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## Tenth Circuit Upholds Employee Termination 2 Days After FMLA Leave Request

By George Wood

In *Milhauser v. Minco Products*, 2012 U.S. App. LEXIS 24938 (8th Cir. Dec. 5, 2012), the U.S. Court of Appeals for the Eighth Circuit ruled that reinstatement under the Uniformed Services Employment and Reemployment Rights Act (“USERRA”) may include the termination of the returning employee’s employment if that is the “position of employment” in which the returning employee would have been employed had he or she remained continuously employed. *Milhauser* answers a question that has appeared clear under Department of Labor regulations for USERRA for some time, but which few courts had considered. This clarification should help companies better understand their reinstatement obligations under USERRA.

### Background

The plaintiff in *Milhauser* had taken a leave of absence to serve in the military. During the leave, his position was eliminated as part of a reduction in force. Upon his release from military service, the plaintiff contacted his employer and requested reinstatement on a timely basis under USERRA. The employer advised the plaintiff that his position had been eliminated during his leave of absence and, as a result, the company would be reinstating the plaintiff to the position of termination, thereby ending his employment with the company. After taking the action, the plaintiff sued, alleging that he was not properly reinstated under USERRA. A Minnesota federal district court granted the employer summary judgment, ruling that the plaintiff had been properly reinstated. The plaintiff then appealed to the Eighth Circuit.

### The Court’s Decision

On appeal, the plaintiff argued that because USERRA uses the phrase “position of employment in which they would have been employed” to describe the reinstatement rights of returning veterans in 38 U.S.C. section 4313(a)(1)(A), an employer cannot terminate a returning veteran’s employment and meet its reinstatement obligations. Rather, according to the employee, an employer must reinstate the returning veteran to a position and then may only terminate that employee if it proves the affirmative defense under 38 U.S.C. section 4312(d)(1) that the employer’s circumstances have so changed as to make reemployment “impossible or unreasonable.”

The Eighth Circuit rejected this position, based on USERRA's language and on the language of its regulations. As the court ruled, "the escalator principle [under USERRA] requires that an employee's career trajectory be examined as if his or her employment 'had not been interrupted by' military service."<sup>1</sup> Thus, if an employee's employment would have been terminated had the employee not taken a military leave of absence, but remained employed, then termination of employment is a proper "reinstatement position" under USERRA.

The court also relied upon USERRA's implementing regulations, which clearly provide that "[d]epending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated."<sup>2</sup> This clear language, adopted by the United States Department of Labor to implement USERRA, was entitled to "considerable deference" by the court.<sup>3</sup>

Finally, the Eighth Circuit relied upon a district court decision that had reached the same conclusion, albeit under a prior military leave statute adopted by Congress.<sup>4</sup>

## Next Steps for Employers

The *Milhauser* decision provides clarity for employers with respect to the question of whether a returning veteran may be placed in a "terminated" status if the veteran's position had been eliminated during a military leave and the veteran would have no other employment with the company. This was clear in USERRA's regulations and has now been confirmed by *Milhauser*.

Employers, however, must make sure that they are properly applying USERRA's reinstatement requirements to a returning veteran whose position has been eliminated. Employers must understand that an employee is required to be reinstated to the "position of employment in which [the employee] would have been employed" had no leave of absence occurred. This may require a broader consideration of positions than simply the veteran's former position. If the veteran would have advanced within the company during the period of leave, any such advancement opportunities must be considered by the employer. Further, if other employees were given the opportunity to bid for or seek other positions within the company as part of a layoff or reduction in force, an employer is required to provide the same opportunity to veterans returning from military leave. In essence, the reinstatement analysis requires more than simple consideration of an employee's prior position. Employers who properly understand and follow this reinstatement process are able to better assist returning veterans and comply with USERRA's requirements.

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1 *Id.* at \*\*9-10.

2 *Id.* at \*10 (citing 20 C.F.R. § 1002.194).

3 *Id.* at \*10

4 See *Derepkowski v. Smith-Lee Co.*, 371 F. Supp. 1071 (E.D. Wis. 1974).