No. 12-1023

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

LUIS A. RIVERA-MELENDEZ, *et al.*,

Plaintiffs-Appellants

v.

PFIZER PHARMACEUTICALS, LLC,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS AND URGING VACATUR IN PART

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INTEREST OF THE UNITED STATES

This appeal presents an important issue regarding the Uniformed Services Employment and Reemployment Act of 1994 (USERRA or the Act), 38 U.S.C. 4301 *et seq.*, a civil rights statute that protects the reemployment rights and benefits of veterans and servicemembers.

The United States has substantial enforcement responsibilities under USERRA. The Act, among other things, directs the Secretary of the United States Department of Labor (the Secretary) to inform USERRA claimants of their

rights under the Act and to provide assistance regarding those rights, 38 U.S.C. 4321, 4322(c), 4333; to investigate complaints of USERRA violations and make efforts to ensure compliance with the Act, 38 U.S.C. 4322, 4326; and, upon a claimant's request, to refer a complaint for potential litigation to other executive agencies, 38 U.S.C. 4323(a)(1), 4324(a)(1). Pursuant to statutory authority, the Secretary issued regulations to assist with the implementation of the Act. See 20 C.F.R. 1002 *et seq*. Congress also gave the Attorney General enforcement responsibilities under the Act, including the authority to initiate litigation on behalf of servicemembers in cases involving state or private employers. 38 U.S.C. 4323(a)(1). The United States thus has a strong interest in the proper judicial interpretation of the Act.

STATEMENT OF THE ISSUE

The United States will address the following issue:

Whether the "escalator principle" and "reasonable certainty" test governing reinstatement claims under USERRA apply to only automatic, non-discretionary promotions.

STATEMENT OF THE CASE

1. Statutory Background

This case arises under USERRA, the latest in a series of statutory protections for members of the United States Armed Forces, which was enacted to improve the

reemployment rights and benefits of veterans and servicemembers. See H.R. Rep. No. 65, Pt. 1, 103d Cong., 1st Sess. 16 (1993) (House Report); S. Rep. No. 158, 103d Cong., 1st Sess. 1 (1993) (Senate Report). "The reemployment rights concept was first enacted into law as * * * [part] of the Selective Training and Service Act of 1940. For over 50 years, Federal law has continued certain civilian employment and reemployment rights * * * for those who serve their country in the uniformed services." Senate Report 39. In enacting USERRA, Congress emphasized that case law interpreting predecessor statutes should apply with equal force to USERRA to the extent that it is consistent with the new law, thus ensuring substantial continuity among the servicemember reemployment protection laws. *Id.* at 40; House Report 19; see also 20 C.F.R. 1002.2.

The purpose of USERRA is three-fold. The Act is intended: (1) to encourage military service "by eliminating or minimizing the disadvantages to civilian careers"; (2) "to minimize the disruption to the lives" of servicemembers and their employers "by providing for the prompt reemployment" of servicemembers; and (3) "to prohibit discrimination" against servicemembers. 38 U.S.C. 4301(a). These purposes have remained consistent from the first enactment in 1940 through the present time. See House Report 20. USERRA accomplishes these purposes through a comprehensive statutory scheme that, among other things, prohibits an employer from discriminating against a

servicemember because of his service, 38 U.S.C. 4311; requires an employer to promptly reemploy a returning servicemember who meets the statutory requirements, absent a change in the employer's circumstances, 38 U.S.C. 4312, 4313(a); and affords a returning servicemember all of the seniority, rights, and benefits that he would have attained had he remained continuously employed, 38 U.S.C. 4316(a).

With respect to reinstatement following the period of military service, USERRA requires that a returning servicemember who meets the statutory requirements be reemployed "in the position * * * in which [he] would have been employed if [his] continuous employment * * * had not been interrupted by such service, or a position of like seniority, status and pay." 38 U.S.C. 4313(a)(2)(A). This position is referred to as the "escalator position." 20 C.F.R. 1002.191. The USERRA regulations explain that "[t]he principle behind the escalator position is that, if not for the period of uniformed service, the employee could have been promoted (or, alternatively, demoted, transferred, or laid off) due to intervening events." 20 C.F.R. 1002.191; see also House Report 30-31. Therefore, "[t]he escalator principle requires that the employee be reemployed in a position that reflects with reasonable certainty the pay, benefits, seniority, and other job perquisites, that he * * * would have attained if not for the period of service." 20 C.F.R. 1002.191.

