Indiana Law Review

Volume 37 **2003** **Number 1**

NOTES

REEMPLOYMENT RIGHTS UNDER THE UNIFORM SERVICES EMPLOYMENT AND REEMPLOYMENT ACT (USERRA): WHO'S BEARING THE COST?

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INTRODUCTION

Imagine phone calls coming to lawyers, doctors, mechanics, assembly-line workers or supervisors, production managers, dish washers, or chefs, the list goes on. Each phone call tells the individual that he or she must pack her bags, kiss her family good-bye, because there is yet another military mission to an undisclosed location for an indefinite amount of time. In some instances the phone call, instead of ordering the individual involuntarily away, gives the person a choice between volunteering his services for thirty to forty-five days several times a year for the next few years or being involuntarily ordered away for an indefinite period of time. This is the sacrifice many men and women choose to make on a daily basis as Guard personnel or Reservists.

The employer of the Guard person and Reservist, however, has no choice in the matter but is statutorily and judicially forced to maintain their positions of employment for indefinite periods and bear the cost without any compensation. This Note will address the fact that the cost of maintaining a large professional military has been externalized and shifted from the government to the employer. This shift in cost calls for either a legislative or judicial remedy to compensate for the unfair burden placed on the employer because of the language and interpretation of the USERRA.

In a complex and highly dependent world in which information is immediate, the U.S. military is continuously called to end, resolve, and head off potential conflicts. As the size of the U.S. military decreased after the Cold War, the military's activity increased. As Air Force Lieutenant General Thomas McInerney explained, "Our deployments have gone up three to four hundred percent, and we have a force that is 40 percent smaller than we had in 1988-89."[1] Therefore, the gap between supply and demand of the U.S. military has been filled to a large extent by the Guard and Reservists—the citizen soldiers.

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1. Brian Cabell, *U.S. Faces Challenge Recruiting Reservists* (Sept. 12, 2000), *at* http://www.cnn.com/2000/US/09/11/us.reservists/index.html (last visited July 7, 2003).

In 1994, Congress enacted the Uniformed Services Employment and Reemployment Rights Act "to expand, codify, and clarify the employment rights and benefits available to veterans and employees."[2] In response to the end of the Cold War and the restructuring of the U.S. military, Congress created a statute to encourage non-career military service by minimizing the disadvantages to civilian careers and employment by prohibiting discrimination against individuals because of their military service.[3] Congress borrowed several concepts from other federal employment discrimination statutes to provide for prompt reemployment of the service member upon completion of his or her service.[4]

The USERRA reflected a shift in the nation's defense policy with a new reliance on the citizen soldier. This new force structure was deemed the "Total Force Policy," which saw the Reserve and Guard components as an integral part of the military resources on hand at any given time.[5] "The Total Force Policy called for an increased reliance on the reserves and was implemented in an effort to make training 'more meaningful' for these components and boost military manpower."[6] Currently, the 1.3 million men and women who serve in the Reserve and Guard make up nearly half of the U.S. Armed Forces.[7]

Initially, the shift in defense policy appeared to be a solution to having a well-trained force on call without the cost of maintaining a large professional standing military. However, with mass activations in 1998 for *Operation Allied Force for Kosovo*, and *Operations Enduring Freedom* and *Noble Eagle* following September 11, 2001, the citizen soldier has been called to duty for extended periods several times in the last few years. "This is the first time since the Vietnam War and creation of the all-volunteer military in 1973 that reserve troops have been asked to stay on active duty" for such periods.[8] Furthermore, other Reservists and Guardsmen, to avoid being called up involuntarily for an indefinite amount of time, volunteer for thirty to forty-five day rotations several times a year. Major General Czekanski described the plight of the Guardsmen and Reservist by rejecting the model of the Guard and Reserves as a one weekend

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2. Eve I. Klein & Maria Cilenti, *When Duty Calls: What Obligations Do Employers Have to Employees Who Are Called to Military Service?*, 73-DEC N.Y. ST. B.J. 10, 10 (2001); *see also* Lieutenant Colonel H. Craig Manson, *The Uniformed Services Employment and Reemployment Rights Act of 1994*, 47 A.F. L. REV. 55, 59 (1999).

3. *See* Klein & Cilenti, *supra* note 2, at 10.

4. Manson, *supra* note 2, at 59.

5. 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, 861 (2002).

6. *Id.*; *see also* Samuel W. Asbury, *A Survey and Comparative Analysis of State Statutes Entitling Public Employees to Paid Military Leave*, 30 GONZ. L. REV. 67, 71 (1994).

7. U.S. Department of State, *Bush Orders 50,000 U.S. Reservists to Active Duty* (Sept. 14, 2001), *at* http://usinfo.state.gov/topical/pol/terror/01091403.htm (last visited Sept. 14, 2001).

8. Reuters, *U.S. Reserves May Stay on Duty for Second Year* (Aug. 26, 2002), *at* http://www.ledger-enquirer.com/mld/ledgerenquirer/3942819.htm (last visited July 9, 2003).

a month, two weeks a year program.[9] The General explained that Reservists need to expect to give at least sixty days a year above and beyond this commitment, and if the volunteerism is not there, rolling activations of up to 120 days may be in order.[10]

The USERRA was created to encourage volunteerism that would allow the country to maintain a large force of citizen soldiers that could be trained and ultimately sent to war.[11] Upon the soldiers' return from war, they would come home to the job that they had left. However, the current force structure and subsequent military policy is dependent on the Reservists and Guardsmen not only in times of war, but also in continuous military operations occurring around the world. Ohio congressman David Hobson explained that people who joined the Reserves and Guard in the past did so with an understanding that periods of being called up to duty would be "relatively short."[12] The congressman described the current situation, in which "[p]art-time reservists are being turned into full-time soldiers and airmen through extended and unpredictable active-duty assignments."[13] This dependence on Reservists and Guardsmen in the Total Force Policy with continuous world-wide military operations has created a situation where employers are faced with a revolving door, unsure when, where, and how often their employees will be voluntarily or involuntarily taken from them.

Courts have found, under other employment laws, such as the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA), that revolving door situations where employees attempt to take periods of indefinite leave create an unreasonable burden for employers.[14] This is similar to the situation employers find themselves in under the USERRA in today's world. If the citizen soldier is called to go to war to defend his or her country and way of life, employers reap the benefits just the same as every other citizen. However, with today's U.S. force structure and consequent political and military policy, the citizen soldier is being called for continuous military operations with the cost disproportionately placed on the employer.

The savings in relying heavily on a part-time citizen soldier as opposed to a full-time professional soldier are tremendous. The Guard and Reserves "allow the nation to nearly double its armed forces . . . while accounting for just 8.3% of the defense budget."[15] The government cost savings from using Reservists instead of the professional soldier is analogous to businesses relying on

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9. Major General James P. Czekanski, Remarks at Grissom Air Reserve Base (May 5, 2002).

10. *Id.*

11. Klein & Cilenti, *supra* note 2, at 10.

12. Greg J. Zoroya, *Citizen Soldiers Report Long Tours, Little Support*, U.S.A. TODAY, Jan. 16, 2003, at A1 (quoting Congressman David Hobson).

13. *Id.*

14. *See* Nowak v. St. Rita High Sch., 142 F.3d 999, 1004 (7th Cir. 1998); Monette v. Elec. Data Sys. Corp., 90 F.3d 1173, 1187 (6th Cir. 1996); Rogers v. Int'l Marine Terminals, 87 F.3d 755, 760 (5th Cir. 1996); Tyndall v. Nat'l Educ. Ctrs. Inc., 31 F.3d 209, 213 (4th Cir. 1994).

15. Zoroya, *supra* note 12, at A1.

temporary employees as opposed to salaried employees. However, the burden is not distributed equally but instead placed primarily on the employer of the citizen soldier. The employer is expected not only to continue its operations not knowing when and for how long their employees will be taken from them but also to keep these positions for them when they return. As a matter of policy, the government must have the option of taking its citizens to defend the country and our way of life, but the burden must be fairly distributed. This should require the government to give some type of compensation to the affected employers.

Congress explicitly declared that the purpose of the USERRA "is to encourage non career service . . . by eliminating or minimizing the disadvantages to civilian careers and employment."[16] Congress sought to prohibit discrimination against individuals because of their service in the military.[17] To help accomplish its objectives, Congress differentiated the statute into three major elements: (1) a prohibition on employment discrimination against service members; (2) reemployment rights for persons absent from employment because of military service; and (3) preservation of benefits for persons absent from employment because of military service.[18]

The second element of the USERRA—the reemployment rights, will be the focus of this Note. The legislative history of the USERRA as well as the major provisions of the USERRA that apply to reemployment rights will be addressed in Part I. In Part II, the reemployment provisions and their applicability in current case law will be discussed. Therein, the Note will explain the process of starting a claim and the administrative channels through which a claim might move. The section will then describe the burden of proof in USERRA claims by looking at cases with a showing of discrimination and cases without a showing of discrimination in which the argument for mandatory reemployment is used. Part III of the Note will begin by explaining the difference between an unreasonable accommodation and undue hardship in the ADA. Part III will next discuss two different types of cases under the ADA: (1) cases where the main issue was whether an employee could meet the burden of proof that indefinite leave was a reasonable accommodation; and (2) cases where the employee met this burden, thereby shifting the burden to the employer to prove that providing indefinite leave as an accommodation was undue hardship. Through the discussion of these two types of cases and the cases addressed in Part III, USERRA claims will be compared and contrasted with the ADA cases.

Finally, this Note will offer solutions to the mandatory requirement of reemployment, which many employers consider unreasonable, an undue hardship or both. The solutions will first suggest that legislation is the most effective but least likely solution. The next solution will contain suggestions from the analyzed case law in Part III of the Note suggesting an application of the ADA burden of proof in USERRA cases. The solutions will address that, as a matter of fairness, that the cost of maintaining a large professional force has been

16. 38 U.S.C. § 4301(a)(1) (2003).

