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BATTLING PTSD: GETTING RESERVISTS SUFFERING FROM PTSD BACK TO WORK THROUGH PROPOSED AMENDMENTS TO USERRA AND VA DISABILITY COMPENSATION BENEFITS

JEREMIAH STEPHAN*

I. INTRODUCTION

“[L]et us strive . . . to care for him who shall have borne the battle and for his widow and his orphan.”¹

“America will always be there for our veterans, just as they’ve always been there for us. We won’t let them down. We take care of our own.”²

A. *Welcome Home*

Returning servicemembers have one of the highest rates of unemployment.³ In 2010, the unemployment rate for young

* JD, The John Marshall Law School, 2013. I would like to thank Professor Brian Clauss for encouraging me to write about USERRA and the staff of the Veterans Legal Support Center & Clinic for their tireless efforts on behalf of Veterans. Special thanks to Lily Strumwasser and Brian Roth for their amazing work editing this article and to all the other members of the Law Review for their hard work and dedication. And perhaps most importantly, I would like to thank my beautiful wife for her unwavering support and willingness to listen to me ramble on about this article when I finally came to bed.

1. See Abraham Lincoln, President, U.S., Second Inaugural Address (Mar. 14, 1865), *available at* <http://www.loc.gov/rr/program/bib/ourdocs/Lincoln2nd.html>. President Lincoln spoke in the final days of the Civil War offering his thoughts on reconciliation, stating that both sides had done wrong and that the country needed to care for its soldiers regardless of what side they fought on. *Id.*

2. See Barack Obama, President, U.S., Your Weekly Address – Help Vets with PTSD (July 10, 2010), *available at* <http://www.whitehouse.gov/blog/2010/07/10/weekly-address-help-vets-with-ptsd>. President Obama spoke about his decision to make filing for PTSD benefits easier for veterans. *Id.*

3. See generally Francine Knowles, *Unemployment Rate Higher for Veterans than Non-Veterans*, CHI. SUN-TIMES (May 29, 2011), <http://www.suntimes.com/news/5594894-418/yyyyyy.html> (reporting high unemployment in returning veterans due to employers’ lack of understanding of the skills that veterans possess); James Dao, *New Data on High*

veterans of the wars in Iraq and Afghanistan hit 21.9 percent.⁴ A large number of these soldiers are members of the National Guard and reserves, most having been deployed multiple times overseas.⁵ Many come home to find their jobs downsized or reluctant employers fearful of future deployments.⁶ Things grow even grimmer for soldiers suffering from posttraumatic stress disorder (“PTSD”).⁷ Symptoms like insomnia, hyper-arousal, and avoidance of stimuli cause many veterans to struggle to keep their jobs, or worse, quit good jobs.⁸

Unemployment Among Recent Veterans, N.Y. TIMES (May 30, 2011), <http://atwar.blogs.nytimes.com/2011/05/30/new-data-on-high-unemployment-among-recent-veterans/> (reporting that data released from the Bureau of Labor Statistics shows a significant higher rate of unemployment for veterans versus the nonveteran population); Laurie Ure, *Unemployment on the Rise for Veterans of Current Wars*, CNN (Apr. 2, 2010), http://articles.cnn.com/2010-04-02/us/veterans.unemployment_1_iraq-and-afghanistan-afghanistan-veterans-unemployment?_s=PM:US.

4. Press Release, U.S. Dep’t of Labor, *Employment Situation of Veterans Summary* (Mar. 11, 2011), *available at* <http://www.bls.gov/news.release/vet.nr0.htm>. Among all veterans, those with a service-connected disability had an unemployment rate of 9.1 percent in July 2010. *Id.* Second Gulf War-era veterans who were current or past members of the Reserve or National Guard had an unemployment rate of 14 percent in July 2010, compared with a rate of 12.1 percent for those veterans who had not been members. *Id.* Regardless of their period of service, unemployment rates in 2010 for veterans with higher levels of education were lower than those with less education. *Id.* Male Second Gulf War-era veterans ages 18 to 24 were more likely to participate in the labor force in 2010 than were their nonveteran counterparts—74 percent versus 67.5 percent. *Id.*

5. *Unemployment Rate for Young Veterans Hits 21.1 Percent*, WASH. POST (Mar. 13, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/03/12/AR2010_031204123.html; Kimberly Hefling, *Unemployment Rate for Young Vets Hit 21.1%*, ARMY TIMES (Mar. 12, 2010, 4:10 PM), http://www.armytimes.com/news/2010/03/ap_military_young_vets_unemployment_031210.

6. Samuel F. Wright & Greg T. Rinckey, *Welcome Home, You’re Fired: A Harsh Reality Awaits Many Returning Veterans Who Find Themselves Locked Out of the Civilian Jobs They Had to Leave when They Deployed; The Law Guarantees that They Can Return to Those Jobs; You Can Make Sure the Law Is Upheld*, 44-APR TRIAL 49, (2008).

7. *Soldiers Say It’s Hard to Return to Civilian Life*, TALK OF THE NATION (Oct. 10, 2011), <http://www.npr.org/2011/10/10/141213271/soldiers-say-its-hard-to-return-to-civilian-life>.

8. The symptoms of PTSD are wide ranging and can additionally include, but are not limited to, intrusive recollections, intense fear, feelings of helplessness, feeling detached from others, and difficulty concentrating. *National Center for PTSD – DSM-IV-TR criteria for PTSD*, U.S. DEP’T OF VETERANS AFFAIRS, <http://www.ptsd.va.gov/professional/pages/dsm-iv-tr-ptsd.asp> (last visited Sept. 24, 2011).

B. *The Road Ahead*

This Comment focuses on the challenges facing returning U.S. Army reservists suffering from PTSD. Part II provides an overview of the job protections promised to these soldiers under the Uniform Service Employment and Reemployment Rights Act (“USERRA”), how PTSD is commonly diagnosed and treated, and when a reservist qualifies for disability compensation. Part III analyzes how USERRA’s protections can be circumvented by employers when a returning employee suffers from PTSD. And Part IV suggests ways to close this gap and give sufferers of PTSD a better chance at meaningful long-term employment.

II. BACKGROUND

The U.S. Army is separated into two main groups: active duty soldiers and reserve soldiers.⁹ Active duty soldiers are full-time professionals in the U.S. Army.¹⁰ In contrast, reservists serve part-time, training one weekend a month and attending one yearly two-week training exercise.¹¹ This enables reservists to maintain a civilian career while continuing to serve their country.¹² In times of war, these soldiers are activated by the President of the United States and are commonly deployed for up to twelve months at a time overseas.¹³

In exchange for their enlistment, reservists receive monetary compensation, advanced training, and tuition reimbursement.¹⁴ For example, a new recruit in the U.S. Army Reserve is eligible for up to \$20,000 in enlistment bonuses,¹⁵ up to \$11,550 in drill pay,¹⁶

9. *About the Army: Active Duty & Army Reserve*, U.S. ARMY, <http://www.goarmy.com/about/service-options/active-duty-and-reserve-duty.html> (last visited Oct. 13, 2011).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. For further discussion on enlistment contracts, see *Modern Status of Military Enlistment Contracts*, 62 A.L.R. FED. 860 (1988) (listing the federal cases that have examined the contractual rights and remedies of military enlistment contracts executed after December 31, 1969).

15. Reservists can also earn an additional \$10,000 for completing Officer Candidate School, \$5,000 for completing the Ranger Indoctrination Program, and additional funds if proficient in a Middle-Eastern language or a high-demand civilian skill. *Benefits – Bonuses: Earning Extra Money*, U.S. ARMY, <http://www.goarmy.com/benefits/money/bonuses-earning-extra-money.html> (last visited Sept. 24, 2011).

16. Reservists are required to complete two weeks of training each year in addition to training one weekend per month. *Benefits – Drill Pay: Army Reserve Soldiers Money for Just One Weekend a Month*, U.S. ARMY, <http://www.goarmy.com/benefits/money/drill-pay-army-reserve-soldiers.html> (last visited Sept. 24, 2011). Drill pay is the compensation received by the reservist for this training. *Id.*

and up to \$12,420 in college tuition.¹⁷ These monetary incentives are fairly new to the U.S. Army but were motivated by the need to increase the recruitment of highly qualified applicants.¹⁸ Additionally, in 1994, Congress increased the job protections given to military servicemembers by enacting USERRA in the hopes of encouraging military service by a new generation of civilian-soldiers.¹⁹

17. This figure refers to the maximum benefit incurred through the Reserve Montgomery GI Bill. Active duty soldiers can receive up to \$86,028 in educational benefits by combining awards from both the Montgomery GI Bill and the Army College Fund. *Education Benefits: Earn Money for College*, U.S. ARMY, <http://www.goarmy.com/benefits/education-benefits/money-for-college.html> (last visited Sept. 24, 2011).

