THE IMPORT OF "UNDUE HARDSHIP" FROM THE ADA TO USERRA: USEFUL GUIDELINE OR TROJAN HORSE?

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TABLE OF CONTENTS

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INTRODUCTION

Since the beginning of the war on terror in 2001, the military has called hundreds of thousands of reservists to active duty.[1] Fighting the war on terror has required the largest deployment of American service men and women since the Vietnam War.[2] Reserve components now comprise about half of the U.S. military's forces.[3] These reservists have been required to put their civilian lives on hold and step off of the corporate ladder while they fulfill their military orders.

Unfortunately, many of these men and women sustain disabling injuries during their service. From 2001 to 2008, the number of disabled veterans in the U.S. increased by over twenty-five percent to 2.9 million, and that number has continued to increase.[4] In the war on terror, the wounded-to-killed ratio is now 16:1, the highest ratio in U.S. history.[5]

1. David S. Loughran, Jacob Alex Klerman & Bogdan Savych, THE EFFECT OF RESERVE ACTIVATIONS AND ACTIVE-DUTY DEPLOYMENTS ON LOCAL EMPLOYMENT DURING THE GLOBAL WAR ON TERRORISM 1 (Rand Corp. Technical Report Series, 2006), *available at* http://www.rand.org/content/dam/rand/pubs/technical_reports/2006/RAND_TR321.pdf.

2. *Id.*

3. 151 CONG. REC. 25,308 (2005) (statement of Rep. Pombo) (noting that "National Guard members and members of Reserve Forces comprise about 46 percent of our total available military manpower").

4. Jennifer Kerr, *Number of Disabled Vets Up With Iraq, Afghan Wars*, THE HUFFINGTON POST (May 5, 2008, 3:18 PM), http://www.huffingtonpost.com/2008/05/11/number-of-disabled-vetsu_n_101183.html; *see also* Press Release, U.S. Census Bureau, Profile America Facts for Features (Oct. 27, 2010), http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb10-ff21.html (indicating that the number of veterans with a disability connected to service in the armed forced was 3.3 million as of 2009).

5. *See* Linda Bilmes, *Soldiers Returning from Iraq and Afghanistan: The Long-term Costs of Providing Veterans Medical Care and Disability Benefits* 2 (John F. Kennedy Sch. of Gov't Faculty Research, Working Paper No. RWP07-001, 2007), *available at* https://research.hks.harvard.edu/publications/workingpapers/citation.aspx?PubId=4329&type=FN&PersonId=177 (explaining that in Vietnam, there were 2.6 injuries per fatality, and in

Because of medical and technological advances, "soldiers are surviving injuries that would have killed them in previous wars . . . [and] are returning back to the United States with short-[term] and long-term disabilities."[6]

When disabled reservists return home, they face the challenge of reentering the workforce. The Uniformed Services Employment and Reemployment Rights Act (USERRA) protects the rights of these returning veterans to be reemployed in the same position that they vacated to perform their military service, or a position of like status, seniority, and pay. Under USERRA, employers have an obligation to make reasonable efforts to help returning veterans become qualified to perform the duties of the reemployment position.[7]

Employers are obligated under USERRA to make reasonable efforts to accommodate disabled veterans and reintegrate them into the workforce. Those obligations may be excused if they would impose an "undue hardship" on the employer.[8] Because of the way that USERRA borrows concepts from the Americans with Disabilities Act, the language describing "undue hardship" under USERRA is likely to be construed in the same way that it is under the ADA.[9] In cases arising under the ADA, courts have interpreted and applied the term "undue hardship" in ways that limit employers' obligations to accommodate employees' disabilities. But despite the important ramifications that "undue hardship" may have in requiring employers to reemploy returning veterans, courts still have not interpreted the term or applied it in the context of USERRA. In this comment, I contend that the similar definitions of the term "undue hardship" under the ADA and USERRA, the similar general purpose of the two acts, and the lack of consensus among government agencies as to how "undue hardship" should be interpreted under USERRA make it likely that courts will apply ADA case law when interpreting the term under USERRA. I argue that such importation would be problematic for four reasons (1) the terms that the undue hardship provision delimits in each act—"reasonable accommodation" under the ADA, and "reasonable efforts" under USERRA—have different meanings and carry different burdens of proof; (2) "undue hardship" analysis under the ADA is

World Wars I and II, there were fewer than two wounded service men for every soldier killed).

6. Michael Waterstone, *Returning Veterans and Disability Law*, 85 NOTRE DAME L. REV. 1081, 1097 (2010).

7. 20 C.F.R. § 1002.198 (2012).

8. *See* 38 U.S.C. § 4303(10) (2006); 20 C.F.R. § 1002.5(i) (2012) (defining "reasonable efforts" by an employer as "actions, including training provided by an employer that do not place an undue hardship on the employer").

9. Kevin G. Martin, *Employment Law*, 46 SYRACUSE L. REV. 499, 512 (1995).

inextricably entwined with "reasonable accommodation" analysis, and courts construe those terms in ways that limit plaintiffs' recovery; (3) administrative guidance, while unclear, suggests that ADA case law should not be imported to interpret undue hardship; and (4) giving a broad interpretation to undue hardship would run counter to USERRA's underlying purpose. To import undue hardship from the ADA to USERRA would, in essence, make the term a Trojan horse; the gift of useful guidance would in practice undermine USERRA's protections for disabled soldiers. I argue that courts should instead construe the term narrowly under USERRA. While it is beyond the scope of this comment to solve the puzzle of how courts should interpret USERRA's undue hardship provision, I propose that USERRA's affirmative defense of "changed circumstances" provides a better model than ADA case law for how courts should interpret the undue hardship provision.

I. USERRA: BACKGROUND AND HISTORY

Reemploying service members upon their return from duty has a long-standing history. Congress first promulgated reemployment protections for veterans prior to America's entry into WWII.[10] As the U.S. military has become increasingly dependent on reservist forces, the nature of reemployment protections has changed. After the Vietnam War, Congress repealed the draft and initiated a "Total Force Policy," by which it came to rely heavily on America's peacetime volunteer force, including the Reserves and National Guard.[11] In response to this changed military strategy, Congress also codified new veteran reemployment protections in the Vietnam Era Veterans' Readjustment Assistance Act (VRRA).[12] The VRRA protected reservists' right to reemployment and was meant to aid soldiers' reentry into the workforce.[13] Despite the protections of the VRRA, however, many soldiers lost their jobs after serving in the Gulf War.[14] Congress was concerned that lack of protection would lead fewer people to enroll in the Reserves and National Guard and could distract

10. 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, 869 (2002) (describing the passage of the Selective Training and Service Act of 1940).