17. *Id.* § 4301 (a)(3).

18. Manson, *supra* note 2, at 59 (citing 32 C.F.R. § 104.1 (1998)).

largely externalized and shifted from the government to the employer. Therefore, a remedy of compensation from the government to the employer is necessary. Finally, the solutions will show that a more practical approach may be to draw a reasonableness standard from the FMLA to use as a guideline to determine when and what type of compensation should be required.

I. USERRA

A. History

The first legislation enacted for the benefit of the deployed serviceman occurred during the Civil War when Congress passed legislation suspending any criminal or civil action against federal soldiers while serving in the Union army.[19] Later, during World War I, the army drafted a soldiers' and sailors' relief bill, which became known as the Soldiers' and Sailors' Civil Relief Act of 1918 (SSCRA).[20] The SSCRA ended when a provision in the statute was activated approximately six months after the war had ended.[21] When the country found itself on the brink of World War II over twenty years later, the SSCRA was reenacted to reassure servicemen that the lives they were leaving behind to fight the war would be, to some extent, kept in order.[22] Along with SSCRA, Congress created the Selective Training and Service Act of 1940 (STSA), which first established veterans' reemployment rights.[23] Congress anticipated the need to train a large number of civilians into the small professional military.[24] If no war occurred, these civilians would go back to their civilian occupations after training.[25] If war did break out, they would return to their jobs at the end of their service.[26] During hearings on the proposed legislation, Senator Elbert D. Thomas of Utah expressed the idea "underlying Congress's decision to grant reemployment rights to veterans."[27] Senator Thomas explained that

> [i]f it is constitutional to require a man to serve in the Armed Forces, [sic] it is not unreasonable to require the employers of such men to rehire

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19. Amy J. McDonough et al., *Crisis of the Soldiers' and Sailors' Civil Relief Act: A Call for the Ghost of Major (Professor) John Wigmore*, 43 MERCER L. REV. 667, 669 (1992).

20. *Id.* at 670.

21. *Id*.

22. Fernandez, *supra* note 5, at 869.

23. *Id.*

24. Manson, *supra* note 2, at 56 (citing Selective Training and Service Act of 1940, Pub. L. No. 783, 54 Stat. 885, formerly codified at 50 U.S.C. § 308, repealed by Selective Service Act of 1948, Pub. L. No. 759, 62 Stat. 625).

25. *Id.*

26. *Id*.

27. Judith Bernstein Gaeta, Note, Kolkhorst v. Tilghman*: An Employee's Right to Military Leave Under the Veterans' Reemployment Rights Act*, 41 CATH. U. L. REV. 259, 264 (1991) (citing Office of Veterans' Reemployment Rights, U.S. Dep't of Labor, The Veterans' Reemployment Rights Handbook, at 1-2 (1988)).

> them upon the completion of their service, since the lives and property of the employers as well as everyone else in the United States are defended by such service.[28]

The U.S. Supreme Court agreed with Senator Thomas' belief "when the Court held that an employer should not penalize a veteran who served in the Armed Forces when the veteran returned to his civilian job after an absence for military duty."[29]

In 1948, the STSA was reenacted as the Selective Service Act (SSA) without meaningful changes to veterans' reemployment rights.[30] Shortly thereafter, the SSA was modified and renamed the Universal Military Training and Service Act (UMT).[31] The purpose of the legislation "was to support the conscription-based force management policies that existed"[32] after the Cold War. "In 1967, the UMT was renamed the Military Selective Service Act of 1967 (MSSA)" without the UMT reemployment provisions being changed.[33] "The MSSA was amended in 1968 to give protection to reservists and National Guardsmen against discrimination after their reemployment because of their military" duty.[34] Finally, in 1974, Congress repealed the MSSA by enacting the Vietnam Era Veterans' Readjustment Assistance Act and recodifying the MSSA's provisions.[35] At the end of the Vietnam War, large numbers of service members separated from the military as involvement in Vietnam came to an end.[36] "Additionally, the draft had ended and the nation was transitioning to a peacetime all-volunteer force."[37] "Employment protection was important in luring the potential one-term volunteer . . . and to induce separating members to continue to serve in the [Guard and] reserve forces."[38]

Congress amended the reemployment legislation several times and finally ended up with the present reemployment rights legislation, Uniformed Services Employment and Re-employment Rights Act of 1994 (USERRA).[39] The USERRA, along with the end of the Cold War, which caused another draw down

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28. *Id*. at 264 n.26 (quoting remarks of Sen. Thomas, 123 CONG. REC. 10, 573 (1940)).

29. *Id.* at 264 (citing Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 284 (1946)).

30. *Id.* (citing Selective Service Act of 1948, Pub. L. No. 759, 62 Stat. 604).

31. *Id*. (citing 1951 Amendments to the Universal Military Training and Service Act, Pub. L. No. 51, §§ 1(a), 3(w), 65 Stat. 75, 86-87 (1951) (formerly codified at 50 U.S.C. § 459 (1948)).

32. Manson, *supra* note 2, at 56.

33. Gaeta, *supra* note 27, at 265 (citing Military Selective Service Act of 1967, Pub. L. No. 90-40, § 1(a), 81 Stat. 100).

34. *Id*. (citing Armed Forces, Reserve Components, Pub. L. No. 90-491, § 1(B), 82 Stat. 790 (1968)).

35. *Id.* (citing 38 U.S.C. §§ 2011-2026 (1976)).

36. Manson, *supra* note 2, at 57.

37. *Id*.

38. *Id*. (citing S. Rep. No. 93-907, at 110 (1974)).

39. *Id.* at 57-58.

of active duty forces, combined to bring about another shift in national defense policy.[40] Furthermore, in the post-Cold War era, the United States faces different security threats and geographic positioning as fewer military personnel are stationed at overseas military bases than before.[41] The result of these facts is that both Reserve and Guard personnel are called on to deploy for varying and often indefinite periods of time.[42]

B. Reemployment Rights Provisions

Under the USERRA, a person covered includes one "who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service,"[43] "on a voluntary or involuntary basis in a uniformed service under competent authority."[44] Virtually all areas of military service are covered, including "active duty, active duty for training, initial active duty for training, inactive duty training, full-time Natural Guard duty," and absences for fitness examinations.[45] USERRA covers all employers in the United States regardless of how many employees they have and whether they are a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities.[46]

USERRA is basically separated into three sections, the first two of which this paper will address. The first prong of the USERRA "is directed at prohibiting discrimination against . . . service members."[47]

> The presence of discrimination against the service member is detected when his military membership, service, or application for service is deemed a "motivating factor" in an employer's negative action, absent a showing by the employer that the actions would have taken place against that employee regardless of any such connection to military service.[48]

The USERRA states the reemployment rights in its second prong.[49] This section defines reemployment rights and requirements, defense for employers and the situations when they may refuse reemployment, and the returning employee's reemployment requirements adjusted for his or her length of duty.[50]

An employee who is called for military duty is entitled to re-employment

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40. *Id*. at 58.
41. *Id*.
42. *Id.*
43. 38 U.S.C. § 4311(a) (2003).
44. *Id.* § 4303(13).
45. *Id.*
46. Manson, *supra* note 2, at 60 (citing 38 U.S.C. § 4303(4)(A)(1) (1998)).
47. Fernandez, *supra* note 5, at 870 (citing Manson, *supra* note 2, at 59).
48. *Id.* (citing 38 U.S.C. § 4311 (2001)).
49. 38 U.S.C. § 4312 (2003).
50. *See* Fernandez, *supra* note 5, at 870 (citing 38 U.S.C. § 4312 (1998)).

> if (1) the employee has given advance written or verbal notice to the employer, unless circumstances make it unreasonable to do so; (2) the cumulative length of absence from employment with that employer, including prior service absences, does not exceed five years, with certain notable exceptions, including service in a time of war or national emergency; and (3) the employee promptly reports to work or submits an application for re-employment within 14 or 90 days after completion of service, depending on the length of service.[51]

"An employee must also submit documentation"[52] if requested by the employer "to establish that the application is timely, that the service limitations have not been exceeded, and that the employee's separation from military service was not dishonorable."[53]

If the employee meets the above conditions and is entitled to reemployment, federal regulations require "that the returning service member is entitled to the position of civilian employment that he or she would have attained had he or she remained continuously employed by that civilian employer."[54] This provision in the USERRA is known as the "escalator" principle.[55] In the first case concerning veterans' reemployment rights decided by the Supreme Court after World War II, *Fishgold v. Sullivan Drydock & Repair Corp.*, the Court observed that the individual "does not step back on the seniority escalator at the point where he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war."[56] Today, the escalator principle is subject to a reasonableness standard, where the benefit sought by the returning service member is protected if it would have accrued with reasonable certainty had the employee continued to be employed, and if the benefit was not subject to a significant contingency.[57] "Another Supreme Court decision used a [similar] 'but for' analysis, holding that the returning employee is guaranteed a status, which he was reasonably certain to acquire, but for his absence due to military service."[58]

There are limitations on the requirements of reemployment, however. An employer can avoid reemploying a citizen soldier if:

> (1) the employer's circumstances have so changed that they make re-employment unreasonable; (2) re-employment would impose undue

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51. Klein & Cilenti, *supra* note 2, at 11 (citing 38 U.S.C. §§ 4312(a)(2), 4312(e)(C), (D) (1998); Sykes v. Columbus & Greenville Ry., 117 F.3d 287, 296-97 (5th Cir. 1997)).

52. *Id.* (citing 38 U.S.C. § 4312(f) (1998)).

53. *Id.*

54. Fernandez, *supra* note 5, at 873 (citing 32 C.F.R. § 104.3 (2001)).

55. Klein & Cilenti, *supra* note 2, at 12.

56. Manson, *supra* note 2, at 71 (citing Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 284-85 (1946)).

57. *Id*. at 72 (citing Alabama Power Co. v. Davis, 431 U.S. 581, 589 (1977)).