18. The Uniformed Services Pay Act of 1981 authorized the military to pay large cash bonuses to certain highly qualified enlistees. Uniformed Services Pay Act of 1981, Pub. L. No. 97-60, § 117, 95 Stat. 989 (1981). At that time, Congress directed the Secretary of Defense to initiate the Enlistment Bonus Experiment, a test performed by The Rand Corporation's Defense Manpower Research Center to determine if large cash bonuses would attract more qualified candidates into the military. *Id.* This eventually led to the system used today, which utilizes promises of monetary awards, college tuition reimbursement, job training, and healthcare benefits. J. Michael Polich et al., *The Enlistment Bonus Experiment*, (Rand, Apr. 1986), available at <http://www.rand.org/content/dam/rand/pubs/reports/2006/R3353.pdf>. See also *Military Recruiting: Trends, Outlook, and Implications*, RAND'S NAT'L DEF. RESEARCH INSTITUTE, RB-7530 (2001), http://www.rand.org/pubs/research_briefs/RB7530/index1.html (recommending increased budgeting for advertising, boosting number of recruiters, creating alternative recruit quality levels for high attrition low-quality recruits). Following September 11, 2001, President Bush immediately activated 50,000 National Guard and Reserve members. MICHELLE CAMDEN ET AL., *IICLE SMARTBOOKS: LABOR AND EMPLOYMENT*, § 3.1, 3-3 (2009). The Country has continued to rely on those activated soldiers throughout the War on Terror. *Id.* As of September 2011, 6,230 U.S. servicemembers had died in Operation Iraqi Freedom and Operation Enduring Freedom. *Faces of the Fallen*, WASH. POST, <http://apps.washingtonpost.com/national/fallen/> (last visited on Sept. 24, 2011).

19. See 38 U.S.C.A. §§ 4301-4335 (stating that USERRA provided military servicemembers with protections against job discrimination based on military service and reemployment rights if deployed); see also Pub. L. No. 93-508-508, § 404(a), 88 Stat. 1578 (stating that USERRA establishes additional rights and liabilities that did not exist under the Veterans Reemployment Rights Act of 1974).

Formal protections for military servicemembers began with the Selective Service and Training Act of 1940. Pub. L. No. 79-783, 54 Stat. 885. The Selective Service and Training Act established the first peacetime draft, requiring men between the ages of 18 and 35 to register for the draft. *Id.* Congress expanded upon Selective Service and Training Act in 1974 by enacting the Veterans' Reemployment Rights Act ("VRRRA"), which was enacted as § 404 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974. CAMDEN ET AL., *supra* note 18.

A. What Is USERRA?

The purpose of USERRA is to encourage non-career service in the military by granting any past, current, or applicant member of the military: (1) protections from employment discrimination based on military service and (2) job protections when they are asked leave their civilian jobs for a deployment.²⁰ USERRA preempts state and local laws that may attempt to reduce, limit, eliminate, or place any conditions on the rights provided under the Act.²¹ However, USERRA does not take away any additional rights or benefits provided to servicemembers by any other federal, state or local laws.²²

1. Timely Reapplication

A servicemember must apply for reemployment within a timely manner of completing her military service to receive job protections under USERRA.²³ This period of time is determined by how long a servicemember was called to active duty.²⁴ For periods of service lasting one to thirty days, a servicemember has one calendar day to report back to work after taking eight hours of rest.²⁵ For service of thirty-one to 181 days, a servicemember must submit an application for reemployment within fourteen days of coming home.²⁶ And service lasting more than 181 days, a servicemember must submit an application for reemployment

20. 38 U.S.C.A. § 4301(1)-(3); *Crews v. City of Mt. Vernon*, 567 F.3d 860, 863 (7th Cir. 2009). To prevail in a reemployment case, a veteran must meet five eligibility criteria; she must show: (1) she left her job for the purpose of performing voluntary or involuntary service in the uniformed services; (2) she gave her employer oral or written notice that she was going into the service; (3) her cumulative period or periods of uniformed service, relating to the employer in question, did not exceed five years; (4) she was released from the period of service without having received an other-than-honorable discharge; and (5) she made a timely application for reemployment. Wright & Rinkey, *supra* note 6, at 50; 38 U.S.C.A. §§ 4304, 4312(a)-(c), 4312(e)(1)(D); *see also* Kathryn Piscitelli & Edward Still, *Background and Construction of USERRA: What Is USERRA?*, USERRA MANUAL (Apr. 2011) (stating that USERRA grants reemployment rights and other benefits to employees who leave civilian jobs to perform military service); *accord* 38 U.S.C.A. §§ 4301-4335 (providing civilian employment protections to servicemembers).

21. 38 U.S.C.A. § 4302(b); 20 C.F.R. § 1002.7(b); Piscitelli & Still, *supra* note 20, at § 1:6.

22. 38 U.S.C.A. § 4302(a); 20 C.F.R. § 1002.7(a), (c); Wright & Rinkey, *supra* note 6, at 50; Piscitelli & Still, *supra* note 20; *see also* *Romero v. Akal Sec., Inc.*, No. 09-cv-00024, 2010 U.S. Dist. WL 1688163 (S.D. Ca. Apr. 23, 2010) (holding that California law controls when it provides greater protections than USERRA; otherwise, USERRA will control).

23. 38 U.S.C. § 4312(e); *CAMDEN ET AL.*, *supra* note 18, at § 3.6, 3-8.

24. 38 U.S.C.A. § 4312(e).

25. *Id.*

26. *Id.*

within ninety days of returning home.²⁷ Failure to abide by these rules does not automatically result in termination of employment, but will subject a servicemember to her employer's rules concerning unexcused absences.²⁸

2. *The Reasonable Accommodation Standard*

If an employee returns home with a service-related disability, USERRA requires her employer to make a reasonable effort to accommodate the servicemember.²⁹ This duty is triggered if the servicemember's disability prevents her from performing any essential job related task.³⁰ If, after the accommodation is made, the servicemember is still unable to perform her job, the employer must then offer her a new position that she can perform with her disability.³¹ This position must be of equivalent seniority, status, and pay.³² Some examples of accommodations an employer is required to make include: (1) "placing the employee . . . on light duty status; (2) modifying technology or equipment used in the job position; (3) revising work practices; or (4) shifting job function."³³ There is no mathematical formula to determine the appropriate level of accommodation, as each circumstance is dependent on the nature of the disability, the requirements of the job, and any other unique issues surrounding the situation.³⁴

3. *Unreasonable or Impossible Standard*

An employer's duty to make a reasonable accommodation is not triggered if the overall circumstances have changed, making it impossible or unreasonable to reemploy a servicemember.³⁵ This exception is meant to be "very limited" and is only applicable where reinstatement would create a useless job or where there is a reduction in the workforce that would have reasonably included

27. *Id.*

28. *Id.*; CAMDEN ET AL., *supra* note 18, at § 3.6, 3-8.

29. 38 U.S.C.A. § 4313(a)(3); 20 C.F.R. §§ 1002.225, 1002.226.

30. 38 U.S.C.A. § 4313(a)(3); 20 C.F.R. § 1002.225.

31. 38 U.S.C.A. § 4313(a)(3)(A).

32. Woodard v. N.Y. Health and Hosps. Corp., 350 F.App'x 586 (2d Cir. 2009) (holding that a city-controlled health and hospital corporation did not violate USERRA when it reemployed a servicemember, who before deployment had worked as the associate director of health care standards, to a similar position of equivalent seniority, status, and pay, despite the servicemember's complaints that the new job was secretarial and had little real responsibility).

33. Uniformed Services Employment and Reemployment Rights Act of 1994, 70 Fed. Reg. 75,246, 75,227 (Dec. 19, 2005), *available at* 2005 WL 3451172.

34. *Id.*; Wright & Rinckey, *supra* note 6, at 50 (stating, "[i]n short, the law says, there must be a position for [the veteran] somewhere in the employer's company").

