand?"[1]

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1. BRUCE SPRINGSTEEN, *Born in the USA*, *on* BORN IN THE U.S.A. (Columbia Records 1984). Springsteen's lyrics refer to a man who got in trouble with the law, was sent to Vietnam, returned home, could not find work at the local refinery, and received little help from the Veteran's Administration (VA) with regard to his employment situation. *See id.*

I. INTRODUCTION

John Doe graduated from college in May of 2006.[2] Like the majority of his contemporaries, he began applying for jobs shortly before graduation.[3] His resume included academic achievements, prior work experience, and noted that he was a soldier in the Army National Guard.[4] The first four interviews that John attended included questions regarding John's Army National Guard commitment.[5] Interviewers from Jiffy Lube, DuPont, Sonic Burrito, and Thrifty Rental Car inquired about the length of John's National Guard commitment and the possibility of John being sent overseas.[6] John duly explained his monthly and weekly commitments, indicating he was unable to speculate about the possibility of deploying overseas.[7] He received no job offers.[8]

After John was denied employment from his first four interviews he figured his military service might be a reason for his failure to get hired and called the Washington State Department of Labor for advice.[9] They referred him to a volunteer attorney associated with the Employer Support of the Guard and Reserve ("ESGR").[10] The ESGR attorney's solution was simple: delete any and all references to your National Guard commitment from the resume.[11]

John updated his job application without any mention of his National Guard affiliation.[12] In his next interview, John fielded zero questions about his National Guard service and was offered a job.[13]

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2. Telephone Interview with John Doe, Washington Army National Guard, in Spokane, Wash. (July 28, 2006) (on file with author) [hereinafter Interview with John Doe]. John Doe is a pseudonym. The reservist in question requested that his real name be withheld.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* ESGR was established by Department of Defense Directive 1250.1 to facilitate cooperation and understanding between reservists and employers regarding work conflicts arising out of military obligations. ESGR – National Committee for Employer Support of the Guard and Reserve, http://www.esgr.org/aboutESGR.asp (last visited Oct. 15, 2007).

11. Interview with John Doe, *supra* note 2. The ESGR representative also suggested that John delete any and all references to his prior active duty military service. *Id.* A different attorney associated with the Department of Labor offered similar advice to another member of the Washington Army National Guard who sought help in trying to determine the alternatives a reservist has, should they feel that they are being discriminated against in the hiring process because of their reserve status. Interview with Second Lieutenant Casey Schober, Washington Army National Guard, in Spokane, Wash. (Aug. 11, 2006) (on file with author).

12. Interview with John Doe, *supra* note 2.

13. *Id.* After being hired John stated that the employer, after subsequently finding about his

Unfortunately, John's experience is not uncommon.[14] Five years after the September 11, 2001 terrorist attacks, many reservists[15] reported difficulty finding employment in part because employers were leery to hire someone who stands the chance of being mobilized and forced to leave his or her job for up to eighteen months.[16] Notably, a recent survey revealed that 51 percent of employers surveyed said that they would not consider hiring a reservist if they knew the reservist was to be mobilized.[17] The higher-than-average unemployment rate of Iraq and Afghanistan war veterans is also partly indicative of such a trend by employers.[18]

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reserve commitment, tried to terminate him. *Id.*

14. *See, e.g.*, Samuel F. Wright, Discriminating in Hiring, RES. OFFICERS ASS'N L. REV., Jan.-Feb. 2003, *available at* http://www.roa.org/site/PageServer?pagename=law_review_64. This publication by the Reserve Officers Association examines an Air Force Reserve officer's difficult experience finding employment after the September 11, 2001 terrorist attacks because of his military affiliation and the possibility of being recalled to active duty. *Id.*; *see also infra* notes 134, 138, 155 and accompanying text.

15. "The reserve components of the armed forces are the: (1) Army National Guard of the United States, (2) Army Reserve, (3) Naval Reserve, (4) Marine Corps Reserve, (5) Air National Guard of the United States, (6) Air Force Reserve, and (7) Coast Guard Reserve." 10 U.S.C. § 10101 (2000). The Army Reserve and Air Force Reserve differ from the Army National Guard and Air National Guard in that Air and Army National Guard fall under both federal and state control. *See* 10 U.S.C. §§ 10104, 10105, 10107, 10110 (2000); 32 U.S.C. § 102 (2000). Unless otherwise stated, members of the reserve components and National Guard will be referred to as 'reservists' for the purposes of this paper.

16. American military operations in Iraq, Afghanistan, and the Horn of Africa since September 11, 2001 have resulted in the mobilization of many of the nation's reservists. In the year following September 11, 2001, approximately 130,000 of the nation's 1,250,000 reservists had served on active duty. June Kronholz, *For Reservists, Tales of Interrupted Lives,* WALL ST. J., Sept. 11, 2002, at A4. By March 2005, the number of National Guardsmen mobilized since September 11, 2001 had grown to 430,000. Howard Berkes & Marisa Penaloza, *Guard, Reserve Service Takes High Financial Toll,* NPR, Mar. 15, 2005, *available at* http://www.npr.org/templates/story/story.php?storyId=4531296. Many of these National Guardsmen were mobilized for eighteen month combat tours in Iraq. *See* Steven Blum, *The National Guard: Challenges and Opportunities*, OFFICER, Dec. 2006, at 50, 52.

17. Karen Jowers, *Employers More Reluctant to Hire Reservists,* AIR FORCE TIMES, Jan. 19, 2007, *available at* http://www.airforcetimes.com/news/2007/01/tnsResemploy1.18/.

18. *See* Richard Castellini, *Survey: Vets Face High Unemployment: Job Search takes a year for 1 in 10 after leaving service,* CNN, July 7, 2006, http://www.cnn.com/2006/US/Careers/07/07/vet.jobs/index.html. This report notes that the unemployment for veterans age 20 to 24 is three times the national average and speculates. *Id. But see* Press Release, U.S. Senate Committee on Veterans' Affairs, New Job Numbers for Veterans Show Positive Signs (July 19, 2006), *available at* http://veterans.senate.gov/public/index.cfm?pageid=24&release_id=10619 (This press release states that the unemployment rate for 20 to 24 year old veterans is 11 percent whereas the unemployment rate for non-veterans of the same age group is 8 percent).

Denying a reservist or veteran[19] employment based on a current or former military service obligation is prohibited by the Uniformed Services Employment and Reemployment Rights Act ("USERRA")[20] and Washington law.[21] However, successfully proving a reservist was denied initial employment because, or even partly because, of reserve affiliation is extremely difficult.[22] Since proving hiring discrimination under USERRA and Washington law is virtually impossible,[23] the time has come to propose changes to both federal and Washington law.

This article will provide a brief background of the history of USERRA and its Washington equivalent and explain the protections USERRA and Washington law currently offer. The article will conclude with an analysis of the current effectiveness of the USERRA and Washington law and propose actions the Washington State Legislature should take in remedying this problem. These actions fall under two categories: incentive based legislation (the carrot) or punitive legislation (the stick). The "carrot" approach includes offering a one-time tax break to businesses that hire reservists and providing preferential consideration for government contracts to employers who have favorable ratings under the ESGR's "Five Star Employer Program." The "stick" approach includes creating a list of Washington businesses who have received adverse court rulings under USERRA or the Washington equivalent, making both the business and its hiring person personally liable for discriminating against a reservist during the hiring process, as well as heightening the burden of proof an employer must show in proving their hiring actions are non-discriminatory. Lastly, in addition to highlighting the legal and budgetary aspects that

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19. Washington defines a veteran as a person who has served, or is serving, honorably in the military during a period of war or armed conflict. WASH. REV. CODE. § 41.04.005 (2006). In order to obtain veteran's status under Washington law, the veteran must be awarded a campaign medal for "opposed action on foreign soil." *Id.* A reservist is not necessarily a veteran because reserve components of the military exist to "provide trained units and qualified persons available for active duty in the armed forces, in time of war or national emergency, and at such other times as the national security may require, to fill the needs of the armed forces whenever more units and persons are needed than are in the regular components." 10 U.S.C. § 10102 (Supp. IV 2004). Therefore, in order to be a reservist, one does not need to serve in a hostile area whereas, under Washington law, service in a hostile area is a requirement to be a veteran.

20. 38 U.S.C. §§ 4301-4334 (2000).

21. WASH. REV. CODE §§ 38.40.040, 38.40.110, 73.16.010 (2006).

22. No published federal or Washington case exists which a reservist successfully proved that he or she was denied employment because of his or her reserve affiliation during the *initial* hiring process. *See infra* notes 96–100 and accompanying text. The United States Supreme Court places a fairly substantial burden of proof on plaintiffs in related employment discrimination cases. *See generally* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993) (5-4 decision). The Court in *Hicks* held that even though a trier of fact in a Title VII civil rights action did not believe an employer's proffered "nondiscriminatory" reasons for firing a minority employee, it was enough to rebut the presumption of intentional discrimination. *Id.* at 507-09.

23. *See id.* at 511; *see also id.* at 534-35 (Souter, J., dissenting).

go with proposing these legislative changes, this article will address the moral implications of making such modifications to the existing law.