11. *Id.* at 861.

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

13. Konrad S. Lee, *When Johnny Comes Marching Home Again, Will He Be Welcome at Work?*, 35 PEPP. L. REV. 247, 252-53 (2008).

14. *Id.* at 254.

those fighting abroad.[15]

In order to "clarify, simplify, and, where necessary, strengthen the existing veterans' employment and reemployment rights provisions" under the VRRA, Congress passed USERRA in 1994.[16] USERRA's purpose is threefold:

> (1) to encourage non-career service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;
>
> (2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities by providing for the prompt reemployment of such persons upon their completion of such service; and
>
> (3) to prohibit discrimination against persons because of their service in the uniformed services.[17]

In furtherance of this purpose, USERRA creates an entitlement for service members to be reemployed upon their return from uniformed service.[18]

For service members to qualify for benefits under USERRA, their discharge must not be characterized as dishonorable or bad conduct, a dismissal, or being dropped from the rolls.[19] Section 4312 of USERRA provides that members of the armed forces or reserves who (1) properly notify employers of their need to take a uniformed service-related absence; (2) take a cumulative absence of no more than five years; and (3) properly reapply to work, are entitled to reemployment.[20] Additionally, USERRA provides that an individual who returns from a period of service greater than ninety days shall be reemployed "in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform."[21] These same entitlements extend to service members who incur or aggravate an injury or disability during the course of

15. *See* 139 CONG. REC. 8978 (1993) (statement of Rep. Clement) ("[Without protection] from discrimination or reprisal on the job as a result of their service, it will be increasingly difficult to recruit Americans to serve."); *see also* 139 CONG. REC. 8977 (1993) (statement of Sen. Stump) ("This bill will help our forces to concentrate totally on the purpose of their mission.").

16. Gummo v. Vill. of Depew, New York, 75 F.3d 98, 105 (2d Cir. 1996) (quoting H.R. Rep. No. 65 (1994)) (internal quotation marks omitted).

17. 38 U.S.C. § 4301 (2006).

18. 38 U.S.C. § 4312(a) (2006).

19. 38 U.S.C. § 4304 (2006).

20. Duarte v. Agilent Techs. Inc., 366 F. Supp. 2d. 1039, 1045 (D. Colo. 2005).

21. 38 U.S.C. § 4313(a)(2)(A) (2006).

their service.[22]

II. "REASONABLE EFFORTS" TO ACCOMMODATE AND "UNDUE HARDSHIP" UNDER USERRA

To be reemployed, a returning service member must be able to perform the essential tasks of the position.[23] Whether a task is "essential" depends on its relationship to the actual performance requirements of the position, and not merely the written job description.[24] The definition of essential tasks is imported directly from the ADA.[25] Honorably discharged service members with disabilities may no longer be able to perform the duties of the job they left when they were called to duty.

Where an employee has incurred or aggravated a disability in the course of military service, USERRA requires that an employer make "reasonable efforts" to help the employee become qualified to perform the essential tasks of the reemployment position.[26] If the returning service member still cannot perform the reemployment position despite the employer's reasonable efforts to accommodate him or her, the employer is obligated to find a position of equivalent seniority, status and pay for which the veteran is qualified or could become qualified with the aid of the employer's reasonable efforts.[27] Regulations promulgated by the Department of Labor explain that the appropriate level of accommodation depends on situation-specific factors, including the nature of the service member's disability and the job requirements of the position.[28] The regulations state: "[s]uch accommodations may include placing the reemployed person in an alternate position; on 'light duty' status; modifying technology or equipment used in the job position; revising work practices; or, shifting job functions."[29] Additionally, the reemployment

22. 38 U.S.C. § 4312(e)(2)(A) (2006).

23. 38 U.S.C. § 4303(9) (2006); 20 C.F.R. § 1002.198 (2012).

24. Uniformed Services Employment and Reemployment Rights Act of 1994, 70 Fed. Reg. 75,274 (Dec. 19, 2005) (codified at 20 C.F.R. pt. 1002) [hereinafter USERRA Regulations].

25. The ADA lists many factors that qualify a job function as "essential," including whether: (1) the position exists to perform the function; (2) there are a limited number of employees to perform the job function; and/or (3) the incumbent is hired specifically for his or her ability to perform the function because it requires a high level of expertise. 29 C.F.R. § 1630.2(n)(2) (2012).

26. 20 C.F.R. § 1002.198 (2012).

27. 38 U.S.C. § 4313(a)(2)(A); *USERRA and the ADA: An Unclear Relationship*, 9 NO. 2 LEAVE & DISABILITY COORDINATION CENTER HANDBOOK NEWSL. 5 (Thompson Publ'g Grp., 2005) [hereinafter *USERRA and the ADA: An Unclear Relationship*].

28. USERRA Regulations, *supra* note 24, at 75,274-75.

29. USERRA Regulations, *supra* note 24, at 75,277; 38 U.S.C. § 4303(9), (10), (15); §

position must be one that does not pose a risk of harm to either the service member performing it or colleagues.[30]

There is a limit, however, to the efforts that employers must make to accommodate returning disabled service members. USERRA defines "reasonable efforts" by an employer as "actions," such as training the employee, that do not place "undue hardship" on the employer.[31] Section 4303(15) of USERRA states that "[t]he term 'undue hardship', in the case of actions taken by an employer, means actions requiring significant difficulty or expense, when considered in light of [enumerated factors]."[32] These factors include: (1) the nature and cost of the action; (2) the overall financial resources required to take the action; and (3) the action's effect on the expenses, resources, and operations of the facility when measured against the employer's overall size.[33]

Undue hardship, which delimits the scope of employers' reasonable efforts to accommodate disabled veterans, requires clarification that courts have yet to provide. This comment focuses on how courts are likely to interpret undue hardship and how courts should interpret the term.

III. FOR LACK OF A BETTER ALTERNATIVE, COURTS WILL LIKELY IMPORT ADA CASE LAW TO INTERPRET "UNDUE HARDSHIP" UNDER USERRA

There is a strong possibility that courts will import ADA case law to interpret "undue hardship" under USERRA. Both USERRA and the ADA require employers to accommodate disabled veterans up to the point that providing accommodations imposes an undue hardship on the employer.[34] In fact, USERRA's definition of undue hardship mirrors that of the ADA.[35] The ADA defines undue hardship as an "action requiring significant difficulty or expense," when considered in light of enumerated factors—the same factors listed under the USERRA definition.[36] Additionally, under both acts, undue hardship is an affirmative defense for which the employer

4313(a)(3) (2006); H.R. REP. NO. 103–65, pt. 1, at 31 (1993); S. REP. NO. 103–158, at 53 (1993).