2. Factual Background

Luis A. Rivera-Meléndez worked for Pfizer Pharmaceuticals, LLC (Pfizer) for approximately seventeen years at Pfizer's manufacturing plant in Barceloneta, Puerto Rico. *Rivera-Meléndez* v. *Pfizer Pharm., Inc.*, No. 10-CV-1012, 2011 WL 5025930, at *1 (D.P.R. Oct. 21, 2011) (*Rivera-Meléndez II*). Rivera-Meléndez began his career at Pfizer as a chemical operator trainee. *Ibid.* After several promotions, in 2004, Rivera-Meléndez advanced to the position of active pharmaceutical ingredient (API) group leader. *Ibid.* Rivera-Meléndez was also a member of the United States Naval Reserve, and was called into active duty twice during his career at Pfizer. *Ibid.* This litigation arises out of Rivera-Meléndez's second tour of duty, when he was called to serve in Iraq beginning in December 2008. *Ibid.*

Pfizer restructured the API department at its Barceloneta plant while Rivera-Meléndez was on active military duty. *Rivera-Meléndez II*, 2011 WL 5025930, at *2. Pfizer eliminated the API group leader positions, including the position held by Rivera-Meléndez before his deployment, and replaced those positions with API team leader and API service coordinator positions. *Ibid*. All three positions had the same salary and benefits. *Id.* at *10. However, the newly-created API team leader position had even greater supervisory responsibilities than the API group leader position, *Rivera-Meléndez* v. *Pfizer Pharm., Inc.*, No. 10-CV-1012, 2011

WL 5442370, at *1 (D.P.R. Nov. 9, 2011) (*Rivera-Meléndez III*), and the API group leader position that was eliminated had greater supervisory responsibilities than the newly-created API service coordinator position. Doc. 108-7, Ex. B-2 at 17-18; Doc. 115-3, Ex. 1 at 11-12.[1]

While Rivera-Meléndez was serving in Iraq, Pfizer management met with the API group leaders to inform them of the change and of their career options. *Rivera-Meléndez II*, 2011 WL 5025930, at *2. API group leaders could apply for an API team leader position; apply for an API service coordinator position, which would be created in the future; be demoted to a senior API operator position; or voluntarily separate from Pfizer. *Ibid.* Pfizer formally announced the new positions in March 2009, while Rivera-Meléndez was deployed. The parties dispute whether Pfizer had a policy or practice of providing notification of promotional opportunities to employees on military or other leave and whether Rivera-Meléndez received any such notice. *Ibid.* Rivera-Meléndez's wife, Wanda Otero-Rivera, also a Pfizer employee, applied for the API team leader position and

[1] "Doc. __" refers to the document number assigned on the district court's docket.

may have informed Rivera-Meléndez of the new positions while he was serving in Iraq.[2] *Ibid.*

Following his honorable discharge, Rivera-Meléndez requested reinstatement and returned to work at Pfizer's Barceloneta plant in October 2009. *Rivera-Meléndez II*, 2011 WL 5025930, at *2. Pfizer reinstated Rivera-Meléndez in a position entitled API group leader; however, Rivera-Meléndez was assigned special projects since his API group leader position had been eliminated during his military service. *Ibid.* In May 2010, once the new position was finalized, Rivera-Meléndez became an API service coordinator. *Id.* at *3. In both of these reinstatement positions, Rivera-Meléndez's salary and benefits remained the same as before his deployment, but his responsibilities were reduced and he no longer had any supervisory duties. *Ibid.*; Doc. 108-7, Ex. B-2 at 17-18; Doc. 115-3, Ex. 1 at 11-12. Rivera-Meléndez testified in his deposition that he was qualified for the API team leader position and that he wanted an opportunity to apply, but he did not submit an application when a new API team leader position became available during the pendency of this litigation in December 2010. *Rivera-Meléndez II*, 2011 WL 5025930, at *3. Rivera-Meléndez asserted that he did not apply for this

[2] Rivera-Meléndez disputed that his wife had informed him of the restructuring, but the court credited Pfizer's assertion in this regard based upon Rivera-Meléndez's deposition testimony that he vaguely remembered his wife telling him that she had applied for the API team leader position. See *Rivera-Meléndez II*, 2011 WL 5025930, at *2 & n.6.

position because he did not believe that he would have received fair treatment in the application process. Doc. 115-1 ¶ 33; Doc. 115-3, Ex. 1 at 14; Doc. 108-7, Ex. B-2 at 34.