58. Fernandez, *supra* note 5, at 873 (citing Tilton v. Mo. Pac. R.R. Co., 376 U.S. 169, 181 (1964)).

> hardship on the employer; (3) the position the employee leaves is for a brief, non-recurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period; or (4) the employer had legally sufficient cause to terminate the employee at the time he/she left for service.[59]

The burden of proof as to these defenses is on the employer who would not have to allow the service member employee to return to that job if the employer has a successful defense.[60]

The "USERRA [also] requires employers to use reasonable efforts to reemploy those service members in that position they would have been reasonably certain to attain, but for the absence caused by such military duty."[61] If the returning service member is unqualified for the position to which he returns, the employer must use reasonable efforts to train that individual.[62] Congress added this reasonable accommodation as a provision to help in "'eliminating or minimizing the disadvantages' to civilian careers."[63] The USERRA approach of reasonable efforts is similar to the ADA provision of reasonable accommodations.[64] In either Act, "[t]hese reasonable efforts or reasonable accommodations are exhausted . . . if the employer can produce evidence that the reemployment or reasonable efforts/accommodations impose an undue hardship upon the employer."[65] "These Acts define 'undue hardship' as actions requiring significant difficulty or expense to the employer considering such factors as the nature and cost of the reasonable efforts or accommodations and the overall resources of the business, facilities, and type of operations involved."[66]

The USERRA and the ADA define undue hardship identically and provide "the same factors for the determination of its presence except that the USERRA substitutes the term 'employer' for 'covered entity.'"[67] For both statutes, "the measure of an undue hardship may be equated to the financial costs associated with the reasonable efforts or accommodations in relation to the overall financial resources of, persons employed at, effect of expenses and resources, or the impact otherwise of the action on the facility's operation."[68]

A difference between the USERRA and other employment discrimination

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59. Klein & Cilenti, *supra* note 2, at 11 (citing 38 U.S.C. § 4303(15) (2000); 38 U.S.C. § 4312(d)(1)(C) (2000); 42 U.S.C. § 12111(10)(A), (B)(i-iv) (1994 & Supp. V 1999); Jordan v. Jones, 84 F.3d 729, 732 (5th Cir. 1996)).

60. Manson, *supra* note 2, at 70 (citing 38 U.S.C. § 4312(d)(2) (1998)).

61. Fernandez, *supra* note 5, at 873 (citing 38 U.S.C. § 4313(a)(1)(A), (a)(2)(A) (2001)).

62. *Id*. at 874 (citing 38 U.S.C. § 4313(a)(1)(B), (a)(2)(B) (2001)).

63. *Id*. (quoting 38 U.S.C. § 4301(a)(1) (2001)).

64. *Id*. (citing 42 U.S.C. § 12111(9) (2001)).

65. *Id*. (citing 38 U.S.C. § 4312(d)(1)(B) (2001); 42 U.S.C. § 12112(b)(5)(A) (2001)).

66. *Id.* (citing Manson, *supra* note 2, at 75).

67. *Id.* at 882 (citing 38 U.S.C. § 4303(4)(a) (2001); 42 U.S.C. § 12111(10)(B)(iii) (2001)).

68. *Id*. (citing 38 U.S.C. § 4303(15)(B) (2001); 42 U.S.C. § 12111(10)(B)(ii) (2001)).

statutes is that the USERRA provides a person who is reemployed after a long-term military leave with short-term protection against discharge "except for cause."[69] This provision gives "an otherwise 'at-will' employee the equivalent of contractual protection against termination."[70] This protection covers the serviceman "for (1) one year after the date of re-employment, if military service was more than 180 days, and (2) 180 days after the date of re-employment, if military service was more than 30 days but less than 181 days."[71]

II. CURRENT APPLICATION

A. The Process of Enforcing USERRA

Before seeing how the USERRA is applied, it is helpful to understand how an employee begins the process of invoking the USERRA. Citizens who feel their rights have been violated under the USERRA can "file a complaint with the Veterans' Employment Training Service (VETS) of the U.S. Department of Labor."[72] The Secretary of Labor can use a subpoena to require "the attendance and testimony of witnesses and production of documents relating to any matter under investigation."[73] If the Secretary of Labor decides that a violation did occur, the Secretary will first make an effort to reach a "voluntary resolution" with the employer so that USERRA requirements are satisfied.[74] If the VETS does not settle the complaint, the individual may present the complaint to the Attorney General for potential court action.[75] "The statute does not mandate, however, that the service member proceed through either the Secretary of Labor or the Attorney General."[76] Therefore, unless the Attorney General agrees to prosecute a case, an employee can commence a private action against the employer under the USERRA at any time.[77]

When viewing how the USERRA is applied, one must keep in perspective the first two sections of the Act. The first section focuses on the discrimination by the employer against the employee. The second section deals with the reemployment rights of the employee regardless of discrimination. Therefore, the key to the application of the USERRA is to understand the burden of proof in relation to these two different sections of the USERRA.

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69. Klein & Cilenti, *supra* note 2, at 10.

70. *Id*. at 14.

71. *Id*. (citing 38 U.S.C. § 4316(c) (2000)).

72. Thomas E.J. Hazard, *Employers' Obligations Under the Uniformed Services Employment and Reemployment Rights Act*, 31 COLO. LAW. 55, 58 (citing 38 U.S.C. §§ 4321-4322 (2000)).

73. Klein & Cilenti, *supra* note 2, at 17 (citing 38 U.S.C. § 4326 (2000)).

74. *Id.*

75. Hazard, *supra* note 72, at 58 (citing 38 U.S.C. § 4323(a)(1) (2000)).

76. Klein & Cilenti, *supra* note 2, at 17 (citing 38 U.S.C. § 4323(a)(2) (2000)).

77. *Id.*

B. Burden of Proof with Showing of Discrimination

The USERRA was enacted, to a large extent, to overrule the U.S. Supreme Court's decision in *Monroe v. Standard Oil Co.*[78] In *Monroe*, the Court held that under the Veterans' Reemployment Rights Act of 1968, an employer violated the veterans' rights laws only where the employee could show that his Reserve status was the "sole motivation" for the adverse action taken against the employee.[79] The USERRA overruled *Monroe* by stating that a violation occurs even when a person's military service is not the sole factor but is a "motivating factor" in the discriminatory action.[80]

The USERRA applies the standard of proof established in *National Labor Relations Board v. Transportation Management Corp*.[81] The employee has the initial burden of showing by a preponderance of the evidence that the employee's military service was "a substantial or motivating factor in the adverse [employment] action" under the "but for" test.[82] The employee does not need to show that military status was the "sole" reason for the employment action, only that it was one of several "factors that a truthful employer would list if asked the reasons for its decision."[83] The employer's discriminatory motivation or intent may be found by either direct or circumstantial evidence.[84]

If an employee demonstrates by direct evidence that his military service was a substantial or motivating factor in the employer's action, then he proves his prima facie case, and the burden shifts to the employer.[85] If an employee does not have direct evidence but can demonstrate discrimination indirectly through relevant circumstantial evidence, he can still establish his prima facie case.[86] When using circumstantial evidence to establish a claim of prohibited employment discrimination, an employee

> must first establish a prima facie case by showing that: (1) he was a member of a protected group; (2) he was similarly situated to an individual who was not a member of his protected group; and (3) he was treated more harshly or disparately than the individual who was not a member of his protected group.[87]

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78. 452 U.S. 549 (1981).

79. *Id*. at 559. *See also* 38 U.S.C. § 2021-2026 (2000).

80. Gummo v. Vill. of Depew, 75 F.3d 98, 106 (2d Cir. 1996). *See also* 38 U.S.C. § 4311(c)(1) (2000).

81. 462 U.S. 393, 403 (1983).

82. Leisek v. Brightwood Corp., 278 F.3d 895, 899 (9th Cir. 2002) (quoting *NLRB*, 462 U.S. at 401).

83. Kelley v. Me. Eye Care Assocs., 37 F. Supp. 2d 47, 54 (D. Me. 1999) (citing Robinson v. Morris Moore Chevrolet-Buick, Inc., 974 F. Supp. 571, 575 (E.D. Tex. 1997)).

84. Sheehan v. Dep't of Navy, 240 F.3d 1009, 1014 (Fed. Cir. 2001).

85. Luecht v. Dep't of Navy, No. 00-3289, 2000 U.S. App. LEXIS 27917, at *5 (Fed. Cir. Nov. 7, 2000).

86. *Id.*

87. *Id.* at *5-*6 (citing Coleman v. Dep't of Air Force, 79 F.3d 1165 (Fed. Cir. 1996)).

"If a prima facie case is shown, the burden then shifts" to the employer, who must provide evidence that supports the existence of a nondiscriminatory reason for taking the action it did.[88]

The burden of proof moves to the employer once the employee establishes his or her prima facie case. The employer must prove by a preponderance of the evidence, "that legitimate reasons, standing alone, would have induced it to take the same adverse action."[89] Thus, under the USERRA an employer may avoid liability if it can demonstrate by a preponderance of the evidence that it took the adverse action only for a valid reason, or if an invalid reason affected the adverse action, the employer must show it would have taken the same action in the absence of that invalid reason.[90] The burden then returns to the employee to show the reasons given by the employer are a ploy for discrimination.[91]

For instance, in *Hill v. Michelin North America, Inc*., the court explained the standard of proof and allocation of burdens at work in USERRA litigation.[92] The employee alleged that Michelin disapproved of his military Reserve obligations and punished him by transferring him to a job with irregular work schedules and long workdays and then ultimately terminating his employment. The employee asserted that his supervisor looked distraught when the employee informed him of his Reserve duty. Michelin maintained that the employee was moved to the position to accommodate his Reserve duties and that the employee was fired for falsifying his timecard. Michelin demonstrated that it terminated all employees who falsified their timecards, regardless of their participation in the Reserves or military.[93] The court found that the evidence presented by the employee of the supervisor's reaction may have been enough to meet his initial burden of proof but was not enough to overcome the employer's response.[94]

Another example of burden shifting with regard to discrimination is the case of *Leisek v. Brightwood Corp*.[95] In *Leisek*, the court found that Leisek had met his prima facie burden by bringing forth evidence from which a reasonable fact finder could deduce that Leisek's Guard status was a "motivating factor" in Brightwood's decision to end his employment.[96] The USERRA allows the discriminatory motivation of the employer to be inferred from a variety of factors such as:

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88. *Id.* at *6.