30. USERRA Regulations, *supra* note 24, at 75,277.

31. 38 U.S.C. § 4303(10); 20 C.F.R. § 1002.5(i) (2012).

32. 38 U.S.C. § 4303(15).

33. *Id.*

34. Andrew J. Ruzicho & Louis A. Jacobs, *Returning Veterans*, 24 NO. 11 EMPL. PRAC. UPDATE 1, 4 (Thompson Publ'g Grp., Nov. 2011).

35. *See* Green, *supra* note 12, at 238 (noting that "the USERRA and ADA have basically the same definition of undue hardship").

36. 42 U.S.C. § 12111(10)(A) (2006). ADA undue hardship factors are delineated in 42 U.S.C. § 12111(10)(B) (2006), while USERRA undue hardship considerations are outlined in 38 U.S.C. § 4303(15) (2006).

bears the burden of proof.[37]

Courts have interpreted terms within reemployment protection laws in light of their predecessors. For example, the term "reasonable accommodation" was one of a number of provisions that the ADA imported from the Rehabilitation Act of 1973, the ADA's predecessor; courts have interpreted the terms identically under both Acts.[38] Similarly, case precedent interpreting the language of USERRA's predecessor, the VRRA, is considered authoritative to the extent that USERRA's language parallels the VRRA.[39]

At least facially, the ADA seems to be a reasonable model for USERRA's disability provisions, as it shares a general purpose with USERRA. Like USERRA, the ADA is primarily an anti-discrimination law; Congress passed the ADA to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[40] Reemployment is also a fundamental goal of the ADA. Just as USERRA seeks to reintegrate veterans into the workplace, the ADA seeks to "bring persons with disabilities into the economic and social mainstream of American life."[41] Similarly, the ADA requires employers to take affirmative steps to accommodate disabled employees if such an accommodation would eliminate a barrier to employment.[42] Hence, the two acts provide protections for two different, yet overlapping, classes of people: disabled Americans and U.S. veterans.

Many practitioners believe that courts will interpret undue hardship under USERRA in the same way that they have interpreted the term under the ADA.[43] Lawyers within the Department of Labor (DOL), the agency

37. *Compare* 38 U.S.C. § 4312(d)(2) (2006) *with* 42 U.S.C. § 12112(b)(5)(A) (2006); *see also* H. Craig Manson, *The Uniformed Services Employment and Reemployment Rights Act of 1994*, 47 A.F. L. REV. 55, 70 (1999) ("USERRA provides an employer with three affirmative defenses in an action to enforce a service member/employee's reemployment rights . . . [including] undue hardship . . . .").

38. Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 543 (7th Cir. 1995).

39. *See* H.R. REP. NO. 103-65, pt. 1, at 19-21 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2454 (stating the House Committee's opinion that the body of case law that evolved under the VRRA should apply in interpreting USERRA's provisions to the extent that it is consistent with the VRRAt); Ruzicho & Jacobs, *supra* note 34, at 6 ("In USERRA actions, the VRRA precedent is considered authoritative to the extent the latter's statutory language parallels the former."); *see also* Rogers v. City of San Antonio, 392 F.3d 758, 762 (5th Cir. 2004) (stating that courts may rely on the case law developed under the VRRA in interpreting USERRA).

40. *Vande Zande*, 44 F.3d 538 at 541 (quoting 42 U.S.C. § 12101(a), (b)(1)).

41. H.R. REP. NO. 101-485, pt. 2, at 22 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 304; 42 U.S.C. § 12101(b)(1) (1994).

42. 42 U.S.C. § 12112(b)(5)(A) (2006).

43. *See, e.g.*, Martin, *supra* note 9, at 512 (predicting that an exception to the general reemployment guarantee in USERRA is "likely to be interpreted in a similar fashion" as the

responsible for enforcing USERRA, share this view.[44] Even USERRA's National Counsel believes that courts will import ADA case law to USERRA in interpreting undue hardship because courts have "no better alternative."[45] But because no case has interpreted undue hardship under USERRA, lawyers admit "it is very difficult to speak definitively about how [the term] will be construed and applied by the courts."[46] In addition to the absence of case law, there is also no Memorandum of Understanding between the EEOC and the DOL regarding this issue.[47] The first court forced to interpret undue hardship under USERRA will have to address to what extent, if at all, ADA case law should be imported to inform the term.

IV. COURTS SHOULD NOT RELY ON ADA CASE LAW TO INTERPRET "UNDUE HARDSHIP" UNDER USERRA

The undue hardship provision of USERRA should be interpreted more narrowly than under the ADA to reflect the differences in: (1) the text of the definitions in the respective Acts; (2) what the undue hardship provision delimits (reasonable accommodation versus reasonable efforts); (3) administrative guidance regarding interpretation of the Acts; and (4) the statutes' specific purposes (accommodating disability versus promptly reemploying veterans).

A. The definitions of undue hardship under the ADA and USERRA differ in a small but significant way

Although USERRA directly borrows the ADA's definition of undue hardship, there is a key difference between the acts' first phrases. Under the ADA, the definition of undue hardship reads: "In determining whether an *accommodation* would impose an undue hardship on a covered entity,

ADA);. *see also* Fernandez, *supra* note 10, at 882 (explaining that the similarities between USERRA and the ADA make it likely that undue hardship will be interpreted similarly under both acts); *Back from Military Service and Disabled: Special Treatment Needed*, 18 NO. 5 ADA COMPLIANCE GUIDE NEWSL. 1 (Thompson Publ'g Grp., 2007) (describing the general perception that "'[u]ndue hardship' means the same thing in USERRA that it does in the ADA").

44. *See USERRA and the ADA: An Unclear Relationship*, *supra* note 27 (stating one DOL lawyer's assumption that undue hardship will be interpreted similarly under USERRA and the ADA).

45. Interview with Matt Levin, Department of Labor (DOL) National USERRA Counsel (Dec. 8, 2011). Mr. Levin believes courts will use ADA case law to interpret undue hardship under USERRA because there is no other definitive source of guidance; there has not been significant case law interpreting the term in the USERRA context.