3. District Court Proceedings

Rivera-Meléndez filed suit against Pfizer in January 2010, asserting USERRA and pendent state law claims. Doc. 1. Rivera-Meléndez raised claims relating to USERRA's anti-discrimination and reinstatement provisions. Doc. 1; Doc. 58. Specifically, Rivera-Meléndez alleged that Pfizer had discriminated against him based on his military service by, among other things, delaying payment of his differential pay and pay raise; failing to pay his Christmas bonus; failing to provide him an opportunity to apply for the API team leader position announced during his deployment; and subjecting him to a hostile work environment. Doc. 1; Doc. 58. Rivera-Meléndez also alleged that Pfizer reinstated him in an inferior position upon his return from active duty. Doc. 1; Doc. 58.

On Pfizer's motion, the district court dismissed Rivera-Meléndez's pendent state law claims. Doc. 74. Pfizer filed a second motion to dismiss, which the court denied. *Rivera-Meléndez* v. *Pfizer Pharm., Inc.*, 788 F. Supp. 2d 33 (D.P.R. 2011) (*Rivera-Meléndez I*). In pertinent part, the district court ruled that Rivera-Meléndez "has the burden of showing that had he been notified, with a reasonable degree of certainty he would have applied to and obtained the pay, benefits,

seniority, and other job perquisites * * * of one of the eleven positions created," which was a factual matter to be determined later in the litigation. *Id.* at 36.

Pfizer subsequently moved for summary judgment, which the district court granted in part and denied in part. *Rivera-Meléndez II*, 2011 WL 5025930. The district court held that Rivera-Meléndez's USERRA discrimination claims pursuant to 38 U.S.C. 4311 largely failed. *Id.* at *5-8. Specifically, the court ruled that Pfizer ultimately gave Rivera-Meléndez a retroactive pay raise; that Pfizer was not required to provide him with any pay differential during his military service; that there was insufficient evidence that he had been deprived of a benefit provided to other similarly situated employees when Pfizer failed to notify him of a promotional opportunity; and that, if cognizable under USERRA, there was no objective evidence of a hostile work environment. *Ibid.* The only discrimination claim that survived summary judgment was Rivera-Meléndez's allegation that Pfizer wrongfully denied him his $100 Christmas bonus, *id.* at *6, which the parties later settled, *Rivera-Meléndez III*, 2011 WL 5442370, at *1 n.1.

The district court also rejected Rivera-Meléndez's USERRA reinstatement claim pursuant to 38 U.S.C. 4312 and 4313. Specifically, Rivera-Meléndez alleged that he should have been reemployed as an API team leader because it was reasonably certain that he would have attained that position if he had been continuously employed with Pfizer. *Rivera-Meléndez II*, 2011 WL 5025930, at *9.

The district court held that the API team leader position was not Rivera-Meléndez's escalator position, and that the API service coordinator position into which Rivera-Meléndez was eventually placed was an appropriate reinstatement position, despite its diminished responsibilities and lack of supervisory duties. *Id.* at *9-11. In so holding, the court ruled that "reference to the escalator position is inapplicable here," because "[a]n escalator position is a promotion that is based solely on employee seniority [and] * * * does not include an appointment to a position that is not automatic." *Id.* at *9. Relying on *McKinney* v. *Missouri-Kansas-Texas Railroad Company*, 357 U.S. 265 (1958), the court held that Rivera-Meléndez was not entitled to the API team leader position because it was not an automatic promotion. *Ibid.*

Instead of applying the Act's escalator principle, the district court held that "USERRA only entitles plaintiff to reemployment in the position he had prior to his service or a position of 'like seniority, status, and pay,'" *Rivera-Meléndez II*, 2011 WL 5025930, at *10.[3] The court then assessed the status of Rivera-

[3] It appears that the district court intended to cite to Section 4313(a)(2)(B), instead of Section 4313(a)(2)(A), in support of this assertion because subsection B refers to the servicemenber's pre-service position, whereas subsection A refers to the servicemember's escalator position. In this case, there is no evidence that Rivera-Meléndez was "not qualified to perform the duties of a position referred to in [Section 4313(a)(2)(A)] after reasonable efforts by the employer to qualify the person," 38 U.S.C. 4313(a)(2)(B), or that he sought reinstatement in the group leader position he occupied at the commencement of his military service.