89. *Sheehan*, 240 F.3d at1013 (citing Nat'l Labor Relations Bd. v. Transp. Mgmt. Corp., 462 U.S. 393 (1983)). *See also* Kelley v. Me. Eye Care Assocs., 37 F. Supp. 2d 47, 54 (D. Me. 1999).

90. *See* Gummo v. Vill. of Depew, 75 F.3d 98, 106 (2d Cir. 1996); *see also* Leisek v. Brightwood Corp., 278 F.3d 895, 899 (9th Cir. 2002); Robinson v. Morris Moore Chevrolet-Buick, Inc., 974 F. Supp. 571, 576 (E.D. Tex. 1997).

91. *Id.*

92. 252 F.3d 307 (4th Cir. 2001).

93. *Id.* at 314.

94. *Id.*

95. *Leisek*, 278 F.3d at 895.

96. *Id*. at 900.

> 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.[97]

The evidence in *Leisek* provided for an inference that Leisek's military status was a "motivating factor" in Brightwood's decision to end his employment because of the significant number of absences from work caused by Leisek's participation in the Guard.[98] "The record include[d] testimony supporting an inference that Leisek's Guard-duty absences . . . had created an increased burden for Brightwood and that it had proposed a plan that would restrict Leisek's future Guard-related absences to a period of three weeks," and that those absences would be taken away from his vacation time.[99] In addition, Leisek was told that Brightwood had ordered him to stop volunteering for ballooning events and decided not to honor any future Guard orders, except for those that it already had been given.

The burden then shifted to Brightwood, who claimed that the evidence established the affirmative defense that it would have ended Leisek's employment for his unauthorized absences, regardless of his Guard status or conduct.[100] The employer has the burden of the proof with respect to this affirmative defense.[101] There was evidence that Brightwood's corporate guidelines made unexcused absences a basis for ending employment.[102] "However, even though Leisek's unexcused absences would be a legitimate reason for terminating his employment, Brightwood ha[d] not established . . . that it would have terminated Leisek even if he had not been active in the Guard."[103]

C. Burden of Proof Without a Showing of Discrimination

In situations where an employee leaves for military duty, most courts find that the employer has a nearly absolute obligation to reemploy the returning serviceman under the second prong of the USERRA. If the returning serviceman can meet the burden of proving the elements of 38 U.S.C. § 4312, the employer must reemploy its former employee.[104] There is no burden shifting exercise such

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97. *Id.*

98. *Id*.

99. *Id*.

100. *Id.*

101. Sheehan v. Dep't of Navy, 240 F.3d 1009, 1014 (Fed. Cir. 2001).

102. *Leisek*, 278 F.3d at 900.

103. *Id*.

104. Fernandez, *supra* note 5, at 871. *See also* 38 U.S.C. § 4312 (2000); Klein & Cilenti, *supra* note 2, at 11.

as in situations when there is a showing of discrimination.

However, in the case of *Curby v. Archon*,[105] the court explained that the proper statutory interpretation of the USERRA was to look at the specific statutory language and design of the statute as a whole.[106] The court found that § 4311 has a very broad scope that covers discrimination in initial employment, reemployment, retention in employment, and promotion, whereas § 4312 has a very narrow scope addressing only reemployment after a leave of absence for military service.[107] The court saw § 4312 as a subsection of § 4311 and "therefore conclude[d] that a person seeking relief under § 4312 must meet the discrimination requirement contained in § 4311."[108] In other words, the court found that the returning servicemen must show that the military service was a "motivating factor" in the termination of employment and then show the elements of § 4312.

Most courts have not agreed with the interpretation of the court in *Curby* and have interpreted § 4312 separately from § 4311. For instance, in *Wrigglesworth v. Brumbaugh*,[109] Wrigglesworth was forced to present his resignation to his employer while on military leave.[110] The employer refused to permit him to retain his previous level of seniority or to advance him to the level he would have reached but for his absence when he returned. The court held this to be a violation of § 4312 by reasoning that "[S]ection 4311 and Section 4312 are independent, with only Section 4311 requiring a finding of discriminatory intent."[111] The court found that the House Report and other legislative history "make[] clear that the purpose of Section 4312 was to provide an automatic right of re-employment different from the right described in Section 4311" and not dependent on proof of discrimination.[112] Furthermore, the court in *Wrigglesworth* distinguished its case from *Curby* by claiming that the facts of the two cases were different.[113] *Curby* dealt with an employee fired under the "just cause" provision under 38 U.S.C. § 4316(c) for gross misconduct. In *Wrigglesworth*, there was no application of the "just cause" provision. The court noted that the *Curby* court's interpretation of the relationship between § 4311 and § 4312 was dicta because the decision rested on the "just cause" provision.[114]

The court in *Wrigglesworth* also addressed the collective bargaining agreement between the employee and the employer waiving reemployment rights under the USERRA. The court explained that "the Supreme Court's decision in

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105. 216 F.3d 549 (6th Cir. 2000).

106. *Id.* at 557.

107. *Id.*

108. *Id.*

109. 121 F. Supp. 2d 1126 (W.D. Mich. 2000).

110. *Id.* at 1128-29.

111. Jordan v. Air Prods. & Chems., Inc., 225 F. Supp. 2d 1206, 1208 (C.D. Cal. 2002) (quoting *Wrigglesworth*, 121 F. Supp. 2d at 1135-36).

112. *Wrigglesworth*, 121 F. Supp. 2d at 1136.

113. *Id*. at 1137.

114. *Id*.

Fishgold made clear that a [sic] employment decision denying re-employment rights cannot be cloaked in the language of a collective bargaining agreement."[115]

In another case, *Jordan v. Air Products and Chemicals, Inc.*,[116] the employer attempted the same type of defense as in *Wrigglesworth*, by trying to place the burden of proof on the employee to show that the termination of employment was a motivating factor. However, the court disagreed with that burden shifting process for slightly different reasons. Jordan had given his employer, Air Products, advance notice that he would be absent from his employment for approximately seventeen days due to his service in the Reserves.[117] Shortly after reporting back to work from his Reserve tour, Jordan was notified by Air Products that his employment was terminated, effective immediately. Jordan brought suit against Air Products for violation of the USERRA. Relying on *Curby v. Archon*, the defense claimed that the employee is required to show not only a failure to reemploy, but also that the person's military service was a motivating factor in the employer's decision under § 4312.[118] The court disagreed, finding that § 4312 creates an "unqualified right to reemployment to those who satisfy the service duration and notice requirements."[119] As the plain language of the statute makes clear, "this benefit is subject only to the defenses enumerated in § 4312, i.e., reemployment is unreasonable, impossible, or creates an undue hardship."[120]

The court explained that once the plaintiff is reemployed under § 4312, the service person is protected by §§ 4316(c) and 4311.[121] "Section 4316 provides that a person who serves for over thirty days and is reemployed under the USERRA shall not be discharged from such employment except for cause for certain time periods."[122] Under § 4311, the decision to terminate cannot be motivated by the employee's "membership application or participation in the armed services."[123]

The right to reemployment is generally considered absolute, based upon the prevailing precedent that the legislation is to be "liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation."[124] However, there is a very limited exception when the reemployment is considered unreasonable or impossible. This is considered an affirmative defense for which the employer has the burden of proof.[125] For

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115. *Id.* at 1138 (citing Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946)).
116. 225 F. Supp. 2d at 1206.
117. *Id.*
118. *Id*. at 1207.
119. *Id*. at 1208.
120. *Id*.
121. *Id.*
122. *Id.*
123. *Id.* at 1208-09.
124. Boone v. Lightner, 319 U.S. 561, 575 (1943).
125. Wrigglesworth v. Brumbaugh, 121 F. Supp. 2d 1126, 1136 (W.D. Mich. 2000).

instance, in *Davis v. Halifax City School System*,[126] the court held that the reemployment of an employee is considered unreasonable "where [the] reinstatement would require creation of a useless job or where there has been a reduction in the work force that reasonably would have included the veteran."[127] Nevertheless, the burden of proof required by the courts, in all practical purposes, has proven to be almost insurmountable by the employer.

III. USERRA AND ADA COMPARISON

Under the USERRA, as under the ADA, an "employer generally must make reasonable efforts to accommodate the disability or to qualify the employee for the relevant position, if service member/employee returns from military duty with a disability or is otherwise unqualified for the job the employee left."[128] The right to reemployment is almost absolute. However, like under the ADA, an employer is not required to reemploy a person or to accommodate or qualify the person if doing so would impose an undue hardship on the employer or is unreasonable.[129] This is an idea borrowed from federal disability law.[130] The USERRA identifies undue hardship in the same way as the ADA defines the concept, that is, "actions requiring significant difficulty or expense."[131] Both statutes list the following factors to be considered when determining undue hardship: "the nature and cost of the action needed . . . the overall financial resources of the facility or facilities involved . . . the overall financial resources of the employer . . . and . . . the type of operation or operations of the employer."[132] The burden of proving undue hardship under both statutes is on the employer.[133] In both contexts, the gauge for determining undue hardship is to compare the financial costs associated with the reasonable efforts or accommodations in relation with the overall financial resources of, persons employed at, effect of expenses and resources, or the impact otherwise of the action on the facility's operation.[134]

There are ADA cases where the employees' absences from the job were similar to that under the USERRA—unscheduled and unpredictable. Specifically, the ADA has been applied to cases where the employees requested indefinite leave as a reasonable accommodation that would make them an otherwise qualified employee. In determining that it would be unreasonable to require employers to accommodate such absences, courts have focused not only on the frequency of these absences, but also on the burden to employers of

126. 508 F. Supp. 966 (E.D.N.C. 1981).
127. *Wrigglesworth*, 121 F. Supp. 2d at 1136 (citing *Davis*, 508 F. Supp. at 969).
128. Manson, *supra* note 2, at 74-75.
129. 38 U.S.C. § 4312(d)(1)(A), (B), (C) (2000).
130. 42 U.S.C. § 12112(b)(5)(A) (1994 & Supp. 1999).
131. 38 U.S.C. § 4303(15) (2000); 42 U.S.C. § 12111(10) (1994 & Supp. V 1999).
132. 38 U.S.C. § 4303(15) (2000); 42 U.S.C. § 12111(10) (1994 & Supp. V 1999).
133. 38 U.S.C. § 4312(d)(2) (2000); 42 U.S.C. § 12112(b)(5)(A) (1994 & Supp. V 1999).
134. 38 U.S.C. 4303(15)(B) (2000); 42 U.S.C. 12111(10)(B)(ii) (1994 & Supp. V 1999).

creating provisions at the last minute to cover for these absent employees.[135] Cases interpreting the federal statutes of the Rehabilitation Act and the ADA agree that chronic and excessive absenteeism need not be accommodated.