II. HISTORY OF THE UNIFORMED EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

Throughout its history, the United States government has enacted legislation protecting the men and women who serve in times of armed conflict.[24] During the Civil War, Congress passed legislation protecting service members from legal proceedings they could not attend due to their military commitment.[25] Congress passed the Soldiers' and Sailors' Civil Relief Act during World War I as a means of offering similar protections to service members fighting in Europe.[26]

Shortly before the United States entered World War II, Congress passed the Selective Training and Service Act of 1940.[27] The rationale behind the law lay partly in providing a means for drafted individuals to return to their jobs at the cessation of hostilities should they occur.[28] After the war, the United States Supreme Court upheld the spirit of the law's protections in *Fishgold v. Sullivan Drydock* when it held that the Act allowed the reemployment of an employee drafted to fight in World War II.[29]

The Supreme Court in *Fishgold* not only allowed the reemployment of a service person but also held that, with regards to advancement opportunities the service person missed while serving abroad, the service person "step[ped] back on at the precise point he would have occupied had he kept his position continuously during the war."[30] The Court further held that the Act be "liberally construed" to aid those who left their occupations to serve their country during a time of great peril.[31] The Court rationalized its holdings by stating that a citizen called to defend the United States should not, upon discharge, be hindered from advancement in their civilian job because of the service-related absence.[32] The Court further noted that the returning

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24. *See infra* notes 27-30 and accompanying text. *See generally* Servicemembers Civil Relief Act, 50 U.S.C. app. §§ 501-596 (Supp. IV 2004).

25. Law of June 11, 1864, ch. 118, 13 Stat. 123 (1864).

26. Law of Mar. 8, 1918, ch. 20, § 602, 40 Stat. 440, 449 (1918) (current version at 50 U.S.C. app. § 502 (Supp. IV 2004)). The Soldiers' and Sailors' Civil Relief Act continues to mandate the staying of legal proceedings and the suspension of certain actions against a service member while the service member is deployed and for a limited period after that service member's military commitment ends. *See* Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. app. § 502 (Supp. IV 2004).

27. Law of Sept. 16, 1940, ch. 720, § 301, 54 Stat. 885 (1940).

28. *Id.* at 885, 890; *see also* H. Craig Manson, *The Uniformed Services Employment and Reemployment Rights Act of 1994*, 47 A.F. L. REV. 55, 56 (1999).

29. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 284 (1946).

30. *Id.* at 284-85. Such seniority retentions are currently covered by USERRA. *See* 38 U.S.C. § 4312 (2000).

31. *Fishgold*, 328 U.S. at 285.

32. *Id.* at 284.

veteran was "to gain by his service for his country an advantage which the law withheld from those who stayed behind."[33] The holding, requiring that legislation providing protections to uniformed service members be "liberally construed," is affirmatively followed by courts and the Department of Labor in construing USERRA today.[34]

At the end of World War II, the Western District of Washington decided a case similar to *Fishgold.* In *Niemiec v. Seattle Rainier Baseball Club, Inc.*, the court applied *Fishgold's* holding by requiring a professional baseball club, pursuant to the Selective Service and Training Act of 1940, to rehire a former player who was absent from the team for three years because of World War II required service.[35] While acknowledging "the seriousness to baseball of having the judge dictate as to [the team's] players," the judge concluded his opinion stating that had the veteran and his comrades failed in their service overseas "there would be no American manager of any baseball if such should be played at the stadium this year. If the Nazis permitted baseball, it would not be an exhibition that any of us liked."[36] As the threat of the Axis powers passed, Congress used the geopolitical realities of the Cold War to justify further veteran-friendly legislation.[37]

During the Cold War, the Selective Service and Training Act of 1940 underwent a series of modifications including the Selective Service Act of 1948 and the Universal Military Training and Service Act of 1967.[38] The protections set out in the Selective Service and Training Act of 1940 generally remained the same while the modifications supported the conscript-based military of the Cold War era.[39] Reservists received their first affirmative statutory protection as part of an amendment to the Military Selective Service Act in 1968 often referred to as the Veterans' Reemployment Rights Act ("VRRA").[40] The VRRA protects reservists against reemployment discrimination caused by their military duty.[41] The Vietnam Era

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33. *Id.*

34. Veterans' Employment and Training Service, 70 Fed. Reg. 75,246 (Dec. 19, 2005) (to be codified at 20 C.F.R. pt. 1002). "The Department [of Labor] intends that [*Fishgold's* liberal construction] interpretive maxim apply with full force and effect in construing USERRA . . . ." *Id.*

35. Niemiec v. Seattle Rainier Baseball Club, Inc., 67 F. Supp. 705, 711 (W.D. Wash. 1946).

36. *Id.* at 713.

37. *See infra* notes 42-45.

38. *See generally* Selective Service Act of 1948, ch. 624, 62 Stat. 604 (1948); Universal Military Training and Service Act, ch. 144, 65 Stat. 75 (1951); Military Selective Service Act of 1967, 81 Stat. 100 (1967).

39. Anthony H. Green, Note, *Reemployment Rights Under the Uniform Services Employment and Reemployment Act (USERRA): Who's Bearing the Cost?,* 37 IND. L. REV. 213, 218 (2003).

40. Law of Aug. 17, 1968, 82 Stat. 790 (1968); *see* Manson, *supra* note 28, at 57 n.9 (noting that the 1968 reemployment legislation was never officially named an "Act," but listed multiple authorities who have found the designation convenient).

41. Judith Bernstein Gaeta, Note, Kolkhorst v. Tilghman*: An Employee's Right to Military*

Veterans' Readjustment Assistance Act of 1974 re-codified provisions of VRRA but included similar provisions protecting reservists from employment discrimination with an emphasis on inducing individuals separating from active military service to serve in the reserve components of the post-Vietnam all volunteer military.[42] Congress, in enacting these protections, recognized reservists were experiencing increased discrimination from employers because reservists were required to "attend weekly drills or summer training."[43] Expanding VRRA legislation to cover reservists soon led to legal battles regarding the statute's scope and the burden of proof a reservist/employee must show to establish discriminatory action by an employer due to an employee's reserve status.

The Supreme Court addressed VRRA's burden of proof standard in *Monroe v. Standard Oil Co.*[44] The Court held that in order for a reservist/employee to prove that an employer violated the VRRA, the reservist/employee must show the employer's discriminatory actions against the reservist/employee were "motivated solely by reserve status."[45] The Court's holding in *Monroe* resulted in the enactment of USERRA, which was written, in part, to overrule *Monroe's* burden of proof requirement.[46]

III. THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

A. *USERRA and Washington's Current Employment Hiring Protections*

Although USERRA was passed, in part, to overrule the Supreme Court's decision in *Monroe*,[47] it still contains many of the same protections set out in the VRRA.[48] At the same time, the Act also recognized the increasing role reservists played in post-Cold War military deployments as part of the military's Total Force Policy.[49] As a result, the drafters of USERRA kept the VRRA provision addressing

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Leave Under the Veterans' Reemployment Rights Act, 41 CATH. U. L. REV. 259, 265 (1991) (citing 82 Stat. 790 (1968)).

42. *Id.* at 265-67.

43. S. REP. NO. 90-1477, at 3421 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 3421.

44. Monroe v. Standard Oil Co., 452 U.S. 549, 551, 559-60 (1981).

45. *Id.* at 559.

46. Green, *supra* note 39, at 223.

47. *Id. See also* Veterans' Employment and Training Service, 70 Fed. Reg. 75,246, 75,250 (Dec. 19, 2005) (to be codified at 20 C.F.R. pt. 1002).

48. *Compare* Uniform Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301-4334 (2000), *with* Veterans' Reemployment Rights Act, Law of Aug. 17, 1968, 82 Stat. 790 (1968).

49. *See* Andy P. Fernandez, *The Need for the Expansion of Military Reservists' Rights in Furtherance of the Total Force Policy: A Comparison of the USERRA and ADA*, 14 ST. THOMAS L. REV. 859, 862–63 (2002). The Department of Defense's Total Force Policy calls for the integration and simultaneous use of active and reserve components of the military to conduct combat operations.

hiring discrimination in order to ensure USERRA continued to facilitate the recruitment of reservists in order to meet the Department of Defense's Total Force Policy.[50] Two sections of USERRA require examining in order to establish the need for new employment discrimination legislation that this article proposes.

To establish a case of employer's hiring discrimination, the Act requires a reservist[51] to show his or her "membership, application for membership, service, application for service, or obligation for service" in the military was a "motivating factor" in the employer's adverse conduct.[52] The "motivating factor" standard is a lesser burden than the "sole motivation" requirement established in *Monroe*.[53] Reservists still bear the burden of establishing that their past, present, or future military service was a motivating factor in an unfavorable employment action by the employer—such as not being hired for a job.[54] In order to do this reservists must establish that: (a) they are, were, or intended to be a member of the armed services; (b) suffered unfavorable action by a prospective or current employer; and, (c) the "motivating factor" for the adverse employment action was reservist's past, present, or future military status.[55] Federal courts interpreting USERRA have held that "[m]ilitary status is a motivating factor if the defendant relied on, took into account, considered, or conditioned its decision on that [military service] consideration"[56] and if the reservist's military status would be "one of the factors that a truthful employer would list if asked for the reasons for [their] decision."[57]

Once the reservist establishes the three requirements necessary to show an alleged violation, the employer must demonstrate, by a preponderance of the evidence, that they would have taken the same action in regardless of the reservist's

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See id. This is evidenced by the fact that in 2005 nearly forty percent of the ground forces in Iraq were from the reserve components of the armed services. *See* Berkes & Penaloza, *supra* note 16.