35. H.R. REP. NO. 103-65, pt. 1, at 25 (1993); U.S.C.C.A.N. 2449, 2458, *available at* 1993 WL 235763, *30.

the veteran had she not been deployed.³⁶ However, it is not a sufficient excuse if another person has been hired to fill the servicemember's position during her deployment.³⁷ The unreasonable or impossible standard is an affirmative defense, shifting the burden of proof to the employer and requiring the employer to prove its case by a preponderance of the evidence.³⁸

4. *Undue Hardship*

Employers are additionally not required to reemploy a disabled servicemember if the efforts necessary to accommodate her would impose an "undue hardship" on the employer.³⁹ Undue hardship is defined by USERRA as "actions requiring significant difficulty or expense."⁴⁰ Those actions include the cost of the accommodation,⁴¹ the overall financial resources of the facility involved,⁴² the overall size of the employer,⁴³ and the nature of the work force involved.⁴⁴ Under USERRA, undue hardship is an affirmative defense, which requires the employer to prove its case by a preponderance of the evidence.⁴⁵

B. *What Is PTSD?*

Posttraumatic Stress Disorder ("PTSD") can occur after a person witnesses a traumatic event.⁴⁶ Most commonly, these events are combat exposure, physical abuse, or sexual assault.⁴⁷ The disorder occurs when the person's natural stress-related reaction to the traumatic event does not subside over time.⁴⁸ Instead, the person is stuck in a disruptive and never-ending state

36. *Id.*; see also *David v. Halifax Cnty. Sch. System*, 508 F. Supp. 966, 968 (E.D.N.C. 1981) (holding that a decline in school system enrollment and a corresponding reduction of teaching staff did not render reemployment of a teacher unreasonable, because the teaching position the servicemember left was not scheduled to be eliminated).

37. *Id.*; see also *Murphree v. Commc'ns. Techs., Inc.*, 460 F. Supp. 2d 702 (E.D. La. 2006) (holding that a military support contractor's hiring of a replacement employee on a permanent basis after reservist had been called up did not constitute changed circumstances under USERRA and therefore contractor failed to demonstrate the impossibility or unreasonableness of re-hiring reservist).

38. Piscitelli & Still, *supra* note 20, at §4:2.

39. 38 U.S.C.A. § 4312(d)(1)(B); 20 C.F.R. § 1002.139(b).

40. 38 U.S.C.A. § 4303(15).

41. *Id.* § 4303(15)(A).

42. *Id.* § 4303(15)(B).

43. *Id.* § 4303(15)(C).

44. *Id.* § 4303(15)(D).

45. Piscitelli & Still, *supra* note 20.

46. *What Is PTSD?*, U.S. DEPT OF VETERANS AFFAIRS, <http://www.ptsd.va.gov/public/pages/what-is-ptsd.asp> (last visited Sept. 24, 2011).

47. *Id.*

48. *Id.*

of hyper-arousal.⁴⁹ In 2004, it was estimated that 12.5 percent of returning soldiers would develop PTSD.⁵⁰ In 2011, those estimates increased to 25 percent.⁵¹

1. *Symptoms and Triggers of PTSD*

PTSD symptoms are unique for each individual.⁵² They may start soon after the traumatic event or may take months or years to surface.⁵³ When they do occur, the symptoms of PTSD can be terrifying and extremely disruptive in a person's life. The most common symptoms are (1) reliving the event; (2) feeling numb; (3) hyper-arousal; and (4) persistent avoidance of stimuli.⁵⁴ These symptoms can be spontaneously triggered by stimuli both inside and outside of the body.⁵⁵ Internal triggers may include feelings of frustration, vulnerability, or loss of control.⁵⁶ External triggers can be tactile, olfactory, auditory, and visual.⁵⁷ These triggers are not always rational, but for whatever reason they are associated with the traumatic event by the person experiencing PTSD.⁵⁸

2. *Common Treatments for PTSD*

The United States Department of Veterans Affairs ("VA") primarily uses a combination of medication and psychotherapy to

49. *Id.* For a better understanding of what PTSD is actually like, watch Kyle Hausmann-Stokes film "Now, After." Kyle Hausmann-Stokes, *Now After – PTSD from a Soldier's POV* (Blue Three Productions 2010), (Dec. 2, 2010), <http://www.youtube.com/watch?v=NkWwZ9ZtPEI>. Kyle served for five years in the Army's Airborne Infantry and as a Squad Leader and Convoy Commander during a year-long combat tour in Iraq. Kyle Hausmann-Stokes Films, KYLEHS.COM, <http://www.kylehs.com/aboutme/index.html> (last visited Aug. 29, 2012). He is now a University of Southern California film school student. *Id.*

50. *1 in 8 Returning Soldiers Suffers from PTSD*, MSNBC.COM (June 30, 2004), http://www.msnbc.msn.com/id/5334479/ns/health-mental_health/t/returning-soldiers-suffers-ptsd/#.Tph0WhVU3yk.

51. *Understanding PTSD*, WWW.PTSD.VA.GOV, http://www.ptsd.va.gov/public/understanding_ptsd/booklet.pdf (last visited Sept. 24, 2011). Additionally, some groups of people are more likely to develop PTSD than others, including people who have had an earlier life-threatening event, little education, another mental health problem, or little support from family and friends. *Id.*

52. *What Is PTSD?*, *supra* note 46.

53. *Id.*

54. *Id.*

55. Matthew Tull, *How to Identify and Cope with Your PTSD Triggers*, ABOUT.COM GUIDE (Nov. 5, 2008), <http://ptsd.about.com/od/selfhelp/a/CopingTriggers.html>.

56. *Id.*

57. *Id.*

58. *Anxiety Disorders*, U.S. DEPT OF HEALTH AND HUMAN SERVS., NAT'L INST. OF MENTAL HEALTH (2009), *available at* <http://www.nimh.nih.gov/health/publications/anxiety-disorders/nimhanxiety.pdf>.

treat PTSD.⁵⁹ From the medication side, Selective Serotonin Reuptake Inhibitors (“SSRI”) are most common and are used to raise the level of serotonin in a patient’s brain.⁶⁰ This change in serotonin levels can make sufferers of PTSD feel better temporarily, allowing the patient to participate in therapy and daily living.⁶¹

On the counseling side, the VA has found that Cognitive Behavioral Therapy (“CBT”) is the most effective form of psychotherapy for treating PTSD.⁶² CBT usually involves meeting with a therapist once a week for three to six months, focusing on patient developing skills to better understand how PTSD changes their thoughts, or talking repeatedly about the traumatic event until the memories are no longer upsetting.⁶³ The latter is known as Prolonged Exposure Therapy (“PE”) has been found to have the highest, and quickest, success rate.⁶⁴

59. *Id.*

60. The most commonly used SSRIs are sertraline (more commonly known as Zoloft) and paroxetine (also known as Paxil). *Id.* The FDA has approved both medications for treatment of PTSD. *Id.* In certain circumstances, doctors will also prescribe medicines called benzodiazepines. *Id.* These medications are used to treat intense feels of anxiety. *Id.* However, benzodiazepines are known to cause addiction and are not recommended for long-term use. *Id.* There are alternative medications available. In a recent study, Dr. Eugene Lipov, a Chicago-based anesthesiologist, used SBG (a drug used to relieve migraines and chronic pain since the 1920s) to treat PTSD in eight civilians and four veterans from Iraq and Afghanistan. Katie Drummond, *Obama Loves this Freaky PTSD Treatment; the Pentagon, Not So Much*, WIRED MAGAZINE (July 19, 2010), <http://www.wired.com/dangerroom/2010/07/obama-loves-this-freaky-ptsd-treatment-the-pentagon-not-so-much/>. SGB is administered in a single injection into the sympathetic nerve tissue on the right side of the cervical vertebra. *Id.* In Dr. Lipov’s first patient, a vet, who had awoken to find himself strangling his wife, said the effects took only seven minutes to kick in. *Id.* The method is very promising, but experts are still studying why this treatment works before attempting to administer it on a large scale. *Id.*

61. *Id.*; *contra* Shankar Vedantam, *Most PTSD Treatments Not Proven Effective*, WASH. POST (Oct. 19, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/18/AR2007101802186.html> (reporting that a recent study conducted by Harvard University psychologist and PTSD expert, Richard McNally, found no strong evidence to support that any medication was effective in treating PTSD, including the drugs Paxil and Zoloft).

62. *Treatment for PTSD*, U.S. DEPT OF VETERANS AFFAIRS, <http://www.ptsd.va.gov/public/pages/treatment-ptsd.asp> (last visited Aug. 29, 2012).

63. *Prolonged Exposure Therapy*, U.S. DEPT OF VETERANS AFFAIRS, <http://www.ptsd.va.gov/public/pages/prolonged-exposure-therapy.asp> (last visited Aug. 29, 2012); *accord Cognitive Processing Therapy*, U.S. DEPT OF VETERANS AFFAIRS, NAT’L CTR. FOR PTSD, http://www.ptsd.va.gov/public/pages/cognitive_processing_therapy.asp (last visited Aug. 29, 2012).