This section will first address the burden of proof in ADA cases that consist of the plaintiff proving an accommodation is reasonable and the employer proving that the accommodation would be an undue hardship. The next part of this discussion will explain the different ways indefinite leave is handled as an issue with respect to a reasonable accommodation in the case law. The final part of this section will discuss undue hardship with respect to ADA in case law. This section will explain the prevailing opinion that indefinite leave of absence is not "reasonable" because it does not enable a disabled person to work and the cost to any employer to train and pay a replacement worker to fill the same position or to continue operations short-handed for an indefinite period of time constitutes an undue burden on the employer. Thus, an indefinite leave of absence is not an "accommodation."

A. Unreasonable Versus Undue Hardship—the Burden of Proof

This subsection focuses on the burden of proof for ADA cases in which the disabled employee contends that indefinite leave is a reasonable accommodation and the employer contends that the accommodation is unreasonable or an undue hardship. Under the USERRA, after the initial elements required for reemployment have been met, the burden shifts to the employer to prove undue hardship.[136] By contrast, under the ADA, the disabled employee must meet the burden of proof that a reasonable accommodation exists before the burden shifts to the employer.

The Supreme Court recently agreed with holdings by lower courts that an employee need only show that an "accommodation" seems reasonable on its face.[137] The accommodation must be feasible for the employer and be objectively reasonable. An accommodation is reasonable only if its costs are not clearly disproportionate to the benefits it will produce.[138] The employee has the burden of production and can satisfy the burden of production by showing a plausible accommodation.[139]

After the employee makes the initial showing, the burden falls on the employer to show that the particular accommodation would be either unreasonable or cause the employer to suffer an undue hardship.[140] The employee makes his showing based on generality, while the employer must show special circumstances that demonstrate undue hardship in its particular

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135. *See* Jackson v. Veterans Admin., 22 F.3d 277, 279 (11th Cir. 1994).

136. *See* 38 U.S.C. § 4312 (2003).

137. *See* U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 401-02 (2002).

138. Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 138 (2d Cir. 1995).

139. *Id.*

140. *Id.*

circumstance.[141] The employer has far greater access to information than the typical employee, both about its own organization and about the practices and structure of the industry as a whole.[142] When the burden is passed to the employer, the difference between the burden of persuasion on the unreasonableness of the accommodation and demonstrating that the accommodation imposes an undue hardship becomes blurred.[143]

The Supreme Court's opinion in *Barnett* could be construed as ambiguous when attempting to reconcile the difference between the Second and Seventh Circuits.[144] However, the *Barnett* opinion could be read to suggest a practical way of reconciling the phrases "reasonable accommodation" and "undue hardship" and their burdens of proof. The Supreme Court explained that the terms do not mean the same thing:[145]

> a demand for an effective accommodation could prove *unreasonable* because of its impact, not on business operations, but on fellow employees—say because it will lead to dismissals, relocations, or modification of employee benefits to which an employer, looking at the matter from the perspective of the business itself, may be relatively indifferent.[146]

The undue hardship inquiry, on the other hand, focuses on the hardships imposed in the context of the particular employer's operations rather than the "general" reasonable standard for burden of proof required by the employee for reasonable accommodation.[147]

The burden on the employer to prove undue hardship consists of performing a cost/benefit analysis.[148] The employee meets his burden of production by identifying an accommodation that facially achieves a rough proportionality between costs and benefits.[149] However, an employer seeking to meet its burden of persuasion of reasonableness, accommodation, and undue hardship must undertake a more advanced analysis by arguing in the terms of § 12111(10).[150] In attempting to meet its burden of persuasion in establishing an affirmative defense of undue hardship, an employer does not have to analyze the costs and benefits of the proposed accommodation with "mathematical precision."[151] A common sense balancing of costs and benefits in light of the factors listed in the

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141. *Barnett*, 535 U.S. at 401-02.
142. *Borkowski,* 63 F.3d at 137.
143. *Id.*
144. *Barnett*, 535 U.S. at 399-400.
145. *Id.*
146. *Id.* at 400-01 (emphasis added).
147. Barth v. Gelb, 2 F.3d 1180, 1187 (D.C. Cir. 1993).
148. *Borkowski*, 63 F.3d at 139.
149. *Id*.
150. *Id*.
151. *Id*. at 140.

statute and regulations is all that is needed.[152]

B. Indefinite Leave and Unreasonable Accommodation

1. Attending Work Regularly Is an Essential Function.—Some employers have attacked the issue of indefinite leave in ADA cases by arguing that being able to attend work regularly is an essential function of employee's job. An employer may argue that if an employee must go on indefinite leave, the employee cannot attend work regularly and, therefore, cannot perform the essential function of the job, thereby making the employee an unqualified individual. For instance, in *Tyndall v. National Education Centers Inc*., the court held that because the employee's attendance problems rendered her unable to fulfill essential functions of her job and these problems occurred even with reasonable accommodations, she was not a qualified individual with a disability.[153] In that case, an employee worked for the employer in a teaching position, and while her performance was adequate, she was frequently absent due to her medical condition of lupus. In its holding, the court reasoned that an employee who does not come to work cannot perform any of her job functions, whether they are essential or otherwise.[154] Even an employee whose job performance is more than adequate when she is working will not be considered qualified for the job unless the employee is also willing and able to come to work on a regular basis.[155]

In *Nowak v. St. Rita High School*,[156] the court also held that regular attendance was an essential function of being a teacher. In *Nowak*, an employee had taught for over twenty-five years when he started having medical problems and missed sixty-five days. The employee worked ten days the next school year, and in the subsequent year the employee did not work at all. Because of the employee's extended illness and continual absence from the classroom, school administrators decided to terminate his employment. The court found that prior to his termination, Nowak was absent from his teaching position for more than eighteen months.[157] The court explained that "[t]he ADA does not require an employer to accommodate an employee who suffers a prolonged illness by allowing him an indefinite leave of absence."[158] Therefore, the court stated that Nowak was not a qualified individual with a disability because the federal law did not mandate that employers had to give leaves of absence to employees with

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152. *Id*.

153. 31 F.3d 209, 213-14 (4th Cir. 1994).

154. *Id.* at 213.

155. *Id.*

156. 142 F.3d 999, 1003 (7th Cir. 1998).

157. *Id*. at 1003-04.

158. *Id*. (citing Rogers v. Int'l Marine Terminals, Inc., 87 F.3d 755, 759 (5th Cir.1996)) (stating "that nothing in the ADA requires an employer to accommodate an employee with an indefinite leave of absence and that because the plaintiff could not attend work, he was not a 'qualified individual with a disability' under the ADA").

prolonged illnesses.[159]

Under the USERRA, an employer does not have the option of arguing that the employee cannot do the job because of a lack of attendance and is therefore not qualified. The USERRA makes it impossible for an employee's military service to be a motivating factor in any termination of employment.[160] For an employer to argue against the statutory right of the employee to be reemployed, the employer can only argue the affirmative defense of undue hardship.[161] The employer cannot argue that missing work makes the employee unqualified. If the employee is not qualified to perform the duties in which he or she would have been employed when the employee returns from duty, the employer must make reasonable efforts to qualify the person for the new position.[162] Thus, the employer must provide retraining or upgrade training if the skills or technology are different when the employee returns from military duty. If those qualification efforts fail, then the employee must be returned to the position held on the date the military service began or "a position of like seniority, status and pay."[163]

2. Indefinite Leave Is Not a Reasonable Accommodation Under ADA.—If an employer unsuccessfully argues that indefinite leave makes an employee unqualified, then the employer can argue that indefinite leave is not a reasonable accommodation. In *Rogers v. International Marine Terminals, Inc.*, the court found that the employee was not a qualified employee under the ADA because he was not able to attend work at the time he was terminated, and the employer was not required to make a reasonable accommodation in the form of an indefinite leave of absence.[164] Rogers was employed as a mechanic who took paid sick leave for the treatment of persistent pain, swelling, and other problems in his right ankle. After using all his sick leave, Rogers received a year of disability benefits pursuant to a disability plan of the employer. The court found that Rogers remained unavailable from January 1993 to December 1993, and because Rogers could not attend work, he was not a "qualified individual with a disability" under the ADA.[165] The court agreed with several other courts that recognized "an essential element of any . . . job is an ability to appear for work . . . and to complete assigned tasks within a reasonable period of time."[166] Moreover, the court found that Rogers could not demonstrate that the employer could reasonably accommodate his purported disability.[167] In a similar case, the Fourth Circuit explained, "Nothing in the text of the reasonable accommodation provision requires an employer to wait an indefinite period for an