50. 38 U.S.C. § 4301(a)(1)-(3) (2000); *see also* Brian Cabell, *U.S. Faces Challenge Recruiting Reservists*, CNN, Sept. 12, 2000, http://www.cnn.com/2000/US/09/11/us.reservists/index.html. Recruiting reservists became increasingly worse after the invasion of Iraq. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, RESERVE FORCES: AN INTEGRATED PLAN IS NEEDED TO ADDRESS ARMY RESERVE PERSONNEL AND EQUIPMENT SHORTAGES 3-5 (2005), *available at* http://www.gao.gov/new.items/d05660.pdf.

51. USERRA affords its protections to both members of the reserve and active duty military. 38 U.S.C. § 4311 (2000). The term "reservist" in this article is used for the sake of consistency.

52. 38 U.S.C. § 4311(c)(1).

53. *See supra* notes 43–45 and accompanying text.

54. Veterans' Employment and Training Service, 70 Fed. Reg. 75,246, 75,250 (Dec. 19, 2005) (to be codified at 20 C.F.R. pt. 1002) (citing Robinson v. Morris Moore Chevrolet-Buick, Inc., 974 F. Supp. 571 (E.D. Tex. 1997)).

55. *Id.*

56. Fink v. City of New York, 129 F. Supp. 2d 511, 520 (E.D.N.Y. 2001) (quoting Robinson v. Morris Moore Chevrolet-Buick, Inc., 974 F. Supp. 571, 576 (E.D. Tex. 1997)).

57. Kelley v. Maine Eye Care Assoc., 37 F. Supp. 2d 47, 54 (D. Me. 1999). The reservist may establish the "motivating factor" link through circumstantial evidence. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 97-98 (2003).

military status.[58] If employers do this, they avoid liability.[59] Employers have successfully defeated USERRA claims by showing the individual they ultimately hired was better qualified than the reservist.[60]

The second section of USERRA pertains to reemployment protections extended to reservists involuntarily or voluntarily mobilized for military service.[61] This section of USERRA essentially requires all employers, regardless of the size of their company, to re-employ reservists once their term of military service ends.[62] Not only must employers re-hire the reservist, they must ensure the reservist returns to a position of seniority equivalent to what the reservist/employee would occupy had no mobilization occurred.[63] Since USERRA allows for an employee to be gone for up to five years for voluntary mobilizations,[64] employees could conceivably volunteer to serve a four year active duty tour, return to their job, and reassume their position with pay and benefits equal to fellow employees who did not take a five year absence from their jobs.[65]

Employees/reservists are allowed automatic reemployment if: (a) they provide verbal or written notice to the employer, in advance of demobilization; (b) their combined length of the absence from work with that employer is not more than five years; and, (c) the employee/reservist applies for reemployment between fourteen to ninety days, depending on the duration of service, and reports to work.[66]

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58. *See* Gummo v. Village of Depew, N.Y., 75 F.3d 98, 106 (2d Cir. 1996); *see also* 20 C.F.R. §§ 1002.21-.23 (2006).

59. Veterans' Employment and Training Service, 70 Fed. Reg. 75,246, 75,250 (Dec. 19, 2005) (to be codified at 20 C.F.R. pt. 1002).

60. *See* Cossette v. Dep't of Agric., 113 F. App'x 398, 400 (Fed. Cir. 2004). *But see* Patterson v. Dep't of the Interior, 424 F.3d 1151, 1153, 1160-61 (Fed. Cir. 2005) (denying summary judgment to an employer on a USERRA hiring discrimination cause of action).

61. *See generally* 38 U.S.C. § 4312 (2000).

62. *Id.*; 20 C.F.R. § 1002.34 (2006) ("USERRA applies to all public and private employers in the United States, regardless of size. For example, an employer with only one employee is covered for the purposes of the Act.").

63. 20 C.F.R. § 1002.191.

64. 38 U.S.C. § 4312(a)(2).

65. *See* 20 C.F.R. § 1002.191. Involuntary mobilizations do not count against the five year limit nor do monthly and yearly drill requirements and mandatory military schooling. 38 U.S.C. § 4312(c). The potential exists for soldiers to be absent from work for up to nine years. For example, a soldier assigned to a military intelligence linguist unit could conceivably spend two months in basic training, four months in advanced individual training, and eighteen months in language training. After this two year time frame the soldier could volunteer to serve five years on active duty and then be involuntarily mobilized for up to two years. *See* Military Occupational Skill Qualification Timeline for A Co. 341st Military Intelligence Battalion, Washington Army National Guard (on file with author).

66. 38 U.S.C. § 4312(a)(1)-(2), (e)(1)(C)-(D) (2000); Green, *supra* note 39, at 219-20; *see also* Sykes v. Columbus & Greenville Ry., 117 F.3d 287, 296-97 (5th Cir. 1997).

The Act allows an employer to deny employment to a reservist if: (a) reemploying the reservist would be unreasonable because of changed circumstances affecting the employer; (b) the employer would experience an undue hardship if they had to reemploy the reservist;[67] (c) the reservist left a job which had no reasonable expectation of reemployment;[68] or (d) the employer had legally justifiable cause to fire the employee before the departure for military service.[69] Furthermore, USERRA forbids an employer from discharging the reservist/employee from employment within six months to one year of the reservist coming off his or her active duty mobilization.[70] A substantial amount of case law exists which supports reservists who are not rehired or treated fairly upon demobilization.[71]

A reservist has two primary means of redressing grievances through USERRA regarding employment or reemployment discrimination. The first method gives the reservist the opportunity to contact the Department of Labor Veterans' Employment and Training Service ("VETS").[72] The Department of Labor requires the reservist to complete a questionnaire which asks about the reservist's military information, the employer's information, and whether the claim relates to employment or reemployment discrimination.[73] Once the reservist files the complaint VETS conducts an investigation.[74] During the course of the investigation, VETS is required to maintain a neutral position as "an advocate for the law [USERRA] and not either party in a complaint."[75] If VETS determines the employer violated USERRA, VETS

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67. Veterans' Employment and Training Service, 70 Fed. Reg. 75246, 75261-62 (Dec. 19, 2005) (to be codified at 20 C.F.R. pt. 1002). Only if employers illustrate that their circumstances have changed so much that rehiring the reservist would create a "useless job" or require restatement of a position that had been eliminated through lay offs that likely would have included the reservist. *Id.* at 75,262.

68. This requirement relates to temporary one-time positions for which the reservist had no reasonable expectation of reemployment. *Id.*

69. *See* Green, *supra* note 39, at 220-21.

70. 38 U.S.C. § 4316(c) (2000).

71. *See infra* note 147 and accompanying text; *see also* Linda Coady, *Jury Orders Target to Pay $1 Million for Firing Soldier*, ANDREWS EMP. LITIG. REP. (Thomson Corp., Stamford, Conn.), July 31, 2001, at 3 (describing a recent district court case from Oregon in which jury awarded $900,000 based on a USERRA employment discrimination cause of action).

72. 38 U.S.C. § 4321 (Supp. IV 2004); U.S. Department of Labor—Veterans' Employment and Training Services, http://www.dol.gov/vets/ (last visited Oct. 8, 2007).

73. VETS/USERRA/VP Form 1010 (REV 2/99), *available at* htt://www.dol.gov/libraryforms/forms/vets/vets-1010.pdf (the form VETS requires reservists complete in order to receive Department of Labor assistance in resolving their grievance contains seven questions regarding reemployment problems and three questions regarding hiring discrimination).

74. Veterans' Employment and Training Service, 70 Fed. Reg. 75,246, 75,286 (Dec. 19, 2005) (to be codified at 20 C.F.R. pt. 1002).

75. E-mail from William Torrans, Veterans' Employment and Training Service, U.S. Department of Labor, to Matt Crotty, Commander, A Co. 341st MI BN, Washington Army National

makes "reasonable efforts" to ensure the employer is in compliance with the Act.[76] Should VETS fail to convince the employer to comply with USERRA, it has the option, at the reservist's request, to refer the case to the United States Attorney's Office.[77] The second method allows the reservist to file a complaint directly against the employer.[78] If a reservist elects to initiate a private suit against an employer the Act states that no court costs or fees shall be charged to the reservist claiming rights under USERRA.[79] While no statute of limitations exists under USERRA, courts have allowed defendant employers to assert the equitable doctrine of laches against complainants.[80]

A court can provide various means of relief if the employee/reservist successfully proves adverse treatment because of their military service.[81] Relief may include forcing the employer to hire the reservist, requiring the employer to pay the reservist back wages or benefits lost because of the employer's failure to comply with USERRA, or, if the court determines that the employer's actions were willful, the court may require the employer to pay the reservist liquidated damages.[82] The court also has the option to award attorney's and expert witness fees to a reservist who prevails in a private right of action under USERRA.[83]

Washington State's Veterans and Veterans' Affairs statute mirrors USERRA's protections.[84] The Washington Legislature enacted the statute in May 2001 to give reservists and National Guard soldiers activated for state-related duties the same protections afforded by USERRA for federal-related duties.[85] Washington is unique in enacting legislation that affords USERRA-like protections to national guardsmen

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Guard (Aug. 2, 2006, 11:17:00 PST) (on file with author).

76. Veterans' Employment and Training Service, 70 Fed. Reg. 75,246, 75,286 (Dec. 19, 2005) (to be codified at 20 C.F.R. pt. 1002).