64. PE was developed by Edna Foa, PhD, Director of the Center for Treatment and Study of Anxiety. *About Prolonged Exposure Therapy*, PERELMAN SCH. OF MED. CTR. FOR THE TREATMENT AND STUDY OF ANXIETY,

C. What Is VA Disability Compensation?

If a veteran suffers an injury caused or aggravated by an event occurring during active duty, she may be eligible for disability compensation through the VA.⁶⁵ To qualify for benefits, the veteran must show that her injury is “service-connected,” requiring her to provide “(1) medical evidence of a current disability; (2) medical, or in certain circumstances, lay evidence of in-service incurrence or aggravation of a disease or injury; and (3) medical evidence of a nexus between the claimed in-service disease or injury and the present disease or injury.”⁶⁶

Once established, the VA matches her symptoms with congressionally established diagnostic codes to determine how much the injury impairs her ability to work.⁶⁷ The diagnostic codes

http://www.med.upenn.edu/ctsa/workshops_pet.html (last visited Aug. 29, 2012). Numerous studies have proven that PE significantly reduces the symptoms of PTSD. *Id.* In 2001 PE for PTSD received an Exemplary Substance Abuse Prevention Program Award from the U.S. Department of Health and Human Services Substance Abuse and Mental Health Services Administration. *Id.* For a better understanding of PE, watch the VA’s film *In-Context Exposure Therapy Helps Bring Closure to Veterans*. *In-Context Exposure Therapy Helps Bring Closure to Veterans*, CHARLESTONVA.GOV (June 2009), http://www.charleston.va.gov/CHARLESTON/news/charlestonVAgov-exposure_therapy.aspx.

65. *Allen v. Principi*, 237 F.3d 1368, 1375 (Fed. Cir. 2001) (holding disability compensation is authorized if the disability occurred in the line of duty; however, compensation is precluded if the injury was caused by the willful misconduct of the veteran); *Allen v. Nicholson*, 21 Vet. App. 54, 63 (2007) (holding that New Mexico Army National Guardsman was not on active duty as defined by the VA when he was called to duty by the state to help with a state prison riot, to qualify for VA benefits the reservist must be on federal active duty); *Disability Compensation*, U.S. DEPT OF VETERANS AFFAIRS, <http://www.vba.va.gov/bln/21/compensation> (last visited Aug. 29, 2012).

66. *Rose v. West*, 11 Vet. App. 169, 171 (1998) (holding that a veteran had obtained the required nexus between his claimed in-service injury and present condition by providing a letter from his private physician opining that his continued back problems originated with his in-service injury); *see Dingess v. Nicholson*, 19 Vet. App. 473, 484 (2006) (holding that a service-connection claim for disability-compensation benefits under 38 U.S.C.A. §§ 1110 or 1131 consists of five elements: (1) veteran status, (2) existence of a disability, (3) a connection between the veteran’s service and the disability, (4) degree of disability, and (5) effective date of the disability); *see generally Golz v. Shinseki*, 590 F.3d 1317, 1321 (Fed. Cir. 2010) (holding that service-connection for PTSD when three elements are met: (1) a current medical diagnosis of PTSD, (2) credible supporting evidence that the claimed in-service stressor actually occurred, and (3) medical evidence establishing a link between the claimed in-service stressor and the current symptomatology).

67. *See Pentecost v. Principi*, 16 Vet. 124 (2002) (holding that, despite not being diagnosed until 1993, a Vietnam veteran was entitled to disability compensation benefits for PTSD, after presenting records from his unit’s record describing an attack by enemy rockets while veteran was stationed in Da Nang, Vietnam in 1967).

also include a percentage of disability, which determines the amount of compensation the servicemember will receive.⁶⁸ This amount is irrespective of the type of injury suffered, the servicemember's rank, or their level of income.⁶⁹ In other words, a ten percent disability rating equates to \$123 per month for any member of the military.⁷⁰

III. ANALYSIS

Matt Farwell served as an Infantryman in Afghanistan for sixteen months.⁷¹ Despite being a decorated soldier with years of civilian work experience, he has been homeless since 2007.⁷² Matt now sleeps in the Stanford University library at night and roams the streets of California during the day, waiting for his chance to be treated for PTSD at a local VA hospital.⁷³

Matt's situation is far from unique.⁷⁴ In 2009, the VA listed over 11,000 veterans between the ages of eighteen and thirty as officially homeless.⁷⁵ This section examines how soldiers like Matt

68. *How the VA Evaluates Levels of Disability*, VIETNAM VETERANS OF AMERICA, http://www.vva.org/ptsd_levels.html (last visited Aug. 29, 2012).

69. *Id.*

70. *Veterans Compensation Benefits Rate Tables – Effective 12/1/09*, U.S. DEPT OF VETERANS AFFAIRS, <http://www.vba.va.gov/bln/21/rates/comp01.htm> (last visited Aug. 29, 2012) (listing the dollar amounts for corresponding disability ratings, including the additional amounts for veterans with spouses, children under and above age eighteen, and dependent parents).

71. Matt Farwell, *Back Home, and Homeless*, N.Y. TIMES (Oct. 5, 2011), <http://atwar.blogs.nytimes.com/2011/10/05/back-home-and-homeless/>. Matt served in the U.S. Army's Second Battalion, 87th Infantry Regiment, Third Brigade, Tenth Mountain Division. *Id.*

72. *Id.* Matt has worked continually since age fifteen, working as a SAT and GRE tutor, defense contracting intern, plumbing specialist at Lowe's, waiter, and lifeguard. *Id.*

73. *Id.* Matt is on the waiting list to have his PTSD treated by Dr. Jonathan Shay, a VA psychiatrist who recently earned the MacArthur Genius Grant for his work on posttraumatic stress disorder and his unique perspective on the psychological impact of war. *Id.*; Deborah Sontag & Amy O'Leary, *Dr. Jonathan Shay on Returning Veterans and Combat Trauma*, N.Y. TIMES (Jan. 13, 2008) <http://www.nytimes.com/2008/01/13/us/13shay-interview.html>.

74. EXAMINING THE LIFETIME COSTS OF SUPPORTING THE NEWEST GENERATION OF VETERANS: SUB-HEARING BEFORE THE SENATE VETERANS AFFAIRS COMMITTEE, 112th Cong. (July 27, 2011) (statement of Paul Rieckhoff, Executive Director & Founder of the Iraq and Afghanistan Veterans of America), *available at* http://veterans.senate.gov/hearings.cfm?action=release.display&release_id=febd3bd7-ce2b-4198-9675-d8923df563d1.

75. *Id.* The VA listed over 11,000 veterans as homeless in 2009. *Id.* For the VA, a homeless person is someone with no stable bed or shelter, which includes living on the streets, in a state-funded homeless shelter, medical or psychiatric inpatient or simply staying with friends and family for an extended period of time. 42 U.S.C.A. § 11302; Farwell, *supra* note 71.

end up without a place to live, despite the job protections promised under USERRA and monthly disability benefits awarded by the VA.

A. *No Rest for the Weary*

Reservists serving in Iraq and Afghanistan are normally deployed for twelve months at a time.⁷⁶ After returning home, USERRA awards reservists a ninety-day rest period before they are required to return to civilian work.⁷⁷ This is more than a vacation, it is meant to allow reservists time to adjust back to civilian life and address any issues that might linger after living in a war zone.⁷⁸ This, however, is not always realistic due to financial burdens and employer demands.

1. *Financial Burdens*

Once deployed, a reservist stops receiving a paycheck from her civilian employer and starts getting paid by the U.S. Army.⁷⁹ In most cases, the pay is significantly lower.⁸⁰ For example, a reservist with a rank of Private First Class deployed in Iraq typically earns \$36,000 for a year of active duty service.⁸¹ And

76. Jim Tice, *Army Considers Shorter Deployments*, USA TODAY (June 21, 2010) http://www.usatoday.com/news/military/2010-06-21-army-modifying-deployments_N.htm. The Army started the wars in Iraq and Afghanistan with twelve-month deployments. *Id.* In 2007, the Army extended deployments to fifteen months when it sent 20,000 additional troops into battle. *Id.* Then, in August 2008, the Army reduced deployments back to twelve months. *Id.* The Army is now attempting to extend the periods between deployments to three years. *Id.*

77. 38 U.S.C.A. § 4312(e).

78. *Id.* The purpose of USERRA is to provide prompt reemployment of servicemembers returning from deployments, but also to minimize the disruption of their lives as well as the disruption to their employers, fellow employees and their communities. *Id.* § 4301(a)(2).

79. *Basic Pay: Active Duty Soldiers*, GOARMY.COM, <http://www.goarmy.com/benefits/money/basic-pay-active-duty-soldiers.html> (last visited Aug. 29, 2012). Once activated, an Army Reserve Soldier will earn active duty pay. *Id.* There is no obligation for an employer to pay an employee who is absent for military duty. *Legal Issues for Military Leave*, TEX. WORK COMM'N, http://www.twc.state.tx.us/news/eft/legal_issues_for_military_leave.html (last visited Aug. 29, 2012). However, under Texas law, a salaried exempt employee who misses work due to military duty must be paid the full salary for the week if she works any time during that week. *Id.*

80. *Basic Pay: Active Duty Soldiers*, *supra* note 79.