46. *USERRA and the ADA: An Unclear Relationship*, *supra* note 27.

47. *USERRA and the ADA: An Unclear Relationship*, *supra* note 27.

factors to be considered include (i) the nature and cost of the *accommodation* needed *under this chapter* . . . ."[48] In contrast, the definition of undue hardship under USERRA states: "[t]he term 'undue hardship', in the case of *actions* taken by an employer, means actions requiring significant difficulty or expense, when considered in light of (A) the nature and cost of the *action* needed *under this chapter* . . . ."[49] USERRA's use of the word "action" implicitly references its conception of "reasonable efforts," which USERRA defines as "actions required of an employer."[50] The difference between the ADA's explicit reference to "accommodation" and USERRA's implicit reference to "reasonable efforts" should affect how courts interpret undue hardship under the two laws.

B. Because reasonable effort under USERRA imposes a heavier burden on employers than reasonable accommodation does under the ADA, these terms alter the context in which undue hardship should be evaluated

USERRA regulations make clear that "reasonable efforts" are different than "reasonable accommodation" under the ADA.[51] USERRA's definition places a heavier burden on employers than the ADA. In addition to requiring employers to modify technology or equipment used in the job position, revise work practices, or shift an employee's job functions,[52] USERRA's standard of "reasonable efforts" requires an employer to train and retrain an employee with a disability to perform his escalator position—the job that he had previously held, after including any promotions that he would reasonably be expected to have attained if he continued working for his employer instead of serving in the military.[53] If the employee cannot perform the job even with this training, the employer will be required to reemploy the service member in a position that is equivalent in seniority, status, and pay to his escalator position, provided that he is qualified for that equivalent position.[54] At this stage, the employer again must help the employee become qualified for that equivalent position.[55] If such a position is unavailable, then the disabled

48. 42 U.S.C. § 12111(10)(B) (2006) (emphasis added).
49. 38 U.S.C § 4303(15) (2006) (emphasis added).
50. *Id.*
51. USERRA Regulations, *supra* note 24, at 75,277.
52. USERRA Regulations, *supra* note 24, at 75,270-71; 38 U.S.C. § 4303(9), (10), (15) (2006); § 4313(a)(3) (2006); H.R. REP. NO. 103–65, pt. I, at 31 (1993); S. REP. NO. 103–158, at 53 (1993).
53. 38 U.S.C. § 4313(a)(2)(A).
54. 20 C.F.R. § 1002.197 (2005).
55. *Id.*

employee, consistent with the particular circumstances of his case, is entitled to a position that approximates the equivalent position in terms of seniority, status, and pay.[56] Thus, unlike the ADA's "reasonable accommodation," which does not require an employer to find a new job for the disabled employee,[57] USERRA's "reasonable efforts" to accommodate an employee's disability may require an employer to search out and offer a job that the disabled service member can perform.[58] To this end, employers have the burden of presenting the returning disabled service member with a list of all of the positions for which he or she may be qualified.[59]

There are further differences between an employer's obligations under USERRA and under the ADA. Under the ADA, courts interpret reasonable accommodation as limited by other employees' settled expectations. In *U.S. Airways v. Barnett*, the Supreme Court held that an accommodation that infringes on an employer's seniority system is not reasonable because the "typical seniority system provides important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment."[60] *U.S. Airways* strongly suggests that a "reasonable" accommodation under the ADA cannot require giving a disabled employee a position held by a more senior employee. Additionally, although "'reasonable accommodation' may include . . . [an employee's] reassignment to a vacant position,"[61] courts have held that an employer is not required to reassign a disabled employee to a vacant position if that employer has a policy of hiring the most qualified person for the job.[62] This interpretation of "reasonable accommodation" essentially requires disabled individuals to compete with the general applicant pool for open positions.

Under USERRA, however, an employer may not refuse to reemploy a returning service member on the basis that another employee replaced him during his absence.[63] *Fryer v. A.S.A.P. Fire & Safety Corp.* illustrates this

56. Sharon M. Erwin, *When the Troops Come Home: Returning Reservists, Employers and the Law*, 19 HEALTH LAW. 1, 10-11 (2007).

57. Smith v. Midland Brake Inc., 180 F.3d 1154, 1170 (10th Cir. 1999) ("[E]mployers need not create a new job or even modify an essential function of a vacant job in order to make it suitable for the disabled employee").

58. Martin, *supra* note 9, at 510-512.

59. USERRA Regulations, *supra* note 24, at 75,261-62.

60. U.S. Airways v. Barnett, 535 U.S. 391, 392 (2002).

61. 42 U.S.C.§ 12111(9) (2006).

62. *See* Huber v. Wal-Mart, 486 F.3d 480, 483 (8th Cir. 2008) (noting that the ADA does not require an employer to reassign a qualified disabled employee to a vacant position when it would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate).

63. *See* 20 C.F.R. § 1002.139(a) (2012) for a codification of this scenario in the regulations. *See also* Murphree v. Commc'ns Techs., Inc., 460 F. Supp. 2d 702, 704, 710 (E.D. La. 2006) (rejecting the employer's argument that hiring of a replacement employee

principle. In *Fryer*, an employee who was working for A.S.A.P Fire & Safety Corporation (ASAP) selling sprinklers was called to military duty.[64] Upon his return from service, ASAP claimed he could not be reemployed because his position had been filled; instead, ASAP rehired Fryer as a sprinkler helper.[65] The sprinkler helper position, however, did not include the same benefits or opportunity for commission as his previous position.[66] Despite ASAP's reemployment of Fryer, ASAP was required to terminate or transfer the replacement employee in order to reemploy Fryer in his previous position; therefore, the court held that hiring Fryer as a sprinkler helper did not meet USERRA's strict reemployment requirements.[67] This case is not an anomaly. USERRA's regulations explicitly state that an employer's obligation to reemploy a returning service member may require terminating the employee who was hired to replace the service member when the service member left for military duty.[68]

Additionally, through legal victories, employers have limited the scope of what constitutes a reasonable accommodation under the ADA. They have not done so under USERRA. The ADA does not require employers to create a part-time position to accommodate a disabled employee, or to displace a temporary worker to accommodate a disabled worker.[69] An employer also has no obligation to create a "light duty" position for a disabled employee under the ADA.[70] Courts have further held that "an accommodation that would result in other employees having

on a permanent basis constitutes changed circumstances that foreclose an employer's obligation to reemploy a returning veteran).