Meléndez's reemployment position as compared to his pre-service position, and held that it was impossible for Pfizer to reemploy Rivera-Meléndez in his eliminated group leader position – even though Pfizer had not pleaded or offered any evidence to support this affirmative defense, as required under the Act. *Id.* at *11; 38 U.S.C. 4312(d)(2); House Report 25; Doc. 11; Doc. 109; Doc. 121. Therefore, the district court concluded that Pfizer had not violated the Act by reemploying Rivera-Meléndez as a service coordinator, notwithstanding the diminished responsibilities of that position. *Rivera-Meléndez II*, 2011 WL 5025930, at *10-11.[4]

Rivera-Meléndez moved the district court to reconsider, among other things, the portion of its summary judgment opinion that dismissed his USERRA reinstatement claim. Doc. 128. Rivera-Meléndez argued that the district court had failed to apply the reasonable certainty test discussed in the court's opinion denying Pfizer's second motion to dismiss. Doc. 128 at 1, 4-9; *Rivera-Meléndez I*, 788 F. Supp. 2d at 36. According to Rivera-Meléndez, the proper inquiry was not whether the API team leader promotion was automatic or discretionary, but whether it was reasonably certain that Rivera-Meléndez would have applied for

[4] Both Rivera-Meléndez's pre-service position and the position that he argued was the proper reinstatement position had greater supervisory responsibilities than his reemployment position. *Rivera-Meléndez III*, 2011 WL 5442370, at *1; Doc. 108-7, Ex. B-2 at 17-18; Doc. 115-3, Ex. 1 at 11-12.

and been promoted to API team leader had he not been in active duty status at the time the promotion was offered. Doc. 128 at 6. To support his argument, Rivera-Meléndez pointed to, among other things, the employment history and promotion of Miguel Nieves, who Rivera-Meléndez claimed was a similarly situated employee. Doc. 128 at 7-8. The district court rejected these arguments. The court held that the reasonably certain inquiry applied only to automatic promotions, and that Rivera-Meléndez had not presented any evidence that the API team leader position, although labeled discretionary, was in fact an automatic promotion. *Rivera-Meléndez III*, 2011 WL 5442370, at *1-2.

SUMMARY OF THE ARGUMENT

This Court should vacate the district court's grant of summary judgment to Pfizer on Rivera-Meléndez's USERRA reinstatement claim. The Act requires that a servicemember be reemployed in the position he would have held if his employment had not been interrupted by military service, or in a position of like seniority, status, and pay. To comply with this mandate, an employer must apply USERRA's escalator principle to determine the position the servicemember would have attained with reasonable certainty if not for his military service; that is, his "escalator position." USERRA requires that an employer determine the escalator position for *all* returning servicemembers qualified for reinstatement.

The district court erred in holding that the Act's escalator principle and its reasonable certainty test apply only to automatic promotions. When a discretionary promotional opportunity arises during the servicemember's military service, the proper inquiry upon reinstatement is not whether the missed promotion was automatic or discretionary, but whether it was reasonably certain that the servicemember would have applied for and received the promotion had he not been in active duty status. To be sure, a returning servicemember is by no means automatically entitled to a discretionary promotion offered during his military service. But the servicemember must have an opportunity to demonstrate that there is a reasonable certainty that he would have attained the promotion if he had been continuously employed. The determination of whether a servicemember is entitled to a discretionary promotion upon his return from military duty is thus a fact-bound decision that should be determined on a case-by-case basis.

The district court's narrow interpretation of USERRA's escalator principle is at odds with the language, purpose, and legislative history of the statute; the Secretary's interpretation of the Act; and governing case law. Furthermore, it is inconsistent with the court's obligation to construe USERRA liberally in the servicemember's favor. The district court's grant of summary judgment to Pfizer

on Rivera-Meléndez's USERRA reinstatement claim should therefore be vacated, and the case remanded for further proceedings under the correct legal standard.[5]

ARGUMENT

THE DISTRICT COURT ERRED IN ITS ANALYSIS OF RIVERA-MELÉNDEZ'S USERRA REINSTATEMENT CLAIM

A. USERRA Should Be Liberally Construed In The Servicemember's Favor

Over sixty years ago, the Supreme Court announced the bedrock principle that governs all cases under USERRA and its predecessor statutes: federal legislation setting forth servicemember employment protections "is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (discussing the Selective Training and Service Act of 1940). Congress, the Supreme Court, and the Secretary have adhered to and reiterated this principle. See, *e.g.*, S. Rep. No. 158, 103d Cong., 1st Sess. 40 (1993) (Senate Report); H.R. Rep. No. 65, Pt. 1, 103d Cong., 1st Sess. 19 (1993) (House Report); *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 584-585 (1977); Final Rules, Uniformed Services Employment and Reemployment Rights Act of 1994, As Amended, 70 Fed. Reg. 75,246 (Dec. 19, 2005). Thus, when presented with competing interpretations of the Act, courts are required to "read the provision in [the