77. 38 U.S.C. § 4323(a)(1) (2000); Veterans' Employment and Training Service, 70 Fed. Reg. 75,246, 75,286-87 (Dec. 19, 2005) (to be codified at 20 C.F.R. pt. 1002).

78. 38 U.S.C. § 4323(a)(2). A reservist files their complaint in federal court if the employer is a private entity and files in state court if the employer is a state government entity. *Id.* § 4323(b).

79. *Id.* § 4323(h).

80. *Id.* § 4323(i); *see* Stevens v. Tennessee Valley Auth., 712 F.2d 1047, 1049 (6th Cir. 1983). Although *Stevens* was decided under VRRA, its holding still applies to USERRA under the Congressional mandate that cases decided under statutes preceding USERRA be applied to USERRA. *See* Veterans' Employment and Training Service, 70 Fed. Reg. 75,246, 75,246 (Dec. 19, 2005) (to be codified at 20 C.F.R. pt. 1002).

81. 38 U.S.C. § 4323(d) (2000).

82. *Id.*

83. *Id.* § 4323(h)(2).

84. WASH. REV. CODE §§ 73.16.005–73.16.100 (2006).

85. *Id.* § 73.16.005 (since USERRA does not provide protections to reservists and National Guard soldiers activated by state governors for state related duties like fire fighting, disaster relief, or civil disturbance protection the Washington Legislature opted to enact statutory protections for such instances); *see also* 20 C.F.R. § 1002.57(b) (2006).

mobilized to support state-related duties. The law received national attention following the Washington governor's August 2001 mobilization of the National Guard to fight forest fires.[86] One Washington National Guard soldier left his civilian job in Oregon to answer the Washington governor's call.[87] Upon returning from firefighting duties the national guardsman was fired and unable to regain his job because Oregon law did not cover such situations.[88] Had the national guardsman's employer been located in Washington, he would have received employment protection under the state's Veterans' Affairs statute.

The Veterans and Veterans' Affairs statute also provides hiring preferences for honorably discharged veterans,[89] and prohibits hiring and reemployment discrimination based on membership in the reserves.[90] Further, the statute instructs the Washington State Attorney General to bring an action on behalf of a national guardsman mobilized under state orders should any employer discriminate against him or her.[91]

Washington State also has a Militia Affairs statute.[92] This statute forbids a person from willfully depriving a member of the Washington Army or Air National Guard of employment or reemployment.[93] However, the Washington law only applies to members of the state's Army or Air National Guard, not individuals serving in the Army, Marine, Air Force, Coast Guard or Navy reserves.[94] Furthermore, the Washington law requires that the person "willfully" deprive the national guardsman of employment.[95] This willful standard is more stringent than USERRA's "motivating factor" requirement.[96] Under Washington law, a reservist must prove that the employer did not hire him solely because he did not want to hire a national guardsman, whereas under USERRA, the reservist only has to show that his reserve status was one reason why he was not hired.[97] If a national guardsman successfully

86. *See* Samuel F. Wright, *USERRA and SSCRA Coverage for National Guard Members*, RES. OFFICERS ASS'N L. REV., June 2002, *available at* http://www.roa.org/site/PageServer?pagename=law_review_45.

87. *Id.*

88. *Id.*

89. WASH. REV. CODE §§ 73.16.010, 41.04.010 (2006).

90. *Id.* §§ 73.16.032–33.

91. *Id.* § 73.16.061.

92. *Id.* §§ 38.04.010-040.

93. *Id.* § 38.40.040; *see, e.g., id.* § 38.40.050 (forbidding an employer from discharging a national guardsman employee because of their National Guard status). Washington law also forbids any organization, business, or club from barring a national guardsman from admission because of their status. *Id.* § 38.40.110 (the punishment for such a violation is a $100 fine and a sanction barring them from conducting business for thirty days).

94. *See id.* § 38.04.010.

95. *Id.* § 38.40.040.

96. *Cf.* 38 U.S.C. § 4311(c)(1) (2000).

97. *Compare* WASH. REV. CODE § 38.40.040 (2006), *with* 38 U.S.C. § 4311 (c)(1).

proves that an employer willfully discriminated against him or her in the hiring process because of his National Guard status, the court must either fine the employer $500 or impose a six month jail term to the employer.[98] The fine under Washington law is significantly less than the hundreds of thousands of dollars a reservist may recover in a successful USERRA action.[99]

While USERRA and the Washington Veteran and Veteran's Affairs statutes recognize the need to ensure reservists are promptly reemployed upon their completion of federal or state active duty, the statutes still do not adequately provide protection to reservists from discrimination by employers.

B. *Why USERRA and Washington's Current Employment Protections Are Inadequate in Protecting Reservists During the Hiring Process*

Although USERRA and its Washington counterpart explicitly prohibit employers from discriminating against reservists during the hiring process, it is "virtually impossible to prove"[100] the discriminatory actions by the employer. Additionally, the USERRA and Washington protections are inadequate for examination of precedent and both practical and unintended consequences.

Little state or federal precedent exists pertaining to reservists successfully proving that they were discriminated against during the hiring process because of their reserve status.[101] There are no published federal or Washington cases in which reservists successfully proved that they were denied employment because of their reserve affiliation during the *initial* hiring process. The two closest cases on point involve employers affirmatively admitting that they did not hire or rehire a serviceperson.[102]

In *McLain v. City of Somerville*, the City of Somerville admitted it did not hire a soldier currently serving on active duty because the city believed that the prospective employee's current active duty military obligation was not covered by USERRA.[103]

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98. WASH. REV. CODE § 38.40.040.

99. *See* Duarte v. Agilent Technologies, Inc., 366 F. Supp. 2d 1039, 1049 (D. Colo. 2005) (awarding the reservist $383,761 in lost wages and $114,500 in back pay, as well as prejudgment interest on the lost wages as part of a reemployment cause of action under USERRA).

100. *See supra* note 22 and accompanying text; *see also* E-mail from Erik Skaggs, Campaign Manager for former House Representative George Nethercutt, to Matt Crotty, Commander, A Co. 341st MI BN, Washington Army National Guard (July 11, 2006, 17:20:00 PST) (on file with author). Mr. Skaggs was also mobilized as a member of the Washington Army National Guard to serve a one-year combat tour in East Africa in response to the September 11th terrorist attacks. During his time overseas, he lost his civilian job and had difficulty obtaining employment upon returning from the Middle East.

101. *See supra* note 22 and accompanying text.

102. *See* McLain v. City of Somerville, 424 F. Supp. 2d 329, 331 (D. Mass. 2006); Beattie v. Trump Shuttle, Inc., 758 F. Supp. 30, 31 (D. D.C. 1991).

103. *McLain*, 424 F. Supp. 2d at 334.

The employer in *Beattie v. Trump Shuttle* admitted it did not rehire a reservist because it believed that the Veterans Reemployment Rights Act ("VRRA"), the statute predating USERRA, did not require the rehiring of a reservist who could not attend employment required training due to a reserve obligation.[104] While the servicepersons[105] in both cases successfully prevailed, the reason for their success is likely based on the employers' admissions that they refused to hire or rehire the serviceperson because of their belief that USERRA did not protect a prospective employee who could not start work on an employer-directed date due to service obligations.[106] Once the employers admitted their decisions not to hire the servicepersons were based on their non-availability due to the applicants' military service obligation, the servicepersons implicated USERRA's explicit hiring discrimination protections.[107]

While USERRA was effective in both the *McLain* and *Sommerville* cases, its ability to protect a reservist in a situation where the employer does not explicitly admit to denying the reservist employment due to his military commitments is far less clear. In fact, federal courts have been mixed in determining whether an employer's denial of reservist or veteran employment is enough to survive summary judgment.[108]

The United States Court of Appeals for the Federal Circuit held in *Cossette v. Department of Agriculture* that a veteran failed to meet USERRA's "motivating factor" requirement when he asserted, "with no evidentiary support," that three other applicants were treated more fairly than he was during the hiring process for a Forest Service position because of their previous Forest Service experience.[109] Dicta from the Eleventh Circuit Court of Appeals in *Coffman v. Chugach Support Services*, a case of first impression deciding a USERRA successor-in-interest claim, stated a reservist failed to meet the "motivating factor" test regarding the employer's decision to not hire him, the reservist could not provide evidence that the employer "relied on, took into account, considered, or conditioned its decision" not to rehire the reservist because of his military service.[110] While noting that hiring discrimination in such cases is "seldom open or notorious," the court reasoned that the employer was justified in not rehiring the reservist because the employer did not express hostility toward military personnel, had previously hired military personnel, and was able to provide testimony from two other persons present at the interview who stated that the

104. *Beattie,* 758 F. Supp. at 31.

105. The plaintiff in *McLain* was a soldier on active duty, not a reservist, whereas the plaintiff in *Beattie* was a reservist. *Id.*; *McLain,* 424 F. Supp.2d at 331. For consistency both plaintiffs are referred to as servicepersons.

106. *Beatie*, 758 F. Supp. at 31; *McLain,* 424 F. Supp. 2d at 333 n.3.

107. *See* 38 U.S.C. § 4311 (2000).

108. *See infra* notes 109-115 and accompanying text.