81. *Id.* Activated Army Reserve Soldiers earn active duty pay once activated. *Id.* Officers in the Army Reserve will earn more, as will individuals who receive merit and combat bonuses. *Id.* The \$36,000 figure used in this article was calculated based on a Private First Class deployed in Iraq. The calculation is as follows: \$1,585.50 per month in basic pay, plus \$254.46 per month for a basic food allowance, plus \$903 per month for a basic housing allowance, plus \$225 per month for imminent danger pay, plus \$100 per month for hardship duty, equaling \$3,067.46 per month (\$36,809.52 annually).

although the Army provides for her basic needs, mortgages, car payments, and credit card bills must still be paid during deployment.⁸² Many reservists also choose to purchase their own equipment, including boots, armor, and goggles, when they feel the gear issued by the Army is inadequate.⁸³ When all this is added up, many find themselves with little savings to live off of once they return home and few are able to take advantage of the full ninety-day rest period.⁸⁴ Instead, some are forced to return to work far earlier than their mental health allows.⁸⁵

2. Employer Demands

When initially enacted in 1994, Congress intended USERRA to protect a reservist's job both while deployed and during the rest period once she returns home.⁸⁶ However, a recent court decision has held that employers are not obligated to respect the full USERRA rest period.⁸⁷

In *Gordon v. Wawa Food Markets*, an Army Reservist stopped by his employer's premises to pick up his paycheck and work schedule on his way home from a weekend training exercise.⁸⁸ Once inside, the employer ordered the reservist to stay and work an unscheduled night shift.⁸⁹ When the reservist refused, the employer threatened to fire him if he did not comply.⁹⁰ The reservist stayed and died in a car accident the next morning, allegedly caused when he fell asleep at the wheel.⁹¹ As part of a tort claim against the employer, the reservist's estate argued that the car accident never would have occurred if the employer had respected USERRA's eight-hour rest period.⁹²

Joyce Wessel Raezer & Debbie Fryar, *Military Pay 101: How Much Do You Earn*, MILITARY MONEY (2004), <http://www.militarymoney.com/PayBenefits/militarypay/tabid/107/itemId/2274/Default.aspx>.

82. *Pre-Deployment Tips for the Soldier*, OHIO NAT'L GUARD, <http://ong.ohio.gov/frg/FRGresources/predeploytip.pdf> (last visited Sept 9, 2012). When deployed, servicemembers are responsible for their household expenses, including rent, mortgage payments, car payments, credit cards, etc. *Id.*

83. Keith Garvin, *Some U.S. Soldiers Forced to Buy Own Gear*, ABC NEWS (Feb. 7, 2011), <http://abcnews.go.com/WNT/story?id=129227&page=1>.

84. Donna Gordon Blankinship, *Financial Struggles Common Among Military Families*, HUFFINGTON POST (Mar. 25, 2011 3:25 PM), <http://www.huffingtonpost.com/huff-wires/20120325/us-afghanistan-family-struggles/>.

85. *Id.*

86. 38 U.S.C.A. § 4312(e).

87. *Gordon v. Wawa Food Mkts.*, 388 F.3d 78 (3d Cir. 2003).

88. *Id.*

89. *Id.* at 80.

90. *Id.*

91. *Id.*

92. 38 U.S.C.A. § 4312(e)(1)(A)(i). An employee completing a period of

The Third Circuit Court of Appeals disagreed, holding that the statutory language in USERRA did not impose an obligation on an employer to provide an employee with eight hours of rest once the employee effectively reports back to work.⁹³ In other words, had the reservist gone straight home that night, he would have been entitled to his rest period; but, by entering his workplace early he forfeited his right to eight hours of rest.⁹⁴

3. PTSD and Returning to Work Early

Returning to work early poses substantial risks to reservists suffering from PTSD. The workplace is full of stress, loud noises, and crowded spaces, all potential PTSD triggers.⁹⁵ And per the Court's ruling in *Gordon*, once a reservist returns to work, her employer is not obligated to allow her to retreat back to her USERRA mandated rest period, even if her PTSD prevents her from performing her job.⁹⁶ Moreover, PTSD treatment programs take three to six months to complete and the drugs commonly prescribed cause blurred vision, dizziness, and vomiting.⁹⁷ This puts reservists with financial problems in a difficult situation, having to choose between their mental health and earning a living. Many are forced to return to work early, putting off the treatment until they have a psychotic break.⁹⁸

uniformed service of fewer than thirty-one days is required to report for work at his civilian job

not later than beginning of the first regularly scheduled work period on the first calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for safe transportation of the person from the place of that service to the person's residence.

Id.

93. *Id.* at 81.

94. Samuel F. Wright, *Reporting Back to Work After Weekend Drills*, ROA.ORG (February 2005), http://www.roa.org/site/PageServer?pagename=law_review_156&printer_friendly=1.

95. Matthew Tull, *How to Identify and Cope with Your PTSD Triggers*, ABOUT.COM GUIDE (Nov. 5, 2008), <http://ptsd.about.com/od/selfhelp/a/CopingTriggers.htm>.

96. *Gordon*, 388 F.3d at 81.

97. *Treatment of PTSD*, U.S. DEPT OF VETERANS AFFAIRS, <http://www.ptsd.va.gov/public/pages/treatment-ptsd.asp> (last visited Sept. 4, 2011) (stating that treatment for PTSD often lasts three to six months, but if other mental health problems are involved, treatment may last one to two years); *Zoloft Side Effects*, DRUGS.COM, <http://www.drugs.com/sfx/zoloft-side-effects.html> (last visited Sept. 4, 2012). Zoloft also commonly causes anxiety, constipation, decreased sexual desire, diarrhea, drowsiness, increased sweating, and loss of appetite. *Id.*; *Paxil Side Effects*, DRUGS.COM, <http://www.drugs.com/sfx/paxil-side-effects.html>. Paxil has also been known to cause gas, increased urination, nervousness, numbness or tingling of the skin, trouble sleeping, weakness, and yawning. *Id.*

98. Kate Thayer, *PTSD Sufferer Who Gave Wife, Nation a Scare Is Now*

Chris Miller of Schaumburg, Illinois is a tragic example of how untreated PTSD can lead to tragedy.⁹⁹ Chris, a former Marine and Iraq veteran, returned home in 2003 and quickly began working long hours in a restaurant to support his family.¹⁰⁰ Chris ignored his PTSD symptoms for months, before an unknown trigger caused a psychotic break.¹⁰¹ Chris fled the state with his infant son, holding him captive for three days.¹⁰² Chris's unfortunate situation would have been preventable if he had sought out treatment at the onset of his PTSD symptoms.¹⁰³ But, like many others, Chris chose putting his family's well-being above his own mental health.

B. Filing for Disability Compensation

A servicemember suffering from PTSD is entitled to monthly compensation from the VA.¹⁰⁴ However, receipt of these funds is not automatic, and starts with a reservist first being diagnosed with PTSD.¹⁰⁵ This poses a problem for many, because the VA operates a passive system, leaving the burden on the reservist to realize she has a problem, and then seek out care on her own.¹⁰⁶ According to the Rand Corporation's recent Invisible Wounds of War Study, only about half (fifty-three percent) of servicemembers who experience PTSD actually seek treatment.¹⁰⁷ This leaves thousands of servicemembers without any chance of ever receiving disability compensation.¹⁰⁸

Disability compensation is not guaranteed for servicemembers who do not seek out treatment.¹⁰⁹ The VA uses

'Normal Again': Since Disappearing for Two Days with Infant Boy, Iraq Veteran Has Receive the Care He Needed, CHI. TRIB. (Sept. 13, 2011), http://articles.chicagotribune.com/2011-09-13/news/ct-met-schaumburg-ptsd-20110913_1_ptsd-breast-milk-post-traumatic-stress-disorder.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. See generally *VA Disability Compensation*, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.vba.va.gov/bln/21/compensation/> (last visited Oct. 14, 2011) (stating that military servicemembers are eligible for disability compensation if they have a service-related disability and were discharged under other than dishonorable conditions).

105. *Pentecost*, 16 Vet. App. at 126.

106. Vanessa Williamson & Erin Mulhall, *Invisible Wounds: Psychological and Neurological Injuries Confront a New Generation of Veterans*, IAVA ISSUE REPORT, 11 (Jan. 2009), http://iava.org/files/IAVA_invisible_wounds_0.pdf.

107. *Id.* at 12.

108. *One in Five Iraq and Afghanistan Veterans Suffer from PTSD or Major Depression*, RAND CORP. (Apr. 17, 2008), <http://www.rand.org/news/press/2008/04/17.html>.