64. Fryer v. A.S.A.P. Fire & Safety Corp., 680 F. Supp. 2d 317, 320-21 (D. Mass. 2010).

65. *Id.* at 321-22.

66. *Id.* at 322.

67. *Id.* at 327.

68. 20 C.F.R. § 1002.139(a) (2012). Note, however, that USERRA requires that in reemploying returning employee-service members, employers must not displace or deprive the benefits of *other* employee-service members in a way that unlawfully infringes upon their rights under Title V, Veterans' Preference. 38 U.S.C. § 4312(g) (2006); 5 U.S.C. § 2108 (2006).

69. *See* Dalton v. Subaru–Isuzu Auto., Inc., 141 F.3d 667, 680 (7th Cir. 1998) (stating that an employer is not required to create new positions for disabled employees under the ADA); Terrell v. U.S. Air, 132 F.3d 621, 626 (11th Cir. 1998) (holding that an employer was not required to create a part-time position for a disabled employee where the employer had already eliminated all part-time positions); Burch v. Coca-Cola Co., 119 F.3d 305, 318 n. 11 (5th Cir. 1997) (explaining that an employer was not required to reemploy a recovering employee on a part-time basis).

70. *See* Turco v. Hoechst Celanese Corp., 101 F.3d 1090, 1094 (5th Cir. 1996) (stating that an employer is not required to create light duty jobs to accommodate disabled employees); Monette v. Elec. Data Sys. Corp., 90 F.3d 1173, 1187 (6th Cir. 1996) (holding that an employer is under no duty to keep a disabled employee "on unpaid leave indefinitely until a suitable position opens up").

to work harder or longer" is unreasonable under the ADA.[71] These holdings all run contrary to USERRA, under which an employer may be required to create part-time and light-duty positions and displace or terminate other workers to reemploy a disabled service member.[72] Case law interpreting "reasonable accommodation" therefore creates fewer protections for disabled veterans under the ADA than case law interpreting "reasonable efforts" to accommodate veterans under USERRA.

C. Undue hardship analysis under the ADA is entangled with analysis of the term "reasonable accommodation"

As the above sections have indicated, under the ADA, "undue hardship" delimits the extent of "reasonable accommodation," a term not used in USERRA. Under the ADA, a cost-benefit analysis is required at two levels of inquiry: first, to determine whether the accommodation is "reasonable" and second, if it imposes an "undue hardship." The cost-benefit analysis for each inquiry is different. To be reasonable, an accommodation's costs must not be "clearly disproportionate to the benefits it will produce."[73] These costs are not only financial, but may also include actions detrimental to other employees.[74] The reasonableness inquiry is a "generalized" one that requires looking at costs and benefits in the "run of cases."[75] The employee must identify an accommodation that achieves a rough proportionality between costs and benefits.[76]

By contrast, the undue hardship inquiry is confined to the operations of the specific employer.[77] In *Borkowski v. Valley Central School District*, one of the few cases to explicitly state how courts should analyze undue hardship, the court explained that judges should "undertake a refined

71. *Turco*, 101 F.3d at 1094. *See also* Kralik v. Durbin, 130 F.3d 76, 79 (3d Cir. 1997) (holding that an accommodation that infringes on the rights of other employees is not reasonable); Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995), *cert. denied*, 516 U.S. 1172 (1996) (stating that an accommodation that imposes undue hardship on the operation of an employer's program is not required under the ADA); Milton v. Scrivner, Inc., 53 F.3d 1118, 1125 (10th Cir. 1995) ("An accommodation that would result in other employees having to work harder or longer hours is not required.").

72. USERRA Regulations, *supra* note 24, at 75,274-75.

73. Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 138 (2d Cir. 1995). Green, *supra* note 12, at 229.

74. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 400 (2002).

75. Barth v. Gelb, 2 F.3d 1180, 1187 (D.C. Cir. 1993).

76. *Borkowski*, 63 F.3d at 139.

77. *See* Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 542 (7th Cir. 1995) (assessing the factors to be evaluated in determining whether an otherwise-reasonable accommodation would impose undue hardship and stating that the financial condition of an employer is only one consideration).

analysis" and consider both "the industry to which the employer belongs as well as the individual characteristics of the particular defendant-employer."[78] To prove undue hardship, employers need not show that an accommodation would drive them to the brink of insolvency.[79] They also need not measure the costs and benefits of the proposed accommodation with "mathematical precision."[80] Instead, employers need only use "common sense" in balancing costs and benefits in light of the listed factors in the definition.[81]

But despite these distinctions in the two concepts, in practice courts' analyses of whether an accommodation is reasonable and whether the accommodation creates an undue hardship under the ADA are nearly identical. The *Borkowski* court itself acknowledged that, after an employee has identified a reasonable accommodation under the ADA, "the difference between . . . [demonstrating] the unreasonableness of the accommodation and demonstrating that the accommodation imposes an undue hardship becomes blurred."[82] Employers, armed with more information than employees concerning industry practices and their own organizations in particular, tend to make a barrage of arguments about the effect that an accommodation will have on their company. Courts do not draw a bright line between what information is sufficiently specific to the employer to constitute undue hardship, and what information is general enough to address whether the proposed accommodation is reasonable in the general "run of cases."[83] In a line of cases including *Hall v. USPS*, in which the Sixth Circuit stated that an accommodation is not reasonable if it places an undue burden on the employer, courts have collapsed the question of whether an undue hardship exists into that of whether an accommodation is reasonable.[84]

In *U.S. Airways* the Supreme Court attempted to clarify the distinction

78. *Borkowski*, 63 F.3d at 139. Note that the legislative history of the ADA equates "undue hardship" to "unduly costly." S. REP. NO. 101-116, at 35 (1989). *Borkowski* places this inquiry in the context of assessing the employer's specific circumstances.

79. S. REP. NO. 101-116, at 31. Congress rejected a provision that would have defined an undue hardship as one that threatened the continued existence of the employer. *Id*.

80. *Borkowski*, 63 F.3d at 140.

81. *Id.*; Green, *supra* note 12, at 230.

82. Green, *supra* note 12, at 230 (citing *Borkowski,* 63 F.3d at 137).

83. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 400 (2002).