109. Cossette v. Dep't of Agric., 113 F. App'x 398, 400–01 (Fed. Cir. 2004).

110. Coffman v. Cuhgach Support Services, Inc., 411 F.3d 1231, 1238–39 (11th Cir. 2005) (citing Brandsasse v. City of Suffolk, Va., 72 F. Supp. 2d 608, 617 (E.D. Va. 1999)).

employer did not consider the reservist's military status in the decision not to rehire him.[111] While arguments could be made in both cases that the employer's actions were reasonable, it equally illustrates the difficulty a reservist/employee has in proving hiring discrimination absent a near admission from the employer that the employer chose not to hire the reservist because of the reserve status.

A year after its decision in *Cossette*, the United States Court of Appeals for the Federal Circuit denied an employer's summary judgment motion in *Patterson v. Department of the Interior*.[112] The court held that a genuine issue of material fact existed as to whether the applicant was not selected for an attorney position after determining that the veteran/applicant had served in the military, was not hired, and the decision not to hire him may have been related to his military service.[113] The court based its decision on precedent that required a "liberal approach" in determining whether USERRA jurisdiction exists.[114] The court reasoned that the veteran/applicant's allegation (which stated that the employer's rationale for not hiring him was pre-textual because the non-veteran who got the job had no distinguishable academic or work experience that separated him from the veteran/applicant), was enough to establish jurisdiction under USERRA and defeat summary judgment.[115]

Patterson and *Coffman* were both decided in 2005, by different circuit courts of appeals, under generally similar circumstances.[116] Yet, these summary judgment decisions yielded opposite results.[117] Opposite results that likely hinged on how "liberally" the circuit court decided to apply USERRA.[118] These conflicting decisions show USERRA's inconsistencies with regard to proving hiring discrimination and do little to help a reservist predict whether filing a USERRA claim is worth the time and effort.

Other federal and appellate courts have similarly mixed records in determining what constitutes an employer's adverse actions to a reservist with regards to reemployment, termination, and promotion causes of action.[119] While these decisions do not relate to hiring discrimination *per se*, it is likely that the courts will

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111. *Id.* (quoting Sheehan v. Dep't of the Navy, 240 F.3d 1009, 1014 (Fed. Cir. 2001)).

112. 424 F.3d 1151 (Fed. Cir. 2005).

113. *See id.* at 1161.

114. *Id.* at 1160 (quoting Yates v. Merit Sys. Prot. Bd., 145 F.3d 1480, 1484 (Fed. Cir. 1998)); *accord* Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946).

115. *Patterson*, 424 F.3d at 1155, 1161.

116. *See supra* notes 107–114 and accompanying text.

117. *See Patterson*, 424 F.3d at 1161; Coffman v. Cuhgach Support Services, Inc., 411 F.3d 1231, 1239 (11th Cir. 2005).

118. *See Fishgold*, 328 U.S. at 286 (interpreting the Selective Training and Service Act to protect from demotions in addition to discharges); *see also* Veterans' Employment and Training Service, 70 Fed. Reg. 75,246 (Dec. 19, 2005) (to be codified at 20 C.F.R. pt. 1002).

119. *See infra* notes 133-149.

look to them in hiring discrimination cases to determine how courts have construed USERRA in analogous situations.

The Ninth Circuit Court of Appeals held that a genuine issue of material fact existed as to whether an employer was justified in *firing* a reservist in *Leisek v. Brightwood Corp.*[120] The court reasoned that discriminatory motive could be inferred from:

> proximity in time between the employee's military activity and the adverse employment action, inconsistencies between proffered reason and other actions of the employer, an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses.[121]

The court held that the testimony regarding the employer's concerns about the employee's National Guard related absences coupled with threats by the employer to not allow the reservist/employee to honor future National Guard obligations and force the reservist/employee to take vacation time to undertake National Guard duty was enough to reverse the district court's employer friendly summary judgment ruling.[122]

A federal district court; however, held differently on similar facts.[123] The court in *Palmatier v. Michigan Department of State Police* granted an employer's summary judgment motion even though the plaintiff/reservist claimed that the officials who promoted a less qualified non-military person over him discussed his service related absenteeism and alleged discrepancies in testimony regarding his employer's view of his military service obligations.[124] While an internal promotion decision technically differs from a hiring decision, it still involves an employer making a decision comparable to one made during a hiring interview. The employer in *Palmatier* justified his decision to promote a less qualified person over the reservist/employee by citing positive interpersonal attributes of the less qualified person.[125] The court concluded by emphatically stating that the record was devoid of evidence that the plaintiff/reservist's military service "was a substantial or motivating factor in the minds of" the employer.[126] The court's interpretation of the record confirms USERRA's ineffectiveness in hiring discrimination decisions. An employer simply staying off the record by remaining silent regarding the applicant's military service

120. 278 F.3d 895, 901 (9th Cir. 2002).

121. *Id.* at 900 (citing Sheehan v. Dep't of the Navy, 240 F.3d 1009, 1014 (Fed. Cir. 2001)).

122. *Id.*

123. *See* Palmatier v. Michigan Dep't of State Police, 981 F. Supp. 529, 530-31, 533 (W.D. Mich. 1997).

124. *Id.* at 533.

125. *Id.*

126. *Id.*

stands a good chance of surviving a USERRA claim as it is extremely difficult to mine the mind of an employer for discriminatory animus.

The decisions regarding firing may guide the courts in examining hiring discrimination claims. Much like the federal circuit courts of appeals' mixed messages in *Cossette* and *Coffman*, analogous cases pertaining to firing give courts, reservists, practitioners, and employers little direction on how USERRA would be applied in a hiring context.

Even when an employer affirmatively makes derogatory statements to a reservist/employee regarding the employee's military service, it is no guarantee that the reservist will win under USERRA.[127] The court in *Gillie-Harp v. Cardinal Health, Inc.* noted that although most employers generally regard an applicant's veteran status as an asset, "there is a difference between holding [reservists] . . . in high esteem and being eager to accommodate a reservist's absences from work."[128] The court cited a litany of less-than-favorable actions by a supervisor to a reservist/employee that included: repeated and intense questioning of the reservist whenever she had military duty; threatened actions by the employer that indicated that the reservist would, in violation of USERRA, have to take vacation days to cover her reserve duty; and, sarcastic comments by the supervisor regarding the reservist's duties.[129] Additionally, after September 11, 2001, the supervisor commented to the reservist: "I suppose you're going to try to tell me you have to go somewhere for a longer period of time now."[130] The supervisor fired the reservist shortly after making the comment.[131] The court concluded that a jury may find these instances *could* be found to be a motivating factor in the firing and elected not to grant summary judgment in favor of the reservist.[132] Although such comments may exhibit a genuine issue of material fact, under a "liberal" reading of USERRA, they could be enough for summary judgment.[133]

No Washington State case law specifically addressing hiring discrimination of reservists exists. The closest case comes from Washington's Division II Court of Appeals which held that the Washington's Veterans Affairs statute does not guarantee veterans employment nor create an "absolute preference mandating the hiring of veterans" for state positions.[134] The decision confirmed previous Washington rulings that "[a] legislative classification favoring veterans is reasonable, and does not violate the Privileges and Immunities Clause, only if its enforcement is limited to situations

127. *E.g.*, Gillie-Harp v. Cardinal Health, Inc., 249 F. Supp. 2d 1113, 1121-22 (W.D. Wis. 2003).

128. *Id.* at 1120.

129. *See id.*

130. *Id.* at 1120 – 21.

131. *Id.*

132. *Id.* at 1121.

133. *See supra* note 34 and accompanying text.

134. Gossage v. State, 49 P.3d 927, 933 (Wash. Ct. App. 2d 2002).

where the veteran possesses qualifications substantially equal to those of non-veteran applicants as revealed by a full and fair examination and interview process."[135]

No federal or Washington precedent addressing reservists in the hiring process exists.[136] Furthermore, the courts are mixed on what constitutes an adverse hiring or firing decision by an employer and unclear on whether an employer's derogatory statements to a reservist are enough of a "motivating factor" to establish a USERRA violation.[137] Lastly, the decisions provide an employer who wants to avoid employee turnover[138] by choosing to not hire a reservist who may be called up to fight in Iraq, Afghanistan, or the Horn of Africa for a year, with a framework on how to avoid USERRA claims: have witnesses at the hiring interview who can testify that the reservist's status is not considered during the hiring interview and subsequent decision, and provide evidence, in either the form of another resume or simple assertions that the other non-reserve applicant had better "interpersonal skills," than someone else equally or even less qualified was hired. Those facts taken together, or separately likely will be enough for an employer's summary judgment motion against a USERRA claim to succeed.

Washington's Veteran's Affairs law and USERRA are also inadequate for practical reasons. First, not many potential employees want to sue their future employer. While the federal bureaucracy has the infrastructure and size which limits the effects and uniqueness of such actions, a similar action by a job applicant in a smaller town could be costly to the reservist's reputation.[139] Suing a future employer has the potential to get the reservist labeled as a complainer and may cause other employers in the town to be very leery of even granting the reservist an interview. During the summer of 2006, a Washington Army National Guard officer who recently graduated with a teaching degree was told by an eastern Washington school district that he would not even be considered for a teaching position because he would be absent part of the year as a result of mandatory military training.[140] When informed that the school district's actions violated both USERRA and Washington law, the soldier firmly stated that he did not want to file a complaint against the

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135. *Id.* at 934 (citing Mitchell v. Bd. of Indus. Ins. Appeals, 34 P.3d 267, 270 (Wash. Ct. App. 2d 2001).

136. *See supra* notes 109–147.

137. *See supra* notes 128–140.