[5] The United States takes no position on what the ultimate disposition of Rivera-Meléndez's USERRA reinstatement claim should be.

servicemember's] favor under the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King* v. *Saint Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991) (interpreting the Vietnam Era Veterans' Readjustment Assistance Act of 1974).

B. USERRA Obligates An Employer To Reemploy A Returning Servicemember In His "Escalator Position"; That Is, The Position He Would Have Attained With Reasonable Certainty But For His Military Service, Or A Position Of Like Seniority, Status, And Pay

USERRA requires, in pertinent part, that a servicemember who served in the uniformed services for more than 90 days be promptly reemployed "in the position of employment in which [he] would have been employed if [his] continuous employment * * * had not been interrupted by such service, or a position of like seniority, status and pay." 38 U.S.C. 4313(a)(2)(A). As the Supreme Court explained, a returning servicemember "does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." *Fishgold*, 328 U.S. at 284-285. Congress explicitly referred to this escalator principle in enacting USERRA, Senate Report 52; House Report 30, and the Secretary incorporated it into the USERRA regulations, 20 C.F.R. 1002.191-1002.197; 70 Fed. Reg. at 75,270. Accordingly, a servicemember must be reemployed in the "position that he * * * would have attained with reasonable certainty if not for the absence due to uniformed service"; that is, in the "escalator

position." 20 C.F.R. 1002.191; see also *Serricchio* v. *Wachovia Sec. LLC*, 658 F.3d 169, 175 (2d Cir. 2011); *Fryer* v. *A.S.A.P. Fire & Safety Corp., Inc.*, 680 F. Supp. 2d 317, 325 (D. Mass. 2010), aff'd, 658 F.3d 85 (1st Cir. 2011).

Although *Fishgold* referred only to "seniority," the Act's implementing regulations make clear that the escalator position encompasses "the seniority, status, and rate of pay that an employee would ordinarily have attained in that position given his * * * job history, including prospects for future earnings and advancement." 20 C.F.R. 1002.193; see also 70 Fed. Reg. at 75,270 ("*Fishgold* principally involved the issue of a veteran's seniority; however, the principle applies with equal force to all aspects of the service member's return to the work force.").

The phrase "like seniority, status and pay" in Section 4313(a)(2)(A) "is intended to provide the employer with a degree of flexibility in meeting its reemployment obligations." 70 Fed. Reg. at 75,273. This Court has long recognized, however, that servicemember reemployment protection statutes prohibit an employer from reemploying a servicemember in a position that results in a material diminution of status as compared to the servicemember's escalator position. See *John S. Doane Co.* v. *Martin*, 164 F.2d 537, 540 (1st Cir. 1947); *Trusteed Funds* v. *Dacy*, 160 F.2d 413, 419 (1st Cir. 1947); accord *Serricchio*, 658 F.3d at 182-183; *Smith* v. *United States Postal Serv.*, 540 F.3d 1364, 1366 (Fed.

Cir. 2008); *Nichols* v. *Department of Veterans Affairs*, 11 F.3d 160, 163-164 (Fed. Cir. 1993); *Duarte* v. *Agilent Techs., Inc.*, 366 F. Supp. 2d 1039, 1045 (D. Colo. 2005).

C. USERRA's Escalator Principle And "Reasonable Certainty" Test Apply To Both Discretionary And Non-Discretionary Promotions

The district court erroneously held that the escalator principle and its reasonable certainty test apply only to non-discretionary, automatic promotions. In doing so, the court misinterpreted the Act, its legislative history, Supreme Court precedent, and the Secretary's views.

The escalator principle and reasonable certainty test govern all USERRA reinstatement claims. The Act's implementing regulations are clear that "*[i]n all cases*, the starting point for determining the proper reemployment position is the escalator position." 20 C.F.R. 1002.192 (emphasis added). The regulations further provide that "*[a]s a general rule*, the employee is entitled to reemployment in the job position that he * * * would have attained with reasonable certainty if not for the absence due to uniformed service." 20 C.F.R. 1002.191 (emphasis added). Thus, the question is not whether the escalator principle applies in a given case, but rather what is the appropriate reinstatement position once the escalator principle and its reasonable certainty test are applied.