84. Hall v. U.S. Postal Serv., 857 F.2d 1073, 1080 (6th Cir. 1988); *see also* Sch. Bd. v. Arline, 480 U.S. 273, 287 n.17 (1987) (determining that an accommodation is not reasonable if it imposes on the employer "undue financial and administrative burdens," or requires a "fundamental alteration in the nature of [the] program") (citing Southeastern Cmty. Coll. v. Davis, 442 U.S. 397, 410 & 412 (1979)); *cf. U.S. Airways*, 535 U.S. at 402 (noting that ordinary summary judgment principles reconcile reasonable accommodation and undue hardship).

between reasonable accommodation and undue hardship. The Supreme Court explained that

> a demand for an effective accommodation could prove unreasonable because of its impact, not on business operations, but on fellow employees . . . 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.[85]

In *U.S. Airways*, the court established assessments of reasonable accommodation and undue hardship as separate, consecutive inquiries, and asserted that the reasonable accommodation inquiry requires examining a broader set of costs than does undue hardship, which focuses on the accommodation's effects on the specific employer.

Even the Court's decision in *U.S. Airways*, however, could not disentangle the analysies of reasonable accommodation and undue hardship. The district court in *U.S. Airways* reasoned that altering U.S. Airways' seniority system in order to transfer an employee with a bad back to a less physically demanding position "would result in undue hardship to both the company and its nondisabled employees."[86] The Supreme Court then used the same facts and a similar analysis to hold that an accommodation that requires altering a seniority system is not "reasonable."[87] Following this logic, the Eastern District of Texas cited *U.S. Airways* and other cases in *Bennett v. Calabrasian* for the proposition that the analysis regarding reasonable accommodation and undue hardship is the same.[88] The *Bennett* court failed to heed the distinction in the cost-benefit analyses required by the two terms, suggesting in a footnote that "undue hardship exists if [an] employer 'incurs anything more than a *de minimis* cost' [in providing it]," hence opening the door for virtually any hardship to be deemed "undue."[89] The *Bennett* court employed undue hardship analysis to support its holding that changing the time of a disabled

85. *U.S. Airways*, 535 U.S. at 399-400.

86. *Id.*

87. *Id.* at 405.

88. *See* Bennett v. Calabrian Chems. Corp., 324 F. Supp. 2d 815, 836-37 (E.D. Tex. 2004) (asserting that undue hardship analysis and reasonable accommodation analysis are nearly identical).

89. *Bennett,* 324 F. Supp. 2d at 838 (citing Bruff v. N. Miss. Health Servs., Inc., 244 F.3d 495, 500 (2001)). Note that the court's citation to *Bruff* in this instance is questionable. *Bruff* is a Title VII case regarding religious accommodation, which imposes very different standards than the ADA. The court's willingness to impose such a minimal burden on the employer to show undue hardship further reveals why importing the term to USERRA would decrease protections for disabled service members.

plaintiff's shift was not a reasonable accommodation.[90]

Because what little ADA case law interpreting undue hardship exists is inextricably entangled with analysis of reasonable accommodation, using this case law to interpret USERRA would be unhelpful at best, and counterproductive at worst. The way in which courts have narrowly construed reasonable accommodation runs counter to USERRA case law, which imposes a comparatively heavier obligation on employers to accommodate returning service members who incur disabilities while serving the nation. This argument is further developed in Section F, *infra*. Importing ADA case law would risk importing the inapplicable standard for reasonable accommodation into USERRA under the guise of undue hardship.

D. Undue hardship is contextualized within different proof structures under the ADA and USERRA

Importing ADA case law to interpret "undue hardship" under USERRA would also be inappropriate because the proof structures encompassing undue hardship under the two Acts are different. Under USERRA, after the plaintiff has met the three initial elements[91] required for reemployment and has shown that the employee incurred or aggravated a disability during service, the employer must make reasonable efforts to accommodate him or her or else bear the burden of proving undue hardship.[92] USERRA regulations emphasize this burden, stating that "employer defenses . . . [including undue hardship] are affirmative ones, and the employer carries the burden to prove by a preponderance of the evidence that any one or more of these defenses is applicable."[93] In contrast, under the ADA, the employee has the burden of production to identify a plausible accommodation that would allow him or her to perform

90. *Bennett,* 324 F. Supp. 2d at 838. Conversely, in *Riel v. Elec. Data Sys.*, 99 F.3d 678, 681, 683 (5th Cir. 1996), the court held that neither adjusting a disabled employee's deadlines nor transferring him to a teaching position without such deadlines was unreasonable "in the run of cases." The court chastised the employer for attempting to place the burden of proof of undue hardship on the employee by refusing to plead the affirmative defense and then attacking the employee's proposed accommodations as unreasonable by using evidence specific to the employer's circumstances. *Id.* Even the court in this case, however, conceded that "the terms 'reasonable accommodation' and 'undue hardship' often go hand-in-hand," and that "[t]he evidence of reasonableness 'in the run of cases' and undue hardship will often be overlapping and resist neat compartmentalization." *Id.*

91. *See supra* section II.

92. 38 U.S.C. § 4303(10) (2006); 43 U.S.C. § 4312(d)(2) (2006); Green, *supra* note 12, at 229.

93. 20 C.F.R. § 1002.139(d) (2012).

the essential functions of the job.[94] After the employee makes the initial showing that a reasonable accommodation exists, the employer can refute the reasonableness of the accommodation, and/or assert undue hardship as an affirmative defense.[95]

A sampling of ADA case law shows that plaintiffs' claims are likely to be rejected at the reasonable accommodation stage of inquiry, when the burden of proof is on the plaintiff. Hence, courts have rarely needed to address whether accommodation poses an undue hardship on an employer. Engaging in proper undue hardship analysis, where the burden is on the employer to prove that an accommodation is unduly costly given its own specific finances, among other factors, would likely result in more plaintiff victories (since employers haled into court are often large, profitable companies). The ADA's framework of reasonable accommodation instead precludes these plaintiff victories, since courts deem accommodations unreasonable in the general run of cases without ever assessing whether the accommodation would be unduly costly to the particular employer.[96]

In contrast, under USERRA's proof structure, the burden is on the *employer* to prove that it could not accommodate a veteran through reasonable efforts. To prove that a veteran cannot be reemployed, the employer would have to successfully argue that its "reasonable efforts" proved futile in three different contexts: (1) the effort to train and retrain the disabled veteran to perform his previous job; (2) the effort to help a veteran become able to perform an equivalent position (of like seniority, status, and pay); and (3) the effort to accommodate the veteran in a position that most closely approximates the equivalent position (which may include a less-skilled or lesser-paying position).[97] Hence, while undue hardship analysis is rarely conducted under the ADA because courts rule against plaintiffs before even reaching the question of undue hardship, under USERRA, undue hardship analysis has rarely been conducted because "there typically has been something the employer can do to accommodate and reemploy a returning disabled veteran."[98]