138. Consultants specializing on employee turnover estimate that it costs an employer $75,000 to replace an employee with a $50,000 salary. William G. Bliss, *Cost of Employee Turnover,* ADVISOR, http://www.isquare.com/turnover.cfm (last visited Oct. 9, 2007) (employee turnover in a 1,000 person business with an annual 10 percent turnover can cost the business $7.5 million dollars each year).

139. *See* Patterson v. Dep't of the Interior, 424 F.3d 1151, 1154 (Fed. Cir. 2005) (illustrating the resources an applicant for a federal position has if they believe they were not hired because of their veteran status).

140. Interview with Joseph Trudeau, Second Lieutenant, Washington Army National Guard, in Medical Lake, Wash. (Aug. 11, 2006).

district out of fear of being labeled "that guy who files a complaint whenever things don't go his way."[141] The reservist's actions also have the potential to make employers leery of hiring other reservists for similar reasons. Although USERRA forbids an employer from retaliating against an employee or potential employee who initiated a USERRA action,[142] the law does not prevent the "baggage" from the action from attaching, and staying attached, to the reservist as he or she begins work.[143]

Second, USERRA and its Washington equivalent allow an employer to fully comply with the statute and still discriminate against hiring reservists. Since USERRA protects active duty service members, reservists, and veterans,[144] a business can elect to hire a veteran who has no remaining service commitment instead of the reservist.[145] In *Goico v. Boeing Co.*, the court determined that since Boeing considered military experience a plus with regards to internal hiring, its decision to hire a veteran over a reservist was valid under USERRA.[146] An employer may justify hiring veterans over reservists while remaining in compliance with USERRA and limiting the possibility of employee turnover.

In addition to USERRA and Washington law being inadequate in protecting reservists in the hiring process for precedential and practical purposes, the "rule" of unintended consequences provides another reason.

While hiring discrimination case law under USERRA and Washington law is scarce, case law relating to the rehiring and reemployment of reservists is substantial.[147] Not only is it substantial, it is generally favorable to the reservist.[148] From the employer's point of view, once a reservist "gets in the door," he or she is

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141. *Id.* The fear of being labeled as a "complainer" is not limited to USERRA claimants as plaintiffs in Title VII actions experience similar feelings. *See generally* 42 U.S.C. § 2000e-2(a)(1) (2000); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

142. 20 C.F.R. § 1002.19 (2006).

143. *See id.* §§ 1002.19, 1002.21-22.

144. 38 U.S.C. § 4311(a) (2000); WASH. REV. CODE. § 73.16.033 (2006).

145. *See* Goico v. Boeing Co., 347 F. Supp. 2d 955, 982–984 (D. Kan. 2004).

146. *Id.* at 984.

147. *See, e.g.*, Warren v. IBM, 358 F. Supp. 2d 301, 303 (S.D.N.Y. 2005) (denying IBM's summary judgment motion reasoning that the company's reason for firing the reservist was pretextual and likely motivated by the employer's dissatisfaction with the reservist repeated military absences and the possibility the reservist would be called to active duty on short notice); Jordan v. Air Products and Chemicals, Inc., 225 F. Supp. 2d 1206, 1208 (C.D. Cal. 2002) (holding that 38 U.S.C. § 4312 created an "unqualified right to reemployment" to reservists who make the requisite notifications regarding their intent to be reemployed); *see also* Nichols v. Snohomish County, 746 P.2d 1208, 1210-13 (Wash. 1987) (affirming a Washington Court of Appeals ruling holding that a county sheriff's office violated WASH. REV. CODE. § 73.16.061 when they fired a reservist for leaving his job to attend military flight school).

148. *See supra* note 147; *see also* Green, *supra* note 39, at 228 (stating "the burden of proof required by the courts, in all practical purposes, has proven to be almost insurmountable by the employer" who does not want to reemploy a reservist).

there to stay and the employer must be prepared to accommodate up to five years of absence while holding the position open for the reservist during the reservist's absence.[149] Furthermore, the employer cannot fire the reservist for up to a year after the reservist returns to work unless it is "for cause."[150] Failure on the employer's part to do this results in substantial monetary and injunctive judgments against employers.[151]

Illustrated differently, the individual Bruce Springsteen refers to as having difficulty getting his job back at the oil refinery (discussed at the start of the article), would be protected by USERRA's expansive reemployment provisions, assuming the person worked at the refinery before being sent to Vietnam.[152] However, had he not worked there before shipping to Vietnam, he would have no recourse. Instead, in 2006, he would get the "ESGR Man's" take-your-reserve-service-off-your-resume advice that the two Washington Army National Guard soldiers referenced earlier in this paper received.[153] This advice is sadly similar to Springsteen's lyrics describing the rough treatment the Vietnam veteran received.

Reservist-friendly rulings have created unintended consequences for reservists wanting to "get in the door" because employers may steer away from the difficulties of accommodating a reservist's military commitment and look to more stable non-reservists when making future hiring decisions. Employers can easily rationalize this decision in today's globalized world where employers must maintain a skilled workforce in order to satisfy customers and make money and the loss of a key employee due to military service could seriously hinder their operations.[154]

Another reason employers may want to avoid hiring reservists is that USERRA provides more protections than comparable federal statutes pertaining to employer's duties toward other protected classes.[155] Employers have successfully defeated Americans with Disabilities Act ("ADA") claims by arguing that an employer does not have to reemploy a disabled employee because of the disabled employee's lengthy absences from work.[156] However, under USERRA, employers are not

149. 38 U.S.C. § 4312(c) (2000).

150. *Id.* § 4316(c).

151. *See, e.g.,* Durate v. Agilent Technologies, Inc., 366 F. Supp. 2d 1039, 1049 (D. Colo. 2005) (awarding the reservist over $5000,000 in lost wages, back pay, and prejudgment interest).

152. *See supra* note 1 and accompanying text.

153. *See supra* note 11.

154. *See generally* Warren v. IBM, 358 F. Supp. 2d 301 (S.D.N.Y. 2005). The reservist in the *Warren* case was instrumental in developing a computer security system as part of a $6.2 billion dollar with JP Morgan Chase. *Id.* at 303-04. The reservist's supervisor expressed frustration with the reservist's absences due to the enormity of the deal and the reservist's key role in the project. *Id.* at 304-05. The supervisor's testimony indicated that if he were to "do it all over again," he would likely not hire a reservist for the position. *Id.*; *see also supra* p. 188–89.

155. *See* Green, *supra* note 39, at 232.

156. *Id.* at 231 (citing Tyndall v. Nat'l Educ. Centers, Inc. 31 F.3d 209, 213–14 (4th Cir. 1994); Nowak v. St. Rita High Sch., 142 F.3d 999, 1003 (7th Cir. 1998)); *see also* 42 U.S.C. §§

allowed to argue that they do not have to reemploy the reservist/employee because a lack of attendance makes the reservist unqualified to do the job.[157] Instead, USERRA requires the employer to make "reasonable efforts" to retrain the reservist upon returning to work.[158] Courts interpreting USERRA generally conclude that a reservist's indefinite absence from work is not an essential factor in determining whether the employer is experiencing an undue hardship in executing its business requirements because of the reservist's absence.[159] The likely result of this is that employers will want to take steps to ensure they are not cornered by such a law.[160] The easiest way to do so would be to simply avoid hiring reservists.

Aside from a lack of precedent regarding hiring discrimination, conflicting firing and reemployment precedent, impracticality, and unintended consequences, USERRA's failure to enforce its ostensibly powerful hiring discrimination protections is illustrated by John Doe's travails. If the officials who advise reservists on their USERRA "protections" offer the primary advice to remove any and all references to reserve duty, then the system has truly failed.[161] Many Washington Army National Guard soldiers have served bravely in Afghanistan, Iraq, and the Horn of Africa while gaining valuable experience that makes them both better citizens and workers. Captain Brian Nelson of the Washington Army National Guard is currently the head operations officer for all conventional intelligence activities in Afghanistan; Specialist Gerrit Kobes of the Washington Army National Guard was awarded the Silver Star, the nation's third highest award for valor, for risking his life to save injured Iraqi soldiers; and Sergeant Erik Skaggs of the Washington Army National Guard received a rare and coveted direct officer commission for his accomplishments in thwarting al Qaeda terrorist operations in the Horn of Africa.[162] Such displays of leadership in a stressful and complex situation, courage under fire, and intellect in preventing the loss of lives at the hands of the most cunning of adversaries deserve a place on a resume. Maintaining a law that, in effect, prevents reservists from using their experiences both dishonors their service and prevents employers from getting an accurate picture of their applicant.[163]

12111-17 (2000).

157. Green, *supra* note 39, at 232.

158. 38 U.S.C. § 4313(a)(1)(B) (2000).

159. *See generally* Green, *supra* note 39, at 238.

160. *Id.*

161. *See supra* notes 2, 11 and accompanying text.

162. Email from Brian Nelson, Captain, S3, 341st MI BN, Afghanistan to Matt Crotty, Major, A Co., 341st MI BN, Spokane, WA (Aug. 14, 2006, 09:05:00 PST) (on file with author); Kevin Graman, *Medic Earns Silver Star,* SPOKESMAN REV., Feb. 15, 2005, at A1; Memorandum for Record from MAJ Matt Crotty, A Co., 341st Military Intelligence Battalion to Washington Army National Guard Direct Commission Board (Oct. 1, 2004) (on file with author).