The escalator principle and reasonable certainty test determine the servicemember's reinstatement position and whether he is entitled to a promotion

upon his return from active duty. The Secretary's commentary to the final rules implementing USERRA makes plain that "the reasonable certainty test * * * applies to discretionary and non-discretionary promotions." 70 Fed. Reg. at 75,271. This is consistent with the Act's legislative history, which provides that "*whatever position* the returning serviceperson would have attained, with reasonable certainty, but for the absence for military service, would be the position guaranteed upon return." House Report 30 (citation omitted; emphasis added). The Secretary specifically rejected the commentators' suggestion that the escalator principle should not apply to discretionary, merit-based promotions. 70 Fed. Reg. at 75,271. Instead, the commentary to the final rules states that regardless of the nature of the promotion or how it may be labeled, the inquiry remains the same: "whether a personnel action was 'reasonably certain.'" *Ibid.*; accord 20 C.F.R. 1002.191-1002.193.

The Secretary's commentary also explains how to apply the escalator principle when a promotional opportunity arises during the servicemember's military service. Citing the Act, its legislative history, and governing case law, the commentary provides that "a returning service member is entitled to a promotion upon reemployment if there is a reasonable certainty that the employee would have been promoted absent military service." 70 Fed. Reg. at 75,271 (citing *Coffy* v. *Republic Steel Corp.*, 447 U.S. 191, 197-198 (1980); *Goggin* v. *Lincoln St. Louis*,

702 F.2d 698, 701 (8th Cir. 1983)); see also *ibid.* (discussing House Report 30; Veterans' Reemployment Rights Handbook at 10-2). In other words, "application of the escalator provision * * * require[s] that a service member receive a missed promotion upon reemployment if there is a reasonable certainty that the promotion would have been granted." *Id.* at 75,272 (citing *McKinney* v. *Missouri-Kansas-Texas R.R. Co.*, 357 U.S. 265, 274 (1958); *Tilton* v. *Missouri Pacific R.R. Co.*, 376 U.S. 169, 177 (1964)).

This reasonable certainty analysis is necessarily fact-bound and must be done on a case-by-case basis. 70 Fed. Reg. at 75,271. Thus, "if the promotion depends 'not simply on seniority or some other form of automatic progression but on an exercise of discretion on the part of the employer,' the returning service member may not be entitled to the promotion." *Ibid.* (quoting *McKinney*, 357 U.S. 265 (1958)). The converse is also true: a servicemember is not automatically disqualified from a promotion simply because the promotion is contingent upon the exercise of managerial discretion. *Ibid.* (final rules are designed to avoid "unwarranted denial of promotions to returning service members"); see also *id.* at 75,272. Thus, the relevant inquiry is only what is reasonably certain. *Id.* at 75,271.

The Secretary's interpretation of the Act and its regulations is entitled to substantial deference. Indeed, the Secretary's interpretation of her own regulations

controls unless it is plainly erroneous or inconsistent with the regulation. *Auer* v. *Robbins*, 519 U.S. 452, 457, 461 (1997); *Massachusetts* v. *United States*, 522 F.3d 115, 127 (1st Cir. 2008) ("This court must also be mindful of the substantial deference required when an agency adopts reasonable interpretations of regulations of its own creation."). Here, the Secretary's commentary is fully consistent with the regulations. See 20 C.F.R. 1002.191 ("The principle behind the escalator position is that, if not for the period of uniformed service, the employee could have been promoted * * * due to intervening events."); 20 C.F.R. 1002.193(a) ("The reemployment position includes the seniority, status, and rate of pay that an employee would ordinarily have attained in that position given his or her job history, including prospects for future earnings and advancement."); 20 C.F.R. 1002.193(b) ("If * * * there is a reasonable certainty that [the servicemember] would have been promoted * * * during the time that the employee served in the uniformed service, then the promotion * * * must be made effective as of the date it would have occurred had employment not been interrupted by uniformed service.") (discussing promotions based on skills tests or examinations); 20 C.F.R. 1002.194 ("Depending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher * * * position.").