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

95. *Id.*

96. The ADA framework, which places the burden on employees of proving that an accommodation is "reasonable," has led critics to argue that ADA case law demonstrates "a recurring attraction toward rules that avoid merit evaluation of the burden accommodation places on the employer." Cheryl L. Anderson, *What is "Because of the Disability" under the Americans with Disabilities Act? Reasonable Accommodation, Causation, and the Windfall Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 323, 377-80 (2006).Ω

97. USERRA Regulations, *supra* note 24, at 75,273; 20 C.F.R. § 1002.198 (2012).

98. Interview with Matt Levin, Department of Labor (DOL) National USERRA Counsel (Dec. 8, 2011). Mr. Levin partly attributes this result to the fact that the DOL is aggressive in pursuing USERRA claims that it deems meritorious. Under USERRA, returning veterans can file a claim with the Veterans' Employment and Training Service (an

USERRA's current framework—under which the burden to prove the reasonableness of efforts to accommodate is on the employer, not the employee—is consistent with the goal of reemploying disabled service members. Contaminating undue hardship analysis under USERRA with the ADA's interpretation of reasonable accommodation would undermine this framework due to the burden-shifting proof structure it would import.

E. Regulatory guidance suggests that ADA interpretations of undue hardship should not be imported to USERRA

USERRA regulations imply that ADA case law should not be imported to assess undue hardship. The U.S. Department of Labor (DOL) has the statutory authority to enforce and promulgate regulations of USERRA.[99] In 2005, the DOL published final regulations implementing USERRA that became effective on January 18, 2006.[100] In the regulations, the DOL discusses situations in which the ADA might be imported to USERRA. One example regards an interpretation of what makes someone "qualified" for reemployment. USERRA defines "qualified" as "having the ability to perform the essential tasks of the position."[101] USERRA's legislative history does not reveal whether "essential tasks" is defined the same way as "essential functions" under the ADA; however, the DOL proactively adopted the regulatory definition of "essential functions" under the ADA.[102] The DOL explained that this change was adopted for purposes of "regulatory consistency."[103]

While this argument for "regulatory consistency" might have opened the door to importing other terms from the ADA to USERRA, the DOL emphasized that certain ADA terms should not be imported to USERRA. For example, the DOL explicitly rejected the suggestion that it adopt and apply the ADA's concept and interpretation of reasonable accommodation

agency of the DOL). If the DOL concludes that the complaint is valid, it shall "attempt to resolve the complaint by making reasonable efforts to ensure that the person or entity named in the complaint complies with the relevant provisions" of the Act. 38 U.S.C. § 4322(d) (2006); *see* also 20 C.F.R. § 1002.290 (2012). If the employer does not comply, the claimant can request that the DOL refer the complaint to the Secretary of Labor, who may bring a civil action on the complainant's behalf. 38 U.S.C. § 4322(e). The claimant also retains the right to privately litigate the claim. *Id.*

99. 38 U.S.C. § 4322 (2006).

100. Jonathan A. Segal, *Questions and Answers about DOL's Final USERRA Orders*, 52 PRAC. LAW. 23 (2006); 70 Fed. Reg. 75,246 (Dec. 19, 2005) (codified at 20 C.F.R. 1002).

101. 38 U.S.C. § 4303(9) (2006).

102. USERRA Regulations, *supra* note 24, at 75, 274.

103. *Id.* at 27, 274.

to USERRA.[104] The DOL first noted that USERRA does not include the term reasonable accommodation.[105] The DOL then went on to state:

> In addition, although interpretations of the ADA may be useful in providing some guidance under USERRA's provisions regarding accommodating an employee with a disability, the Department is reluctant to adopt extensive portions of complex regulations promulgated under other statutes not administered or enforced by the Department, and notes that there are significant differences in the coverage of the two statutes.[106]

Because the DOL did not specifically apply this reasoning to address whether courts should rely on ADA case law when interpreting the term "undue hardship" under USERRA, the question remains unanswered. However, given how intertwined the concept of reasonable accommodation is with undue hardship under the ADA,[107] the DOL's admonishment that the term "reasonable accommodation" should not be imported to USERRA supports the argument that courts should also not import ADA case law to interpret undue hardship under USERRA.

F. Importing ADA case law to interpret undue hardship under USERRA would contravene USERRA's underlying purpose

Importing ADA case law to interpret undue hardship under USERRA would be anathema to USERRA's purpose. The legislative history and purpose of USERRA support a narrow reading of undue hardship. In *Coffy v. Republic Steel Corp.*, the Supreme Court declared that the Act upon which USERRA was based, the VRRA, "is to be liberally construed for the benefit of the returning veteran."[108] USERRA is a recodification of the VRRA intended to expand veterans' reemployment protections and ease service members back into civilian life when they return from service.[109] Courts look to USERRA's underlying purpose in interpreting the statute and construe USERRA to serve the legislative goal of enabling individuals to fulfill military obligations without bearing the loss of civilian employment.[110] The DOL has given regulatory authority to this liberal construction of USERRA. The preamble to the USERRA regulations states

104. *Id.* at 75, 277.
105. *Id.*
106. *Id.*
107. *See supra* pt. III.2.
108. Coffy v. Republic Steel Corp., 447 U.S. 191, 196 (1980).
109. 38 U.S.C. § 4301(a)(1) (2006).
110. *See* McGuire v. United Parcel Serv., 152 F.3d 673, 676 (7th Cir. 1998) ("USERRA is to be liberally construed in favor of those who served their country.").

that "the interpretive maxim" that applies when construing the Act is the Supreme Court's proclamation that it "is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need . . . [a]nd no practice of employers . . . can cut down the service adjustment benefits which Congress has secured the veteran under the Act."[111]

Courts interpreting USERRA inherit the task of construing the separate provisions of the Act as "parts of an organic whole."[112] In interpreting each part, courts should afford the greatest protective benefit to the veteran as the "harmonious interplay of the separate provisions permits."[113] To achieve this goal, courts should interpret reemployment protections broadly and affirmative defenses narrowly. Some courts have followed this trend in holding that a service member's right to be promptly reemployed takes precedence over an employer's interest to conduct pre-employment tests of the employee's physical fitness.[114] Other courts have followed this trend in holding that the only factor that should prevent a returning veteran from being "qualified" for an employment position is whether the veteran has exhibited dangerous or extreme behavior.[115] Still other courts have continued this pattern by holding that a veteran does not waive his rights under USERRA by refusing an offer of reemployment that includes anything less than proper seniority, pay and lost wages and benefits.[116] Whereas importing the ADA's interpretation of undue hardship would significantly broaden the employer's affirmative defense under USERRA, interpreting undue hardship narrowly would follow the above trend and would limit the circumstances in which employers would be able to deny reemployment to returning disabled veterans.