163. Individuals have suggested that a provision be added to USERRA which bars employers from asking reservists about their military commitment. Telephone Interview with Samuel Wright, Captain, Legal Affairs Advisor for Reserve Officers' Association, U.S. Navy JAG Corps, in

Fortunately, avenues exist for which USERRA can be fixed to accommodate the desires of reservist/applicants and employers.

IV. MAKING WASHINGTON LAW MORE EFFECTIVE IN PROTECTING RESERVISTS DURING THE HIRING PROCESS

A. *The "Carrot" Approach*

Two incentive options exist for fixing USERRA and its Washington equivalent's shortcomings with regard to the problems that arise in initial hiring. These options are: (a) give employers who hire reservists a one-time $1,000 tax break for each reservist hired, or (b) give employers who have reservists working for them preferential consideration in the awarding of government contracts.

Awarding a tax break to employers who hire reservists is not a new idea. Congressman George Nethercutt introduced the Reserve Employer Tax Credit Act of 2001.[164] The purpose of the bill was to amend the Internal Revenue Code of 1986 to allow for employers to get a $2,000 credit for each reservist employed.[165] The bill never made it out of committee.[166] While the legislative record is silent as to why the bill never succeeded, Samuel Wright, a United States Navy Judge Advocate General (JAG) officer who helped draft USERRA, believes that the primary reason for the bill's failure stems from congressional unwillingness to go against a mandate of the Tax Reform Act of 1986.[167] The Tax Reform Act of 1986 implied that if Congress wanted to affect social change they should not use the Internal Revenue Code as the means to do so under the rationale that such tax incentives greatly increased the complexity of the tax code and perpetuated unequal taxation of American citizens.[168]

Washington D.C. (July 12, 2006) (notes on file with author). The Department of Labor declined to make this modification to USERRA after concluding such questions by employers are not unlawful and that "in many instances a prospective employee's military service may enhance his or her potential value to the employer." Veterans' Employment and Training Service, 70 Fed. Reg. 75253 (Dec. 19, 2005) (to be codified at 20 C.F.R. pt. 1002). *Contra* Wright, *supra* note 14. Commentators from the Reserve Officers Association posit that USERRA should contain a provision that forbids employers from asking potential employees about their reserve obligations in the hiring process. *Id.* This position stemmed from multiple inquiries from reservists who were having difficulty getting jobs due to both future and previous mobilizations in support of military operations in the Middle East. *Id.*

164. H.R. 394, 107th Cong. (1st Sess. 2001).

165. *Id.*

166. *Id.*

167. Telephone Interview with Samuel Wright, Captain, Legal Affairs Advisor for Reserve Officers' Association, U.S. Navy JAG Corps, in Washington D.C. (July 12, 2006) (notes on file with author).

168. *See* Tax Reform Act (TRA) of 1986, Pub. L. No. 99-514, 100 Stat. 2085. (one of the purposes behind the Tax Reform Act of 1986 was to stop the use of the Internal Revenue Code as a mechanism to affect social change).

Recently, Representative Rodney Alexander introduced a similar bill which offers employers a $1500 one-time tax credit for hiring a reservist or National Guardsman.[169] The National Guard and Ready Reserves Employment Protection Act of 2006 simplifies the proposed 2001 bill but offers a smaller incentive.[170] Representative Alexander stated he is "just looking for everything and anything to help [reservists] who are looking for [jobs]" in response to the Department of Defense concern that reservists are experiencing difficulty finding jobs because of their reserve affiliation.[171] At the same time, Representative Alexander recognized the budgetary difficulties of passing such a bill.[172] Fortunately, Washington has a tax structure that can be modified to support such an incentive.

The Washington legislature has recently passed tax relief/credit with the purpose of maintaining a veterans' relief fund at the county level and providing a tax credit for companies who create manufacturing jobs.[173] While these measures do not go directly toward tax credits for employers who hire reservists, they exhibit a legislative "open mindedness" that is not hindered by the federal Internal Revenue Code constraints. Furthermore, both measures could be easily modified to support a tax credit for employers that hire reservists.

The Washington legislature recently updated a state law authorizing each county to levy a tax to fund: veteran's assistance programs, burial expenses for indigent veterans, and costs of administering the assistance programs.[174] Legislative history pertaining to the modification of the statute recognizes that:

> [m]any troops returned from the first deployment to the Middle East only to lose their jobs. Some of these returning veterans were not eligible for state assistance. When additional troops return, the need for assistance will be greater. This bill provides needed flexibility and accountability and could serve as model legislation for other states.[175]

Proponents of the bill also noted that the law "encourages the self reliance of veterans by providing a hand up, not just a hand out."[176] The law could be modified to include a provision that allows money raised in support of the law be put toward the tax credit. Since reservists and National Guard soldiers make up less than one

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169. National Guard and Ready Reserves Employment Protection Act of 2006, H.R. 5765, 109th Cong. (2nd Sess. 2006).

170. *Id.*

171. Rick Maze, *Lawmaker Proposes Tax Credit for Hiring Reservists,* AIR FORCE TIMES, July 14, 2006, *available at* http://www.airforce.times/legacy/new/1-292925-1953009.php.

172. *Id.*

173. WASH. REV. CODE §§ 73.08.080, 82.60.010 (2006).

174. *Id.* § 73.08.080.

175. H.R. 59-HB 1189, Reg Sess., at 6 (Wash. 2005).

176. *Id.*

percent of the state's population, it is likely that this proposal could be supported.[177] Moreover, such a law would find support in *Fishgold's* dicta which affirmed legislation providing a benefit to those who serve in a time of war at the expense of those who stay behind.[178] The Legislature's recognition of the employment troubles of soldiers returning from the Middle East, coupled with their intent to use the law as a "hand up" to encourage self-help, hints that Washington's citizens would be amenable to such an addition. Such a law also would continue Washington's superb record on passing veteran-friendly legislation and set a standard for other states to follow.[179]

Additionally, Washington has an alternative tax credit structure that would support an employer tax credit for hiring reservists. Currently, employers in rural areas who hire manufacturing or research and development persons receive a $4,000 tax credit for each position, as long as that the number of new hires exceeds fifteen percent of the employer's current workforce.[180] The framework of this law can be used as a model for a provision that gives a $1,000 one-time tax credit to an employer that hires a reservist. Since the rationale behind the current provision—creation of jobs in rural areas in order to save the state money on providing social services to unemployed persons—parallels the intent of the proposed tax credit which is to enhance hiring protections for reservists so the state does not have to pay for them, it also will likely find support in the legislature. In light of the recent statistics which show that the unemployment rate of younger veterans is higher than the national average, the need for such legislation is apparent.[181] With a small segment of the nation and state's population bearing the burden of combating a ferocious enemy overseas, extending such a tax credit to employers who hire the reservists bearing would likely receive bi-partisan support.

The Washington Legislature could extend the scope of the tax credit to even further include businesses that hire volunteer first responders like: volunteer

177. The United States Government Accountability Office reported that 4680 soldiers were in the Washington Army National Guard in 2001. U.S. GOV'T ACCOUNTABILITY OFFICE, MILITARY PERSONNEL STRENGTH IN THE ARMY NATIONAL GUARD 5, (2002), *available at* http://www.gao.gov/new.items/d02540r.pdf. There are approximately 9,000 Washington Army and Air National Guard soldiers in Washington State. Washington National Guard, http://www.washingtonguard.com (last visited Oct. 20, 2007). The U.S. Census Bureau estimated that Washington's population in 2005 was 6,287,759. U.S. Census Bureau, Population Estimates, *available at* http://census.gov/popest/states/NST-ann-est2005.html (last visited Oct. 20, 2007). Based on these statistics there are no more than 10,000 Air National Guard and Army National Guard personnel residing in Washington. This amounts to less than .0016 percent of the population being active Guardsmen.

178. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 284 (1946).

179. *See supra* notes 84–93 and accompanying text.

180. WASH. ADMIN. CODE § 458-20-240 (2006); WASH. REV. CODE §§ 82.62.030, 82.62.045 (2006).

181. *See supra* note 18 and accompanying text.

firefighters, volunteer police officers, and search and rescue volunteers. Extending the scope of the tax credit to cover volunteer first responders also could help in getting state employee lobbies to support the measure.[182]

Alternatively, the tax credit can be narrowed to apply only to businesses that hire a member of the Washington Army or Air National Guard. The rationale for limiting the tax credit is since members of the National Guard provide services to the state during disaster or civil unrest, the state should support businesses who hire such individuals who could be called to respond to a flood, fire, or riot threatening state economic interests. Whereas members of the Army, Navy, Air Force, and Marine reserves serve only under federal authority, it should fall upon the federal government to extend tax credits to businesses who hire members of the Army, Navy, Air Force, or Marine reserves.[183] This alternative would lessen the state tax burden and still protect members of the Washington Army and Air National Guard who stand to be called to state duty in the event of a natural or manmade disaster.

Providing preferential consideration to employers who hire reservists for government contracts is a second "carrot" approach to USERRA and the Washington law's shortcomings. This proposal would not require the state to award contracts to businesses that are recognized for being favorable to reservists, but only take such a factor into consideration during the selection process. This approach would not run afoul of the Washington Law against Discrimination ("WLAD")[184] for two reasons. First, the WLAD mandates that the state shall not "grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[185] Since veteran or reserve status is not listed in the WLAD it is likely that such a measure would survive scrutiny under that law. Second, since this proposal requires that the state only positively consider an employer's reservist population, it is not a preferential treatment scheme. Furthermore, a preferential consideration law could be based on the Veterans' Affairs statute, which requires veteran-applicants for state jobs receive additional points (but not guaranteed employment) with regards to state positions.[186] Since the Washington Legislature has approved giving veterans extra points on civil service tests, it is likely that they would support legislation requiring the state to *consider* the number of reservists an employer has before granting them the contract.