109. *Career After Combat: Employment and Education Challenges for Iraq and Afghanistan Veterans*, IAVA (Jan. 2009)

diagnostic codes based on the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) to determine if a servicemember's symptoms warrant compensation.¹¹⁰ Many are diagnosed with PTSD by a VA physician, but never receive compensation because their symptoms do not meet the VA's high standard.¹¹¹ Others have symptoms that constantly disrupt their lives and ability to work, but are only awarded minimal monthly compensation.¹¹² For instance, to receive a disability rating of thirty percent for PTSD, the VA requires the following symptoms:

Occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self-care, and conversation normal), due to such symptoms as: depressed mood, anxiety, suspiciousness, panic attacks (weekly or less often), chronic sleep impairment, mild memory loss (such as forgetting names, directions, recent events).¹¹³

For this, a servicemember would receive \$376.00 per month.¹¹⁴ Put another way, a servicemember who cannot consistently complete tasks at work, suffers from memory loss, weekly panic attacks, and insomnia, will receive a total annual benefit from the VA of \$4,512.00.¹¹⁵ Although there is no doubt that this money is helpful, it is not enough from which to live.¹¹⁶ Instead, returning reservists

http://iava.org/files/careersaftercombat_quickfacts_final.pdf. Reservists returning from combat are not receiving the pay, pensions, health care coverage, and other benefits to which they are entitled. *Id.*

110. How the VA Evaluates Levels of Disability, VIETNAM VETERANS OF AMERICAN, http://www.vva.org/ptsd_levels.html (last visited Sept. 4, 2012).

111. A servicemember will receive a zero percent, non-compensable disability if "[a] mental condition has been formally diagnosed, but symptoms are not severe enough either to interfere with occupational and social functioning or require continuous medication." *How the VA Evaluates Levels of Disability*, Vietnam Veterans of America, http://www.vva.org/ptsd_levels.html (last visited Oct. 14, 2011).

112. The VA rates PTSD at 0%, 10%, 30%, 50%, 70% and 100%. *Id.* A servicemember with a 10% rating will receive \$123 per month, \$376 at 30%, \$770 at 50%, \$1228 at 70% and \$2,673 at 100%. *Veterans Compensation Benefits Rate Tables – Effective 12/1/09*, U.S. DEPT OF VETERANS AFFAIRS, <http://www.vba.va.gov/bln/21/rates/comp01.htm> (last visited Oct. 14, 2011).

113. THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (hereinafter DSM-IV), § 9411 (Am. Psychiatric Ass'n 4th ed., 1994).

114. *Veterans Compensation Benefits Rate Tables – Effective 12/1/09*, U.S. DEPT OF VETERANS AFFAIRS, <http://www.vba.va.gov/bln/21/rates/comp01.htm> (last visited Oct. 11, 2011). A servicemember suffering from the same symptoms, who has a spouse and two dependent young children, will receive a monthly benefit of \$475. *Id.*

115. This figure was calculated by multiplying the servicemembers monthly benefit of \$375 by twelve months.

116. The 2011 poverty threshold for individuals is a yearly income of at least \$10,890 or \$22,350 for a household of four. Silvio Laccetti, *Beyond the*

must work while they are treated for PTSD and hope that their employer is tolerant of any symptoms that prevent them from performing their job.

C. Problems with USERRA Protections

In the 2010 fiscal year, returning servicemembers filed 1,438 formal USERRA complaints with the Department of Labor.¹¹⁷ Four hundred seven (twenty-eight percent) of these claims dealt with reinstatement issues.¹¹⁸ Of the total claims, sixty-six percent ended in favor of the employer.¹¹⁹ Although the Department of Labor's report does not specify the rationale for ruling against servicemembers two-thirds of the time, it can be reasonably assumed that employers benefit from two powerful provisions within USERRA: (1) the unreasonable or impossible standard and (2) the undue hardship exception.

1. The Unreasonable or Impossible Standard

An employer has no duty to reemploy a reservist if it can be established that the employer's "circumstances have so changed as to make such reemployment impossible or unreasonable."¹²⁰ When

Poverty Threshold, PHILA. INQUIRER (Oct. 5, 2011) http://articles.philly.com/2011-10-05/news/30247087_1_poverty-line-poverty-threshold-wealth.

117. *USERRA Fiscal Year 2010 Annual Report to Congress*, Office of the Assistant Secretary for Veterans' Employment and Training, U.S. DEPT OF LABOR, at 8 (Feb. 2010) <http://www.dol.gov/vets/programs/userra/FY2010%20USERRA%20Annual%20Report.pdf>. 38 U.S.C.A. § 4332 requires the Secretary of Labor, after Consultation with the Attorney General and the Special Counsel, to prepare and transmit an annual report to Congress containing the information on the claims submitted during the fiscal year under USERRA. *Id.* at 7-8. Most notably of these statistics is that the Department of Justice only filed five USERRA complaints on behalf of servicemembers in the 2010 fiscal year. *Id.* at 9. Also worth noting is that of the 1,438 claims handled by the Department of Labor, 106 ended with the employer granting all of the servicemembers entitlements, 255 claims settled, with only thirteen cases being found to have merit but not resolved by the end of the fiscal year. *Id.* at 11-12.

118. *Id.* at 11.

119. *Id.* at 11-12. Eight hundred fifty-five cases were concluded in favor of the employer. *Id.* This figure was calculated by adding the following claims together: 440 claims were found to have no merit, 106 claims were administratively closed, 236 claims withdrawn, fifty-five claims were found to not be eligible for USERRA protections, thirteen claims had merit but were not resolved, and the merit of five claims was undetermined at the time the report was filed. *Id.* An administrative closure of a claim involves a claimant displaying lack of interest or being uncooperative with the Department of Labor and when a claimant has authorized a third party to simultaneously represent this interests. *Id.* at 12. The sixty-six percent figure was reached by dividing the claims found in favor of the employer (855) by the total claims filed (1,438).

120. 38 U.S.C.A. § 4312(d)(1)(A).

drafted, legislators intended this to be a limited exception, only applicable where the reemployment of a reservist would create a useless job or where a reduction in the work force would have included the reservist had she not been deployed.¹²¹ But, in 1992 the Fifth Circuit expanded upon this language in *Cole v. Swint*, by holding that “the purpose of the exception is to allow employers who have eliminated a reservist’s position or *otherwise drastically changed their business* to avoid rehiring someone for a job that no longer exists.”¹²² This interpretation creates problems for reservists who come home to find their employer has merged with, or been bought out by, another company.¹²³ This type of occurrence happens constantly in the marketplace, both in good and bad economic times.¹²⁴

121. H.R. Rep. No. 103-65, pt. 1, at 25 (1993); U.S.C.C.A.N. 2449, 2458, available at 1993 WL 235763, 30; *David v. Halifax Cty. Sch. Sys.*, 508 F. Supp. 966, 968 (E.D.N.C. 1981).

122. *Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992) (holding that the hiring of a replacement for the individual asserting re-employment rights did not constitute changed circumstances under USERRA, because if mere replacement of the employee would exempt the employer then USERRA’s protections would be meaningless.).

123. See generally *Murphee v. Commc’ns Techs., Inc.*, 460 F. Supp. 2d 702, 710-11 (E.D. La. 2006) (holding that a merger or transfer of assets is not a prerequisite to successorship liability under USERRA). In *Murphee* the court addressed the case of a reservist who was denied reemployment by the military contractor who took over his pre-deployment employer. *Id.* at 704. The military contractor filed for summary judgment, but the court held that there was a genuine issue of material fact as to whether the military contractor was the successor in interest of reservist’s pre-deployment employer. *Id.* at 709. If held to be the successor in interest, the military contract would be obligated under USERRA to rehire the reservist. *Id.* USERRA does not specifically define “successor in interest” and this was a question of first impression for the court. *Id.* at 706.