G. "Changed circumstances": an affirmative defense that undue hardship should model

A narrow interpretation of undue hardship would also comport with how courts construe other affirmative defenses under USERRA. Take, for

111. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946); *see also* Alabama Power Co. v. Davis, 431 U.S. 581, 584-85 (1977) (citing *Fishgold*, 328 U.S. at 285); King v. St. Vincent's Hosp., 502 U.S. 215, 221 n.9 (1991) (same).

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

113. *Id.*

114. Petty v. Metro. Gov't, 538 F.3d 431, 441 (6th Cir. 2008).

115. Lapine v. Town of Wellesley, 167 F. Supp. 2d 132, 139 (D. Mass. 2001), *aff'd*, 304 F.3d 90 (1st Cir. 2002).

116. U.S. v. Nevada, 817 F. Supp. 2d 1230, 1245 (D. Nev. 2011) (citing Stevens v. Tenn. Valley Auth., 699 F.2d 314, 316 (6th Cir. 1983); Hanna v. Am. Motors Corp., 724 F.2d 1300, 1312–13 (7th Cir. 1984)).

example, courts' interpretation of the statutory exception of "changed circumstances." This affirmative defense excuses an employer from reinstating a veteran when the employer's circumstances have changed so much that reemployment is "impossible or unreasonable."[117] Courts have held that "changed circumstances" is a very limited exception to be applied only where 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."[118]

While there are no cases interpreting undue hardship under USERRA, there are cases assessing "changed circumstances" that could provide a model for how courts should interpret the undue hardship defense. In *Loeb v. Kivo*, the employer refused to rehire a returning veteran because it claimed that his position as salesman no longer existed.[119] Demand for the company's product had increased, and because customers were coming to the company plant to place orders, the employer reasoned that there was no need for salesmen to go door-to-door making sales.[120] The *Loeb* court, however, held that this reasoning did not meet the employer's burden to show changed circumstances. The court rationalized that there was still sales work to be done at the plant—there were still "[samples] to be made up and displayed, customers to be dealt with, and orders to be taken."[121] As a result, the employer was required to reemploy the veteran.

This case can be reframed within the context of disability. Assuming instead that the plaintiff in *Loeb* was a veteran who returned from service with a disability that inhibited him from traveling to customers' homes, his disability would arguably obviate the need for his services as a salesman. The employer could argue that it should not be required to "create a useless job" just to rehire the veteran.[122] But applying the reasoning in *Loeb*, a court could reject the employer's defense and find that, based on the specific circumstances of this employer, the employer was required to reemploy the veteran. After all, there were still sales to be made in the store, customers to be dealt with, and orders to be taken. By this logic,

117. 38 U.S.C. § 4312(d)(1)(A) (2006).

118. Wrigglesworth v. Brumbaugh, 121 F. Supp. 2d 1126, 1136 (W.D. Mich. 2000) (quoting Davis v. Halifax Cnty. Sch. Sys., 508 F. Supp. 966, 968 (E.D.N.C. 1981)) (discussing the purpose of the VRRA); *see also* Duarte v. Agilent Techs. Inc., 366 F. Supp. 2d 1039, 1046 (D. Colo. 2005) (noting that the legislative history of USERRA indicates that the VRRA's purpose and case law is to be applied when interpreting USERRA's provisions).

119. Loeb v. Kivo, 169 F.2d 346, 349 (S.D.N.Y 1948).

120. *Id.*

121. *Id. See also* Ruzicho & Jacobs, *supra* note 36, at 3 (discussing *Loeb* further).

122. Such an argument would follow the logic of *Wrigglesworth*, 121 F. Supp. 2d at 1126.

finding or creating a new job for the disabled veteran—for example by changing his responsibilities and reducing the need for travel by allowing him to work in-house—would not create an undue hardship for the employer, since there was enough benefit to be derived from his reemployment to justify the costs of the position.

Other courts assessing the changed circumstances defense have held that even when an employer is recovering from a "financial crisis," it is not enough to justify failure to reemploy the veteran. In *Van Doren v. Van Doren Laundry Service*, the court held that reemploying a veteran is not unreasonable or impossible even if doing so may result in "some loss of efficiency or economy of operation."[123] While in the context of the ADA, such costs to an employer may be enough to prove undue hardship,[124] *Van Doren* suggests that courts conducting a cost-benefit analysis under USERRA should give little weight to costs associated with the employer's efficiency and operations. Even when the employer is financially unstable, such costs should not outweigh the great benefits of reemploying veterans.[125] USERRA itself is a testament to those benefits.

CONCLUSION

Courts faced with the challenge of interpreting undue hardship under USERRA should not look to undue hardship cases under the ADA for guidance, despite their like purposes and the similarity of their definitions of the term. Importing ADA case law to USERRA would not only defy what the term delimits in both Acts and contravene what little guidance the DOL regulations provide, it would also undermine the strong protections that USERRA provides to America's disabled service members. With more veterans returning from war with disabilities than ever before and an endemic problem of unemployment that disparately afflicts veterans, it is particularly important to provide these service members with the reemployment protections they deserve. Instead of basing decisions on the ADA when analyzing the undue hardship defense, courts should look to other affirmative defenses under USERRA, such as "changed circumstances," for guidance. Accordingly, courts should restrict the scope

123. Van Doren v. Van Doren Laundry Serv., 162 F.2d 1007, 1009 (3d Cir. 1947).

124. *See* Huber v. Wal-Mart, 486 F.3d 480, 484 (8th Cir. 2008) (holding that employers are not required to incur the loss in efficiency that would result from hiring a disabled employee instead of the most qualified applicant for a position).

125. *See* Kay v. Gen. Cable Corp., 144 F.2d 653, 655 (3d Cir. 1944) (interpreting USERRA's predecessor, the VRRA, and stating "[a]ccepting the [employer's] contention that there would be some loss of efficiency and possibly some additional expense involved, more than that is needed to justify refusal to reinstate a person within the protection of the Act.").

of the undue hardship defense. Doing so would support the Act's important purpose of promptly reemploying those who serve our country.