159. *Id.* at 1004.
160. *See* Klein & Cilenti, *supra* note 2, at 11.
161. *See id.* at 11-12.
162. *See* 38 U.S.C. § 4313(a)(1)(B) (2000).
163. *See id.* § 4313(a)(2)(B).
164. 87 F.3d 755 (5th Cir. 1996).
165. *Id*. at 759.
166. *Id*. (citing Carr v. Reno, 23 F.3d 525, 530 (D.C. Cir. 1994)).
167. *Id*.

accommodation to achieve its intended effect."[168] The court reasoned

> [a] reasonable accommodation is by its terms most logically construed as that which presently, or in the immediate future, enables the employee to perform the essential functions of the job in question. . . . [R]easonable accommodation does not require [an employer] to wait indefinitely for [the employee's] medical conditions to be corrected.[169]

In *Monette v. Electronic Data Systems Corp.*, the Sixth Circuit held that employers are "under no duty to keep employees on unpaid leave indefinitely until [a] position opens up."[170] In this case, Monette was a customer services representative for EDS who became injured delivering audio and visual equipment. Monette requested indefinite medical leave and received full pay and benefits for the next seven months. Monette proposed as a reasonable accommodation that the employer should have kept him on unpaid medical leave indefinitely until another customer service representative or receptionist position opened up. In holding for the employer, the court explained that employers simply are not required to keep an employee on staff indefinitely in the hope that some position may become available some time in the future.[171]

A few courts have found that an employee's request for an extended leave of absence could be a reasonable accommodation. For instance, in *Criado v. IBM Corp.*, the court upheld a jury verdict finding that IBM had violated the ADA by firing an employee who requested temporary leave to receive treatment for depression.[172] Holding that Criado's request for leave was a reasonable accommodation and did not unduly burden IBM,[173] the court recognized that a leave of absence for medical treatment may constitute a reasonable accommodation turning on the facts of the case.[174] The court found that the employer's unpaid leave policies were evidence that the employer would not be unduly burdened and could reasonably accommodate the employee's request.[175]

Another case in which a court found indefinite leave to be a reasonable accommodation is *Cehrs v. Northeast Ohio Alzheimer's Research Center*.[176] In *Cehrs*, an employee suffered from pustular psoriasis and psoriatic arthritis and could not work. The employer terminated her for allegedly failing to complete the paperwork to extend her leave of absence. The court held that an issue of fact existed as to whether granting medical leave would have unduly burdened the

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168. Myers v. Hose, 50 F.3d 278, 283 (4th Cir. 1995).

169. *Id.*

170. 90 F.3d 1173, 1187 (6th Cir. 1996) (citing 42 U.S.C. § 12111(9)(A-B) (1994 & Supp. V 1999)).

171. *Id*.

172. 145 F.3d 437, 443 (1st Cir. 1998).

173. *Id*.

174. *Id*. at 443.

175. *Id*. at 444.

176. 155 F.3d 775 (6th Cir. 1998).

defendant or would have been a reasonable accommodation under the ADA.[177] The court contended that the employer never bears the burden of proving that the accommodation proposed by an employee is unreasonable, and it would impose an undue burden upon the employer if the a presumption existed that uninterrupted attendance is an essential job requirement.[178] The court explained that if an employer cannot show that an accommodation unduly burdens it, then there is no reason to deny the employee the accommodation.[179] It reasoned that Congress has already determined that uninterrupted attendance in the face of a family medical emergency is not a necessary job requirement and does not unduly burden employers.[180] Therefore, the *Cehrs* court concluded that there is no presumption that uninterrupted attendance is an essential job requirement, and it found that a medical leave of absence can constitute a reasonable accommodation under appropriate circumstances.[181] However, the court also held that the employee's Family and Medical Leave Act (FMLA) claim failed because the employee is allotted twelve weeks of absence by law, and the employee would have been unable to return within the twelve-week time period.[182]

The general rule in ADA cases concerning indefinite leave is that indefinite leave is not a reasonable accommodation because it would not enable the employee to perform the required essential functions. If an employee could not perform the essential functions, then the employee is not a qualified individual under the ADA. Some courts have extended Congress's intent of making unpaid leave a statutory right under the FMLA[183] to the ADA, allowing for employees to take unpaid leave as a reasonable accommodation.[184] However, courts can also read into the ADA the limitations Congress imposed on the FMLA of twelve weeks.[185] Therefore, the allowance for unpaid leave is not indefinite, but it is limited by some type of reasonableness standard.

For instance, in *Hudson v. MCI Telecommunications Corp*.,[186] an employee who worked as a customer service representative had Carpal Tunnel Syndrome. Her physician prohibited her from all typing and keyboard activity. The employee continued to work, after first being suspended for tardiness, until her termination. The court agreed with the plaintiff that a reasonable allowance of time for medical care and treatment may form a reasonable accommodation in appropriate circumstances.[187] However, the court found that the employee had

177. *Id.*
178. *Id.* at 782.
179. *Id*.
180. *Id*. at 783 (citing 29 U.S.C. §§ 2601-2654 (2000)).
181. *Id.*
182. *Id*. at 785 (citing 29 U.S.C. § 2612(a)(1)(D) (2000)).
183. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (1994 & Supp. V 1999).
184. *See* Criado v. IBM Corp., 145 F.3d 437 (1st Cir. 1998); *Cehrs*, 155 F.3d. at 775.
185. *Cehrs*, 155 F.3d. at 782.
186. 87 F.3d 1167 (10th Cir. 1996).
187. *Id.* at 1169.

failed to present any evidence of the expected duration of her impairment as of the date of her termination.[188] The court explained that MCI was not required to wait indefinitely for her recovery by either keeping her on its payroll or electing to pay the cost of her disability benefits.[189]

Likewise, in *Taylor v. Pepsi-Cola Co.*, the court affirmed a judgment that an indefinite period of medical leave was not a reasonable accommodation.[190] The court acknowledged that an allowance of time for medical care or treatment may constitute a reasonable accommodation.[191] However, the court cited *Rascon*[192] stating that an "indefinite unpaid leave is not a reasonable accommodation where the plaintiff fails to present evidence of expected duration of her impairment."[193]

Unlike the ADA, the USERRA has no provision enabling courts to check an employee's indefinite leave with a reasonable standard, except the length of five years.[194] Therefore, an employer must reemploy a returning serviceman regardless of how many times a serviceman leaves and how long the serviceman is gone, as long as five years of cumulative leave is not exceeded. An employer's only option under the USERRA is to carry the burden of proving undue hardship.

C. Undue Hardship on Employer

As first introduced, the ADA called for a very high threshold for undue hardship; an accommodation would not be unreasonable unless it threatened the continued existence of the employer's business.[195] Congress softened the burden on the employer by changing the definition to include a list of factors to be considered to determine what constitutes an undue hardship.[196] The most important factors in determining whether an accommodation causes undue hardship is "the employer's ability to bear the cost," rather than the cost of the accommodation itself.[197] Therefore, undue hardship must be determined on a case-by-case basis.[198] An accommodation that would impose an undue hardship "on a small business, or in a particular industry, may be reasonable for a large employer, or in a different industry."[199] Congress has clearly marked the limits

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188. *Id*.

189. *Id.*

190. 196 F.3d 1106, 1110 (10th Cir. 1999).

191. *Id*.

192. Rascon v. U.S. West Communications, Inc., 143 F.3d 1324, 1333-34 (10th Cir. 1998).

193. *Taylor*, 196 F.3d at 1110.

194. *See* 38 U.S.C. § 4312 (2000).

195. Bonnie P. Tucker, *The Americans with Disabilities Act: An Overview*, 1989 U. ILL. L. REV. 923, 927 (1989).

196. *See* 42 U.S.C. § 12111(10)(A) (1994 & Supp. V 1999).

197. Jeffrey O. Cooper, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. PA. L. REV. 1423, 1449 (1991).

198. *Id*.

199. *Id.* at 1450.

of undue hardship; "an undue hardship may be something less than a cost that would drive the employer to the verge of going out of business, but must impose more than a de minimis cost."[200] In other words, under the ADA, an accommodation imposes an undue hardship if its "cost would either . . . substantially impair the ability of the employer to produce goods or provide services, or . . . impose such a high cost that the employer would be forced to compensate by reducing the overall workforce."[201]

With respect to an employee taking indefinite leave as a reasonable accommodation, courts look to the specific facts of each case to determine whether an accommodation is an undue hardship on the employer. Courts have focused on the effect that an absence for an indefinite amount of time would have on other employees. For instance, in *Jackson v. Veterans Administration*, the court affirmed a judgment in favor of the employer and held that requiring the employer to accommodate the employee's repeated, sporadic, and unscheduled absences, caused because of a disability, by "making last-minute provisions for [the employee's] work to be done by someone else" would place undue hardship on employer.[202] The court rejected the proposed accommodation and stated that "[s]uch accommodations do not address the heart of the problem: the unpredictable nature of Jackson's absences. There is no way to accommodate this aspect of his absences."[203]

If an employee were able to take indefinite leave as an accommodation, the other employees would have to increase their workload in order for the employer to keep the employee's position open. The effect of increasing the workload on other employees is generally not considered a reasonable accommodation.[204] For instance, in *Turco v. Hoechst Celanese Corp.,* the court affirmed judgment in favor of an employer on an ADA claim where the employee's diabetes prevented him from meeting the physical or mental demands of his job.[205] The court rejected the contention that the employee would have been able to meet these demands better if he had been switched to a day shift and noted that because the employer did not have a day shift, the proposed accommodation would have imposed an undue burden on the employer by requiring that other employees work harder.[206]

To assert a defense of undue hardship, the employer must show more than increased costs of production. The employer must show that the increased cost threatens its ability to maintain its current level of output or its current workforce.[207] However, there is no bright line rule requiring quantitative evidence to prove undue hardship. There is only a general observation that