124. See generally Tim Worstell, *Microsoft Finally Closes on Skype*, FORBES (Oct. 15, 2011), <http://www.forbes.com/sites/timworstell/2011/10/15/microsoft-finally-closes-on-skype/> (showing that Microsoft was involved in a \$8.5 billion dollar acquisition/merger with Skype during a poor economy); Paul R. La Monica, *Disney Buys Pixar: House of Mouse is teaming up with Pixar in \$7.4 billion deal. Steve Jobs to become board member at Disney*, CNN MONEY (Jan. 25, 2006), http://money.cnn.com/2006/01/24/news/companies/disney_pixar_deal/ (showing that Disney and Pixar were involved in a merger during poor economic times); Sallie Hofmeister, *Merger of Time Warner, Turned Okd*, LA TIMES (July 18, 1996), <http://pqasb.pqarchiver.com/latimes/access/9948073.html?dids=9948073:9948073&FMT=ABS&FMTS=ABS:FT&type=current&date=Jul+18%2C+1996&auth=Hofmeister%2C+Sallie&pub=Los+Angeles+Times&desc=Merger+of+Time+Warner%2C+Turner+OKd&pqatl=google> (showing that Time Warner and Turner Broadcasting were involved in a merger during good economic times) and ; Paul Farhi, *Westinghouse to Buy CBS; \$5.4 Billion Merger Would Create Top Station* WASH. POST (Aug. 2, 1995), <http://pqasb.pqarchiver.com/washingtonpost/access/19377706.html?dids=19377706:19377706&FMT=ABS&FMTS=ABS:FT&type=current&date=Aug+02%2>

Typically, during a merger, many redundant positions are eliminated.¹²⁵ When this occurs to a deployed reservist's position, the employer can use the impossible or unreasonable standard to refuse reemployment.¹²⁶ For the employer, the burden is relatively simple. The employer is required to show that the reservist's position was eliminated and provide reasonable evidence that, had the reservist not been deployed, she would have been let go during the merger.¹²⁷ On paper, this can be shown very clearly; however, in reality, for many reservists, something very different likely could have occurred. For instance, if the reservist was home in the months before the merger, she might have been able to use her relationships and reputation within the company to transfer to, or at least apply for, a position within a different department. This, however, is impossible for a reservist to prove after the fact, and leaves many reservists without a job or a remedy against their employer.

2. *The Undue Hardship Exception*

USERRA requires an employer to make a reasonable effort to reemploy a servicemember who returns home from a deployment.¹²⁸ This includes making a "reasonable accommodation" if the servicemember is prevented by her disability from performing an essential function of her job.¹²⁹ This poses a unique problem for sufferers of PTSD, because symptoms preventing work may not surface for weeks or months after a servicemember returns to work.¹³⁰ In this instance, the law is

C+1995&author=Paul+Farhi&pub=The+Washington+Post+(pre-1997+Fulltext)&desc=Westinghouse+To+Buy+CBS%3B+%245.4+Billion+Merger+Would+Create+Top+Station+Owner &pqatl=google (showing that Westinghouse and CBS were involved in a merger during good economic times).

125. A company's organizational structure can change due to outsourcing, acquisitions, or mergers. *Managing Change: Indicators of Change*, ENCYCLOPEDIA OF BUSINESS, 2nd ed. <http://www.referenceforbusiness.com/management/Log-Mar/Managing-Change.html> (last visited Sept. 4, 2011). These actions are often accompanied by layoffs, when certain positions become redundant. *Id.*

126. *Cole*, 961 F.2d at 60.

127. *Murphree*, 460 F.Supp.2d at 709-10.

128. 38 U.S.C.A. § 4313(a)(3); 20 C.F.R. §§ 1002.225, 1002.226.

129. *Id.*

130. PTSD symptoms usually start soon after the sufferer experiences a traumatic event, but they may also develop slowly over time and not surface for months or years. *What is PTSD*, U.S. Department of Veterans Affairs, <http://www.ptsd.va.gov/public/pages/what-is-ptsd.asp> (last visited on Sept. 4, 2011). A caller named Jonathan from Traverse City, Michigan called into the NPR "Talk of the Nation" show to share his experience with PTSD. *Talk of the Nation: Soldiers Say It's Hard to Return to Civilian Life*, NPR (Oct. 10, 2011)(transcript and audio available at <http://www.npr.org/2011/10/10/141213271/soldiers-say-its-hard-to-return-to-civilian-life>).

unclear whether USERRA requires an employer to offer a new position of comparable seniority, status, and pay.¹³¹ Moreover, treatment for PTSD commonly takes three to six months to complete, after which the servicemember is likely able to return to their previous position.¹³² USERRA makes no mention of a temporary position being offered to accommodate this situation, nor does it address a servicemember being “cured” and requesting to return to her original position.¹³³

IV. PROPOSAL

Servicemembers suffering from PTSD have access to a wide range of treatment options and benefits.¹³⁴ Unfortunately, these programs work independently of one another, with little regard to a servicemember’s place in other programs. To truly “take care of our own,” these programs must work together, allowing a servicemember to rest, seek treatment, and heal before returning to work.¹³⁵ For this to happen, three major changes are needed: (1) USERRA must be amended to allow servicemembers who have returned to work the ability to leave work temporarily to seek treatment for PTSD, (2) servicemembers suffering from PTSD need to receive financial support during treatment, and (3) USERRA must be amended to clearly define what it means to return to work.

A. Changes to USERRA

USERRA currently gives returning reservists a mandated rest period dependent on their length of deployment.¹³⁶ For

Jonathan reported that he was in the Army Reserve and served in Iraq for 10 months. *Id.* Jonathan immediately returned to work, but was soon diagnosed with PTSD. *Id.* He was forced to stop working and go into a rehabilitation program before he could return to work permanently. *Id.*

131. *Id.*

132. *Cognitive Processing Therapy*, U.S. DEPT OF VETERANS AFFAIRS, NAT’L CTR. FOR PTSD, http://www.ptsd.va.gov/public/pages/cognitive_processing_therapy.asp (last visited Sept. 4, 2012.).

133. *See generally* 38 U.S.C.A. §§ 4301-4335 (showing that USERRA does not contemplate injuries that are delayed in their onset and can be cured after a short leave of absence from the workplace).

134. *PTSD Treatment Programs in the U.S.* Department of Veterans Affairs, U.S. DEPT OF VETERANS AFFAIRS, <http://www.ptsd.va.gov/public/pages/va-ptsd-treatment-programs.asp> (last visited Sept. 4, 2012).

135. Barack Obama, *supra* note 2. In his July 10, 2010, weekly address to the Nation, President Barack Obama spoke about his decision to make filing for PTSD benefits easier for veterans. *Id.* The speech concluded with President Obama’s assurance that, “we take care of our own,” implying that the U.S. Federal Government would do everything in its power to help veterans suffering from PTSD. *Id.* This comment is an attempt to expand upon that promise, by filing the holes in the current system.

136. 38 U.S.C.A. § 4312(e).

reservists serving in Iraq and Afghanistan, this is typically a ninety-day rest period.¹³⁷ Ninety days is perfect for physical exhaustion because it allows reservists time to rest and heal physical injuries before returning to work; however, emotional injuries are different. PTSD, for example, may not surface for months or even years after a deployment ends.¹³⁸ If a reservist has already returned to work, USERRA does not protect the job of a reservist if she chooses to take a leave of absence in order to seek treatment.¹³⁹

A small amendment to USERRA is all that is needed to correct this problem. USERRA already addresses a reservist hospitalized for an injury incurred during service.¹⁴⁰ 38 U.S.C. § 4312(e)(2)(A) provides:

A person who is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service in the uniformed services shall, at the end of the period that is necessary for the person to recover from such illness or injury, report to the person's employer . . . such period of recovery may not exceed two years.¹⁴¹

This provision could be extended to cover PTSD by adding the following language:

A person, who is diagnosed with service-connected PTSD within two years of completion of service in the uniformed services, shall notify the employer referred to in such subsection of the person's intent to leave work temporarily, for a period not to exceed ninety days, to seek treatment for PTSD. The employer shall be required to reemploy the uniformed service member only if the employer receives an application for reemployment within seven days of the completion of the ninety-day leave of absence from work.

This would extend USERRA's job protections for up to two years, allowing servicemembers to take a ninety-day leave of absence if they develop military service-related PTSD after returning to work. After ninety days of treatment, a servicemember would

137. Jim Tice, *Army Considers Shorter Deployments*, USA TODAY (June 21, 2010), http://www.usatoday.com/news/military/2010-06-21-army-modifying-deployments_N.htm. Soldiers in the Army serving in Iraq and Afghanistan are commonly deployed for twelve months at a time. *Id.* USERRA grants servicemembers serving periods of service of more than 180 days a ninety-day period of rest. 38 U.S.C.A. §4312(e)(1)(D).

138. *What Is PTSD?*, *supra* note 46.

139. *See generally* 38 U.S.C.A. §§ 4301-4335 (establishing employment protections for servicemembers absent from work for military duty).

140. 38 U.S.C.A. § 4312(e)(2)(A). This provision within USERRA allows a servicemember who returns from a deployment injured, to retain reemployment rights for up to two years while in the hospital recovering from an injury. *Id.* This two-year period can be extended if the servicemember requires longer than two years to heal. 38 U.S.C.A. § 4312(e)(2)(B).

141. *Id.*

submit an application for reemployment and the employer would be required, under USERRA, to give the servicemember her job back.