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182. The Washington State Federation of State Employees maintains a fairly robust lobbying effort, which is known to be aggressive in pursuing legislation that benefits state workers. Washington Federation of State Employees, http://www.wfse.org/index.cfm (last visited Oct. 20, 2007) (the website contains numerous examples of their lobbying efforts).

183. *See supra* note 15.

184. WASH. REV. CODE § 49.60.400 (2006).

185. *Id.*

186. *See id.* § 73.16.010.

Implementing this second approach would bear no costs to the state. The ESGR currently maintains a database listing reservist friendly employers called the "Five Star Employment Program."[187] Employers can obtain a "Five Star" rating from ESGR if they: (1) sign a statement publicly declaring support for reservists; (2) review their human resources processes to ensure they comply with USERRA; (3) promote managerial training that instructs supervisors on how to lead employees who are reservists; (4) adopt policies that are "above and beyond" USERRA; and (5) advocate employee service in the reserves.[188] This proposal simply requires the state to check the ESGR website before awarding a contract.

In addition to these "carrot approaches" more punitive alternatives exist.

B. *The "Stick" Approaches*

The State of Washington has three options for punishing employers discriminating against reservists in the hiring process. The first option involves maintaining a database of employers who have received adverse court decisions under USERRA or its Washington equivalent. The second option is to pass legislation that holds the hiring interviewers personally liable for discriminatory actions they take during the hiring process. The third option is to change the employer's burden of proof in hiring discrimination causes of action from preponderance of the evidence to clear and convincing.

The Washington State Department of Revenue currently maintains a list of delinquent tax payers.[189] The purpose of this list is ostensibly to warn citizens and businesses of the dangers of entering into deals with people who have failed to pay their taxes. The state could maintain a similar list of employers who received unfavorable decisions under USERRA or Washington law. This list would let citizens know that the business in which they may be working, or planning to work, discriminated against reservists during the hiring process. The list would not forbid people from doing business with the employer; however, it could serve as a deterrent to some employers for public relations reasons. While a good part of the country is opposed to the Bush Administration's handling of the Iraq War,[190] there remains a strong "support the troops" sentiment. Ostensibly, an employer would not like to be

187. Employer Support of the Guard and Reserve, http://www.esgr.com (follow "Supportive Employers—Washington Map" hyperlink) (last visited Oct. 20, 2007).

188. Employer Support of the Guard and Reserve, About ESGR, http://www.esgr.com/about.asp (last visited Oct. 20, 2007).

189. Washington State Department of Revenue, Delinquent Taxpayer List, http://dor.wa.gov/Content/FileAndPayTaxes/LateFiling/delinquentTaxpayerList.aspx (last visited Oct. 20, 2007).

190. Over 62 percent of adults polled in August 2006 disapproved of President Bush's handling of the Iraq war. Opinion Poll, ABC NEWS & WASHINGTON POST (Aug. 3 – 6, 2006), *available at* http://www.pollingreport.com/iraq.htm (last visited Aug. 11, 2006).

labeled as entity that does not "support the troops," nor be associated with an entity that is not supporting of servicepersons.[191]

Washington could also pass a law that holds the person who discriminates in the hiring process responsible for his or her actions. Federal decisions are mixed on whether USERRA allows individual employees to be held liable for the discriminatory actions of their employer with regard to the hiring process.[192] Washington could clear the muddied federal waters by passing a law that affirmatively makes an individual human resources person liable for discriminatory actions they take during the hiring process of a reservist. Additionally, this would continue to bolster Washington's reputation as a veteran friendly state.

Lastly, Washington could change the burden of proof in its Veteran's Affairs statute from preponderance of the evidence to clear and convincing. Currently USERRA and Washington only require that employer shows, by preponderance of the evidence, that their decision not to hire a reservist was not motivated by the reservist's military affiliation.[193] The current burden of proof is inadequate for two reasons. First, it helps perpetuate conflicting USERRA related court decisions where some courts hold employers' assertions that they did not consider the reservist's military status in making their decision satisfies the preponderance of the evidence requirement whereas other courts require more of employers.[194] Second, it reinforces USERRA in its current ineffective state—a state which generally allows employers to

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191. *See generally* Two Time OEF Vet Loses Job Because He Served His Country, http://www.blackfive.net/main/2006/07/two-time-oef-ve.html (July 13, 2006) (last visited Oct. 20, 2007). Blackfive, a blog operated by former military personnel, responded to a news report about a teacher losing his job because of his military service in Afghanistan by posting the name, phone number, and email address of the principal who allegedly fired the teacher and the contact information for the school board maintaining oversight, and hiring and firing authority, of the principal. *Id.* The post received 53 comments by concerned readers, many of whom stated their intent to email the principal, school board, and local attorneys. *Id.* Even association with a business entity that *allegedly* engaged in conduct that could be construed as anti-soldier carries tough ramifications. Recently a free-lance journalist known for his positive coverage of United States military operations in Iraq had one of his photos allegedly stolen by a French company and used in a manner that could be construed as "anti-war." Michael Yon: Online Magazine, Speak Out to HFM, http://www.michaelyon-online.com/shockmag.php (last visited Oct. 20, 2007) (many American based stores pulled magazines owned by the French company HFM once word of the French company's alleged conduct became known); Daryl Lang, *Drugstore Chain Pulls Shock Magazine; Blogger Rejects Settlement*, PHOTO DISTRICT NEWS, June 4, 2006, http://www.pdnonline.com/pdn/newswire/article_display.jsp?vnu_content_id=1002688652.

192. *See* Brandsasse v. City of Suffolk, 72 F. Supp. 2d 608, 617–18 (E.D. Va. 1999); Jones v. Wolf Camera, Inc., No. 3:96-CV-2578-D, 1997 WL 22678, at *2 (N.D. Tex. Jan. 10, 1997). *But see* Satterfield v. Borough of Schuykill Haven, 12 F. Supp. 2d 423, 437-38 (E.D. Pa. 1998); Brooks v. Fiore, No. 00-803 GMS, 2001 WL 1218448, at *9 (D. Del. Oct. 11, 2001).

193. *See* 38 U.S.C. § 4311 (2000); WASH. REV. CODE § 73.16.032 (2006); *see also* Sheehan v. Dep't of Navy, 240 F.3d 1009, 1013 (Fed. Cir. 2001); Trimble v. Wash. State Univ., No. 22022-9-II, 1998 WL 726481, at *5 (Wash. Ct. App. Oct. 16, 1998); *supra* note 57 and accompanying text.

194. *See supra* notes 116-119 and accompanying text.

discriminate against a reservist so long as they do not affirmatively state that they considered the reservist's military status as part of their decision not to hire.[195] Changing the burden of proof to clear and convincing would likely require employers to provide more than self-serving statements that they "did not consider the reservist's status" or "hired someone better qualified."[196]

More importantly, a stricter burden of proof will have the positive effect of forcing employers to reexamine their hiring practices as they apply to reservists. It is possible that many employers do not even know they are violating USERRA or Washington law when they refuse to consider reservists for employment. Thus, changing the burden of proof could force employers to self educate themselves on USERRA and Washington law. For instance, it is unlikely that the school district official who told the Washington Army National Guard soldier he would "not consider him" because of his military obligations was aware that his statement was illegal and could subject him to a fine, jail time, or a civil suit.[197] If employers knew that they would have to prove by clear and convincing evidence that their decision was not discriminatory, employers would likely have to support it with a well thought-out and written hiring procedure addressing reservist hiring and show that, in accordance with their procedure, the reservist was not hired for a reason other than military status.

V. CONCLUSION

Current federal and Washington statutes protecting reservists from hiring discrimination are inadequate. Fortunately, Washington State has easily achievable mechanisms which have the potential of benefiting both employer and reservist alike. Adopting such approaches may further encourage American citizens to join, or stay in, the reserve components of our nation's armed services making the possibility of a draft unnecessary. Moreover, adopting these approaches will go far in giving reservists the peace of mind that when they sign up to serve in the reserves their decision will be viewed by employers as a plus. This added peace of mind will also allow reservists, should they be sent overseas, to focus on their military duties instead of worrying about how they are going to find their next job when they return. As many of Washington's citizen soldiers have learned in this post-September 11th world, being able to focus on the mission overseas is vitally important.

Therefore, the "V.A. Man's" advice needs to be along the lines of "Son, don't you understand that, in Washington State, an employer will receive a $1,000 tax credit for hiring you; and, if they don't hire you, they gotta' prove why they didn't by clear and convincing evidence. So, be sure to keep your reserve affiliation on your

195. *See supra* p. 179–80.

196. *See supra* notes 108–115 and accompanying text.

197. 38 U.S.C. § 4311 (2000); WASH. REV. CODE §§ 38.40.110, 38.40.040; 73.16.032 (2006); *see also supra* p. 179–80.

resume because you've done some great stuff that an employer should know about."[198] Adopting these proposals will turn such advice into reality.

198. *See supra* note 1.