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200. *Id*.
201. *Id*. at 1455.
202. 22 F.3d 277, 279 (11th Cir. 1994).
203. *Id*.
204. 29 C.F.R. § 1630.2 (2003).
205. 101 F.3d 1090, 1093 (5th Cir. 1996).
206. *Id*. at 1094.
207. Cooper, *supra* note 197, at 1456.

courts generally view evidence as less persuasive as it becomes more speculative and less quantitative.[208] In *Barth*, plaintiff, a computer specialist with a severe case of diabetes, wanted to work at one of twelve overseas radio relay stations, but his employer denied the application because he could not get medical clearance. Barth brought suit when his employer denied his request for a medical waiver and a limited waiver restricting his assignments to posts with suitable medical facilities.[209] The court held that the employer established sufficient facts to support a claim of undue hardship by virtue of the loss of "essential operational flexibility" that would have resulted from an attempt to accommodate Barth's medical needs.[210] The lower court observed that "the thin staffing at each post required flexibility of assignment, put a premium on workers not subject to serious health risks, and offered few options for initial assignment of Mr. Barth."[211]

As the case law may suggest, an employee on indefinite leave can subject an employee to undue hardship through its effect on the employer's operations as well as the effect on other employees. However, the employer still has the burden of proving undue hardship. In *Borkowski v. Valley Central School District*, the court held that the employer did not meet the burden of proof.[212] Ms. Borkowski, a school teacher for over twenty years, requested a teacher's aide to assist her in maintaining classroom control and thereby allow her to perform all of the functions of a library teacher. Ms. Borkowski presented some factual evidence that the accommodation would make her qualified, and that the accommodation was reasonable.[213] Therefore, the burden shifted to the employer, the school district. The court said the school district did not present any evidence concerning the cost of providing a teacher's aide, its budget and organization, or any of the other factors made relevant by the regulations.[214] The school argued that the provision of an assistant was unreasonable and created an undue hardship as a matter of law. However, the court concluded that there was nothing inherently unreasonable or undue in the burden that an employer would assume by providing an assistant to an employee with disabilities.[215]

> [I]n the absence of evidence regarding school district budgets, the cost of providing an aide of this sort, or any like kind of information, we are unable to conclude that unreasonableness or undue hardship has been established, and we certainly cannot say that either has been established as a matter of law.[216]

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208. Barth v. Gelb, 2 F.3d. 1180, 1189 (D.C. Cir. 1993).
209. *Id.*
210. *Id.*
211. *Id*. at 1188.
212. 63 F.3d 131, 142 (2d Cir. 1995).
213. *Id*.
214. *Id*.
215. *Id*.
216. *Id*. at 143.

Therefore, employers generally must provide some type of statistical or quantified evidence from a cost and benefit analysis to meet their burden. However, in cases where indefinite leave for the employee is the issue, that is not necessarily the case. In *Walton v. Mental Health Association of Southeastern Pennsylvania*, Walton worked for "MHASP," an advocacy organization for people with mental illness.[217] Walton suffered from depression and because of her illness missed twenty-one days in 1990, forty days in 1991, fifty days in 1992, and fourteen and one-half days in 1993 before taking leave. MHASP terminated her a few months later.[218] The court affirmed that Walton's requested accommodation—continued leave—would have created an undue burden on MHASP.[219] The court stated that although unpaid leave supplementing regular sick and personal days might represent a reasonable accommodation, an employer does not have to allow this type of leave to the extent that MHASP had already granted it to Walton.[220] The court concluded that a blanket requirement that an employer allow such leave is beyond the scope of the ADA when the absent employee simply will not be performing the essential functions of her position.[221]

Though the USERRA and ADA have basically the same definition of undue hardship, the affirmative defense under the USERRA has been rarely used and almost never successful. There are several reasons for the difference in the successfulness of raising the affirmative defense under the two acts. First, under the ADA, employers are able to relate undue hardship to whether the employee can physically do the job and whether indefinite leave would allow the individual to do the job. However, an employee is generally considered unable to perform the essential functions if the individual is on an indefinite leave and not at work. Under the USERRA, undue hardship becomes merely a question of whether an employer can weather the cost of reemploying the returning serviceman after an indefinite amount of time. In interpreting the USERRA, courts presume that indefinite leave does not affect or threaten the essential functions of a job. Whereas, under the ADA, the judiciary has generally presumed indefinite leave has a significant effect on the essential functions of performing a job. Second, when the employer challenges an employee's claim under the ADA, generally the situation is reduced to the specific employer versus the specific employee claiming a disability and discrimination. Under the USERRA, however, the employer is perceived to be not only challenging the employee's reemployment, but also the nation's need for the citizen soldier to either defend its way of life or take time to ensure their readiness to defend its way of life. Therefore, an employer is less likely to publicly challenge an employee's right to reemployment. Third, related to the prior reason is the strength of an argument

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217. 168 F.3d 661 (3rd Cir. 1999).

218. *Id.*

219. *Id*. at 671.

220. *Id*.

221. *Id.*

of reciprocal benefit under an employee leaving to serve his country that is not present under ADA cases.

IV. SOLUTION

A. Legislation

The first and most obvious solution to the problem of requiring employers to carry a disproportionate burden is legislation. The USERRA has a built-in presumption that indefinite leave is neither an unreasonable accommodation nor does it have any real effect on an employee's essential functions. A legislative amendment is needed to reduce the unfairness that the USERRA causes employers.

There has been some recent movement within Congress to decrease the burden employers are asked to bear. For instance, House Resolution 394 was introduced, which would allow employers a credit of up to $2000 for each Reservist who supports contingency operations in an active-duty status.[222] The legislation would give a $7500 total credit per employer.[223] As an owner of a Goodyear Tire Store explained, "In the past, companies have allowed their employees to serve the country because it's viewed as the patriotic thing to do. . . . Now, when two of my employees are fulfilling their military obligation, I've just lost one-third of my work force."[224]

Because of the economic slowdown and consequent fiscal tightening, House Resolution 394, along with other legislative efforts, has seen little legislative movement or success.[225] With legislative success seeming unlikely, the next best solution is for the judiciary to adopt the general approach of ADA burden-shifting with the added presumption that indefinite leave is unreasonable.

B. USERRA Burden Shifting

A solution to the lack of burden shifting element of the USERRA is the implementation of a similar burden shifting exercise employed by ADA case law. First, the burden shifting process should require the government to show that an indefinite leave is reasonable on its face, similar to the burden of the alleged disabled employee in ADA cases. The burden should be placed on the government because it is the government who the employee will generally work through to resolve reemployment situations.[226] This burden should be applied similarly to how the burden of showing indefinite leave was a reasonable

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222. H.R. 394, 107th Cong. (2001).

223. *Id.*

224. Captain James R. Wilson, *Congress Considers Tax Breaks for Employers*, HILLTOP TIMES, Mar. 1, 2001, *at* http://www.hilltoptimes.com/archive/20010301/Supplement/2.html.

225. H.R. 394 (sent to House Comm. on Ways and Means); S. 3088, 107th Cong. (2002) (no co-sponsors and sent to Senate Comm. on Governmental Affairs); H.R. 3711, 107th Cong. (2002) (no co-sponsors and sent to House Comm. on Ways and Means).

226. *See* Klein & Cilenti, *supra* note 2, at 17.

accommodation in both *Rogers* and *Myers*.[227] In those cases, the courts held that indefinite leave was not a reasonable accommodation in the ADA claim because the employee could not meet the prima facie burden of showing that indefinite leave was generally a reasonable accommodation.[228]

During this process, the returning serviceman should be allowed to return to his position of reemployment. The issue is not whether the serviceman should be reemployed, but who should bear the cost of reemploying the serviceman. Therefore, if it is a situation where the reemployment would be found to be an unreasonable accommodation, then the remedy should be for the government to reimburse the employer for all training and other expenses involved in the reemployment of the returning serviceman. For instance, for an airline pilot who leaves for twelve months of duty and goes through the minimum retraining required, costs average slightly over $10,000 for the employer.[229] If the period of leave is found to be unreasonable, the government would reimburse the airline for the retraining expense. In this type of situation, the facts would generally not allow for a finding that an airline that loses one or even 200 out of 8000 pilots is faced with an undue hardship. Yet for an airline to be faced with bearing the costs of retraining its pilots only to have them called to duty again would be unreasonable.

If the government can show that the period of leave was reasonable, then the burden should shift to the employer to show that reemployment would be an undue hardship. For undue hardship, the burden is not necessarily based on statistical proof. Beyond when reemployment may be unreasonable, undue hardship should concern when the indefinite leave of a serviceman could actually put the operations of a business in jeopardy. Under the USERRA, the courts liberally construe the statutes in favor of protecting the serviceman. If the end is not the reemployment of the serviceman, but a determination of who should bear the cost, the courts should either construe the statute evenly for both parties or in favor of the employer. For situations where the employer is able to prove undue hardship, the government should provide compensation to the employer for keeping positions open for an indefinite amount of time. In addition, for a small employer with less than fifty employees, finances should be provided to the employer for the cost of keeping the position open.

The question should not be whether the employee should be reemployed because that could decrease volunteerism and force the country to rely on involuntary measures. Involuntary measures consist of what the military has most recently used over the last couple of years such as a constant "stop-loss" policy. "Stop-loss" is a policy which holds servicemen who wish to retire or leave the military involuntarily, or a measure which has not been used since the Vietnam era—conscription. The question should be who bears the cost of

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227. *See* Rogers v. Int'l Marine Terminals, Inc., 87 F.3d. 755 (5th Cir. 1996); Myers v. Hose, 50 F.3d 278 (4th Cir. 1995).

228. *Id.*

229. Interview with David Mikkelson, First Officer on Airbus 328, United Airlines, in Chicago, Ill. (Jan. 16, 2003).

reemploying the returning servicemen.