It should be noted that ninety days might not be enough time for all reservists to be cured of their PTSD symptoms.¹⁴² Some people who suffer from PTSD need six months, or even longer, to be completely cured.¹⁴³ However, most people are able to return to their daily lives after three months of treatment.¹⁴⁴ It is during this initial stage that sufferers of PTSD learn to cope with their symptoms.¹⁴⁵ Reservists could then continue their treatment after returning to work by attending weekly therapy session in the evening or weekend hours.¹⁴⁶

B. Financial Support

Once a reservist completes a deployment, her military pay stops.¹⁴⁷ A reservist is then expected to support herself on savings until she returns to work.¹⁴⁸ Unfortunately, a lengthy rest period is not possible for most reservists, because most lack the financial resources necessary to survive without a steady paycheck. This forces some to ignore their PTSD symptoms and return to work immediately.¹⁴⁹ By doing this, many reservists exacerbate their PTSD symptoms and are eventually unable to perform their job. This problem can be prevented by the addition of two new programs: (1) mandatory PTSD screenings for all returning reservists, and (2) an increase in disability compensation for suffers of PTSD.

1. Mandatory PTSD Screenings

All returning reservists should receive a mandatory PTSD screening before returning home to civilian life.¹⁵⁰ Additionally,

142. *Understanding PTSD*, *supra* note 51.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Programs for Veterans with Post-Traumatic Stress Disorder (PTSD)*, DEPT OF VETERANS AFFAIRS VETERANS HEALTH ADMIN. WASH., DC, http://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=2174 (last visited Sept. 4, 2012). Clinics and medical facilities that see for the 10,000 veterans per year must offer a full range of PTSD services during evening hours at least one day per week. *Id.* at 15. Additional evening, early morning, or weekend hours must be offered to meet the needs of the facilities' patient population. *Id.*

147. *Military Pay 101: How Much Do You Earn*, *supra* note 81.

148. *Id.*

149. Thayer, *supra* note 98.

150. Heath Haussamen, *Teague Seeks Mandatory Screenings to Combat PTSD*, NMPOLITICS.NET (May 27, 2009), <http://www.nmpolitics.net/index/2009/05/teague-seeks-mandatory-screenings-to-combat-ptsd/>. U.S. Representative Harry Teague, D-N.M., sponsored a bill

mandatory screenings should also be required after a servicemember has been home for three and twelve months. These screenings could easily be completed as part of a reservist's weekend training sessions.¹⁵¹

These mandatory screenings would ensure that reservists experiencing PTSD symptoms are diagnosed and treated quickly. Rapid treatment has been shown to dramatically shorten the amount of treatment needed to cure PTSD.¹⁵² Moreover, if PTSD is ignored, it can grow significantly more severe and require much longer and more involved treatments.¹⁵³

2. Disability Compensation

The VA should also treat all servicemembers diagnosed with PTSD as one hundred percent disabled during the first ninety days of treatment.¹⁵⁴ At a disability rating of one hundred percent, a servicemember would receive a monthly benefit of \$2,673.¹⁵⁵ This

in 2009 that would require mandatory mental health assessments for all servicemembers when entering the military, before and after each deployment, and after discharge from the military. *Id.* Many reservists who leave the service receive no counseling or education on PTSD. Matthew Renda, *A Soldier's Struggle: Iraq Veteran Now Battles PTSD*, THE UNION (Nov. 11, 2011), <http://www.theunion.com/article/20111111/NEWS/111119965/1053&parentprofile=1053>. Thirty-three-year-old Army veteran Justin Weathers is an all too common example. *Id.* He left the military in 2004 and received no counseling or education on PTSD. *Id.* Mr. Weather's PTSD went untreated for a long period of time, until he sought a diagnosis himself. *Id.* He is now in counseling and making slow progress back to full mental health. *Id.*

151. Reservists are required to complete two weeks of training each year in addition to training one weekend per month. *Benefits – Drill Pay: Army Reserve Soldiers Money for Just One Weekend a Month*, U.S. ARMY, <http://www.goarmy.com/benefits/money/drill-pay-army-reserve-soldiers.html> (last visited Sept. 4, 2012).

152. *Understanding PTSD*, *supra* note 51.

153. *Dangers of Mixing Medications for PTSD*, PTSD TREATMENT HELP, <http://ptsdtreatmenthelp.com/treatment/dangers-of-mixing-medications-for-ptsd/> (last visited Sept. 4, 2012). PTSD will only get worse if ignored, untreated, or self medicated. *Id.*

154. This is not a unique concept; the VA does something very similar with Hodgkin's disease. 38 C.F.R. § 4.117, DC 7709; *Green v. West*, 11 Vet. App. 472, 474 (1998). In this case, a servicemember had a unique physical illness that was not included in the VA's diagnostic codes. *Id.* When that occurs, the VA is instructed to match the condition with the next closest diagnostic code. *Id.* This veteran was matched with DC 7709, which corresponds with Hodgkin's Disease. *Id.* A short time later, the diagnostic code for Hodgkin's disease was rewritten, entitled all veterans rated under the code to be entitled to a one hundred percent disability rating while seeking treatment for their disease. *Id.* When the veteran was not given a one hundred percent rating while he treated for his disease, he appealed his decision and was eventually awarded a disability rating of one hundred percent. *Id.*

155. *Veterans Compensation Benefits Rate Tables – Effective 12/1/09*, U.S. DEPT OF VETERANS AFFAIRS, <http://www.vba.va.gov/bln/21/rates/comp01.htm>

amount is more than enough to stay financially afloat during the initial stages of PTSD treatment.¹⁵⁶ This benefit should be contingent on a servicemember actively participating in therapy and agreeing not to return to work for three months.

After three months of therapy, most patients have developed the skills necessary to return to work.¹⁵⁷ This ensures that servicemembers will return to their job permanently, becoming productive members of society, instead of burdens on the VA and other community organizations.

C. Guaranteed Rest After Deployment

In *Gordon v. Wawa Food Markets*, the Third Circuit Court of Appeals held a reservist who stopped by his employer to pick up his paycheck had effectively reported back to work and ended his mandated rest period.¹⁵⁸ The court was unable to hold otherwise, because USERRA does not clearly define what it means to report back to an employer.¹⁵⁹

This issue can easily be corrected by adding the following language to USERRA:

A person reports to, or submits an application for reemployment to an employer, when that person states, either verbally or in writing, that he or she seeks to begin employment. Returning to a job site or the employer's place of business is not sufficient application for reemployment.

This language provides that before a reservist may officially return to work, she must notify her employer of her intent to return to work.¹⁶⁰ Physical actions, such as visiting a job site or stopping by an employer's place of business, are not sufficient.

(last visited Sept. 4, 2012). Two thousand six hundred seventy-three dollars corresponds to the monthly allowance awarded to a veteran without children or a spouse. *Id.* A veteran rated at one hundred percent with a spouse would receive a monthly benefit of \$2,823.00. *Id.* A veteran with a spouse and two children under age eighteen would receive a monthly benefit of \$3,007.00. *Id.*

156. The 2011 poverty line for an individual is a yearly income of at least \$10,890. Silvio Laccetti, *Beyond the Poverty Threshold*, PHILA. INQUIRER (Oct. 5, 2011), http://articles.philly.com/2011-10-05/news/30247087_1_poverty-line-poverty-threshold-wealth. A monthly income of \$2,673 amounts to a yearly income of \$32,076.

157. *Military Pay 101: How Much Do You Earn*, *supra* note 81.

158. *Gordon*, 388 F.3d at 81.

159. *Id.*

160. When deployed, USERRA requires a servicemember to notify her employer either in writing or verbally unless doing so would be impossible under the circumstances. *Job Rights for Veterans and Reserve Component Members: The Uniformed Services Employment and Reemployment Rights Act of 1995 USERRA 38 U.S.C. 4301-4335*, U.S. DEP'T OF LABOR, http://www.dol.gov/vets/programs/userra/userra_fs.htm (last visited Sept. 4, 2012). However, USERRA has no similar requirement for servicemembers returning to work. *Id.*

This amendment ensures that a reservist may take care of routine tasks, such as picking up a paycheck or checking on the scheduling of future work, without sacrificing her USERRA mandated rest period.

V. CONCLUSION

PTSD is one of the most prevalent injuries suffered by military servicemembers of the wars in Iraq and Afghanistan.¹⁶¹ But unlike the injuries of past wars, PTSD can be cured. All that is needed are a few small changes in the system to provide soldiers with the time and resources necessary to heal.

161. Roxana A. Soto, *Invisible Wounds: For Many Soldiers the War Continues When They Get Home*, DENVER POST (Nov. 10 2011), http://www.denverpost.com/recommended/ci_19300430. One hundred seventy-one thousand veterans of the Iraq and Afghanistan war suffer from PTSD. *Id.*