C. Economic Argument

The military's move to a "Total Force Policy" and greater reliance on the citizen soldier has not been an issue unique to our time. The issue of whether our nation's military should consist of a professional standing army or a group of militias has been around since the colonial years. Adam Smith believed that the ability of a nation to wage war is best measured in terms of its productive capacity.[230] Military theorists in Smith's time felt that security demanded a well-trained and well-disciplined armed force to battle their adversaries. It was generally thought that a militia, however trained and disciplined, could not take the place of professional soldiers, especially in an age when the development of firearms put a greater premium on organization and order than on individual skill, bravery, and dexterity.[231]

Like Adam Smith, Alexander Hamilton also believed that the professional army should be the basis of a national defense, not a band of militias. Hamilton wrote, "[W]ar, like most other things, is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice."[232] On the other hand, Thomas Jefferson saw a professional standing army as being a possible threat to the individual liberties of its own people.[233] Though he did agree with Hamilton that the military establishment and some type of constant force was necessary for the nation's defense, Jefferson thought a system of universal liability where all men participate in the nation's military was more suitable than a professional standing army.[234]

The military has moved to a "Total Force Policy" to increase the numbers in the military at a decreased cost.[235] In 1990, the total active duty force was 2.065 million servicemen and the military budget was approximately $390 billion, or 5.8% of the Gross Domestic Product (GDP).[236] In 2002, the total active duty force was less than 1.4 million servicemen, the military budget was

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230. MAKERS OF MODERN STRATEGY FROM MACHIAVELLI TO THE NUCLEAR AGE 222 (Peter Paret et al. eds., 1986).

231. *Id*. at 228.

232. *Id*. at 239 (citing THE FEDERALIST, No. 25, 156 (1787)).

233. *Id*. at 241.

234. *Id.* at 242. In a letter to James Monroe in 1813, Jefferson wrote: "[I]t proves more forcibly the necessity of obliging every citizen to be a soldier; this was the case with the Greeks and Romans, and must be that of every free State . . . . We must train and classify the whole of our male citizens and make military instruction a regular part of collegiate education. We can never be safe till this is done."

235. *See* Fernandez, *supra* note 5, at 861.

236. Department of Defense, *News Transcript, Background Briefing on the Fiscal Year 2002 Budget Amendment, at* http://www.natprior.org/charts/DOD1977to2002.htm (last modified June 22, 2001).

approximately $300 billion, which is only 3.7% of GDP.[237] As the military transitioned out of the cold war and began decreasing the size of its force, the leadership realized that a Reserve unit could be maintained in a mission-ready status similar to an active duty unit at one third the cost. Therefore, a military force structure could be maintained relying heavily on the citizen soldier and still allow for large reductions in the military budget. The civilian leadership has focused on the large savings in a citizen soldier army without realizing the true social costs. This is because a large portion of the cost has been externalized to other parties, predominantly the employer of the citizen soldier.

Externalities exist whenever some person or entity makes a decision about how to use resources without taking full account of the effects of the decision. The entity ignores some of the effects—some of the costs or benefits that result from a particular activity because they fall on others.[238] As a consequence of this external cost shift, resources tend to be misused or "misallocated."[239] In this case, the government is placing the burden on the employer by shifting the cost. The military is using the citizen soldier similarly to a private company relying on temporary workers, thereby relieving itself of the burden of having to pay for the benefits generally due full time employees. The employers, on the other hand, have to maintain the benefits of the citizen-soldier upon the individual's return from duty as if he never left. The term "externalities" implies that when external costs are found, steps should be taken by the government to eliminate them.[240]

One could argue that the benefit the citizen soldiers create in defending their country and its way of life is felt by everyone. Therefore, the externalities are reciprocal because the employer benefits from security and stability, by-products of the citizen-solder's efforts. However, the cost is disproportionately placed on the employer. Most citizens have to pay taxes in one form or another, a portion of which goes to pay for the national defense. Employers not only pay their share of taxes, but also involuntarily have their employees taken from them often and for indefinite periods of time. Such employers are then burdened with maintaining the citizen-soldier's employment position and reemploying the returning serviceman in a position that he would have been in as if he had never left. The cost that the government saves in not having to maintain a large professional force has been shifted disproportionately to the employer. Pigou writes: "In any industry, where there is reason to believe that the free play of self-interest will cause an amount of resources to be invested different from the amount that is required in the best interest of the national dividend, there is a prima facie case for public intervention."[241] The aim of economic policy is to ensure that people, when deciding which course of action to take, choose that which brings about the best outcome for the system as a whole.[242]

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237. *Id*.

238. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 47 (4th ed. 1998).

239. *Id.*

240. RONALD HARRY COASE, THE FIRM, THE MARKET, AND THE LAW 27 (1988).

241. A.C. PIGOU, THE ECONOMICS OF WELFARE 5th ed. (1952).

242. COASE, *supra* note 240, at 27.

The way in which industry, the military in this instance, is organized is thus dependent on the relation between the costs of carrying out transactions in the market and the costs of organizing the same operations within that firm which can perform the task at the lowest cost.[243] The lowest cost for the military to organize its operations is to rely on the citizen soldier. The military in effect will increase its allocation of resources and organize its operations to rely more heavily on the citizen soldier rather than on the professional soldier until the marginal costs of relying on the citizen-soldier are greater than the cost of the professional soldier. The producer, the military, is normally only interested in maximizing its own incomes or in this case, minimizing its costs and is not concerned with social costs.[244] The military will only undertake an activity if the cost of the factors employed is less than its private cost.[245]

The solution is not to expect the government to negotiate with each employer of service personnel because the transaction costs would be far too high. Furthermore, there is the practical reciprocal nature of the problem, in that the military must have the discretion to use citizen soldiers when the need arises for the country's national security. However, expecting the military to negotiate with employers or allowing the country's security to be vulnerable by creating obstacles to the military relying on the citizen soldier is not an option. Instead, the burden shifting adapted by the courts in USERRA cases should be made more similar to that of the ADA cases as discussed above. When under a new burden of proof scheme, an employer can show that reemployment is unreasonable or an undue burden. The government should then provide compensation to the employer to ease the reemployment of the serviceman. In that way, the military can still use the citizen solder, and the employer has a realistic opportunity to meet the burden of showing reemployment is unreasonable or an undue burden.

D. FMLA Comparisons

Indefinite leave is not necessarily always an unreasonable accommodation. With the creation of the Family and Medical Leave Act (FMLA) and the trend in some ADA cases since the creation of the FMLA, indefinite leave has become more of an accepted accommodation.[246] Under the FMLA, an employee becomes eligible for FMLA coverage if he or she has been employed by a covered employer for no less than a year and has worked at least 1250 hours during the preceding twelve months.[247] Once eligible, an employee may take reasonable periods of unpaid leave for medical reasons, for child-birth or adoption, or for the care of a spouse, parent, or child who suffers from a serious health condition.[248] Leave periods are circumscribed: an eligible employee may take a maximum of

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243. *Id*. at 63.
244. *Id*. at 158.
245. *Id.*
246. Cehrs v. Northeast Ohio Alzheimer's Research Ctr., 155 F.3d 775 (6th Cir. 1998).
247. 29 U.S.C. § 2611(2)A (2000).
248. *Id.* § 2601(b)2.

twelve workweeks of FMLA leave in any twelve-month span.[249] Following such a leave, an employee is entitled to reclaim his or her former job.[250]

However, the FMLA applies only to private sector operations that employ fifty or more persons.[251] Applying the FMLA to smaller employers would unfairly burden a small employer by causing it to go without an employee for as much as a three-month period once a year. Under the USERRA, reemployment rights apply to all employers regardless of size. Furthermore, the FMLA implicates shorter time frames, which, as defined, can be an illness that lasts as little as four days.[252] Added to this, the maximum annual benefit under the FMLA is twelve weeks of unpaid leave.[253] While leave periods under the USERRA are many times truly indefinite, the periods of leave traditionally last between one weekend and twenty-four months. [254]

In *Jordan*, the court found that the citizen-soldier had an unqualified right to reemployment as long as the duration requirements were met.[255] An accumulative duration requirement of five years of leave is not a reasonable accommodation. The cost to an employer to have to retrain employees who leave for six, twelve, or twenty-four month periods is an unfair and disproportionate burden. Under the FMLA, an employer knows that the employee will be returning no later than three months from the date she left. Under the USERRA there is no way to know the duration of the leave except that it cannot be longer than five years.

To avoid the transactions costs of having to engage in a burden-shifting process like the ADA, perhaps an approach similar to the FMLA would be appropriate. For periods of less than three months of leave, the government would reimburse employers only for retraining expenses of returning serviceman. For periods over three months, then allow typical USERRA case law approach of requiring the employer to prove undue hardship to recover additional expenses such as of having to hire and train third parties to temporarily replace the departed citizen soldier, or business losses directly related to having the employee leave.

CONCLUSION

The USERRA was created to protect the citizen soldiers' right to reemployment in a time when Congress could not have foreseen or anticipated the demand and the resultant reliance on the citizen soldier. This Note has attempted to show the unfairness of the reemployment provision in the USERRA.

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249. *Id.* § 2612(a)1.

250. *Id.* § 2614(a)1.

251. *Id.* § 2611(4).

252. *Id.* 2612(a)(1)(C) (stating that an employee may qualify for FMLA leave to care for a child under eighteen merely by showing that the child suffers from a serious health condition).

253. *Id.* 2612(a)(1) (2000).

254. Reuters, *U.S. Reserves May Stay on Duty for Second Year*, *available at* http://www.ledger-enquirer.com/mld/ledgerenquirer/3942819.htm (last visited Aug. 26, 2002).

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

There have been several efforts to correct this within Congress and give employers some type of financial help to reduce the impact of having to reemploy employees who are gone for indefinite periods of time. Because of the political and economic realities of our time, the unfairness will have to be corrected by the judiciary. The judiciary can find an equitable solution by adapting a burden of proof similar to that used in ADA cases. The judiciary could also use an equity approach that attempts to take into consideration the externalized costs that the reemployment right places on the employer. The question is not whether citizen soldiers should have the right to reemployment, but rather, who should bear the ultimate cost in fulfilling that right.