The district court misinterpreted these regulations and the Secretary's commentary to the final rules. The district court based its decision primarily on

McKinney, 357 U.S. at 271. See *Rivera-Meléndez II*, 2011 WL 5025930, at *9. In *McKinney*, the petitioner claimed that he had been deprived of a seniority right when his employer did not allow him to exercise seniority rights to obtain a higher level position after his position was eliminated following his return from military service. 357 U.S. at 267-268. The Court held that "on application for re-employment a veteran is not entitled to demand that he be assigned a position higher than that he formerly held when promotion to such a position depends, not simply on seniority or some other form of automatic progression, but on the exercise of discretion on the part of the employer." *Id.* at 272. The Court allowed McKinney leave to amend his complaint to allege that the position he sought, in practice, automatically accrued on the basis of seniority. *Id.* at 274.

The district court did not, however, account for a later Supreme Court decision that clarified *McKinney*'s holding. Six years after *McKinney*, the Court decided *Tilton*, 376 U.S. 169, another case involving the seniority rights of veterans returning to a railroad company. In *Tilton*, the veterans claimed that their employer had denied them seniority rights by assigning them seniority based upon the date they returned from military service and completed the training program required to advance to a higher position, as opposed to the date they would have completed the program if they had not been called into military service. *Id.* at 173-174. The Supreme Court reversed the lower court decision that, relying on

McKinney, denied petitioners relief because the promotions were not automatic. *Id.* at 177-178. The Court explained that *McKinney* "did not adopt a rule of absolute foreseeability." *Id.* at 179. "To exact such certainty as a condition for insuring a ve[]teran's seniority rights would render these statutorily protected rights without real meaning." *Id.* at 180. Therefore, the Court held "that Congress intended a reemployed veteran * * * to enjoy the seniority status which he would have acquired by virtue of continued employment but for his absence in military service. This requirement is met if, as a matter of foresight, it was reasonably certain that advancement would have occurred, and if, as a matter of hindsight, it did in fact occur." *Id.* at 181.

Although *McKinney* and *Tilton* involve seniority rights, these decisions set out the reasonable certainty test that governs application of the escalator principle and a veteran's reemployment more generally. See, *e.g.*, *Alabama Power Co.*, 431 U.S. at 587-589, 591; *Barrett* v. *Grand Trunk W. R.R. Co.*, 581 F.2d 132, 135-136 (7th Cir. 1978), cert. denied, 440 U.S. 946 (1979); *Hatton* v. *Tabard Press Corp.*, 406 F.2d 593, 596-597, 599 (2d Cir. 1969); *Moore* v. *Kansas*, No. 78-CV-1079, 1979 WL 1866, at *4 (D. Kan. May 31, 1979) (unpublished); *Burke* v. *Boston Edison Co.*, 279 F. Supp. 853, 856 (D. Mass. 1968); *Leite* v. *Department of Army*, 109 M.S.P.R. 229, 233-236 (M.S.P.B. 2008); see also 70 Fed. Reg. at 75,272. To be sure, a servicemember is not automatically entitled to a discretionary promotion.

See, *e.g.*, 70 Fed. Reg. at 75,271; *Brandt* v. *Minneapolis, Northfield & S. R.R. Co.*, 714 F.2d 793, 796 (8th Cir. 1983); *Goggin*, 702 F.2d at 701. But the fact that a promotion may be discretionary does not necessarily mean that it is not an appropriate reinstatement position. Courts require that the employer's exercise of discretion be genuine, *e.g.*, *Schilz* v. *City of Taylor*, 825 F.2d 944, 946 (6th Cir. 1987); *Brandt*, 714 F.2d at 798; *Hatton*, 406 F.2d at 597, and allow a servicemember to demonstrate the reasonable certainty required for the promotion to accrue, *e.g.*, *Criddell* v. *United States Postal Serv.*, No. 92-3135, 1992 WL 240272, at *1 (Fed. Cir. Sept. 28, 1992) (unpublished); *Goggin*, 702 F.2d at 702; *Jeong Ko* v. *City of La Habra*, No. CV105305, 2011 WL 1792820, at *4 (C.D. Cal. May 11, 2011); *Thomas* v. *Pacific Nw. Bell Tel. Co.*, 434 F. Supp. 741, 746 (D. Or. 1977); *Leite*, 109 M.S.P.R. at 234-236. Thus, courts have held that a returning servicemember is entitled to any promotions that would have accrued automatically, *Lapine* v. *Town of Wellesley*, 167 F. Supp. 2d 132, 141 (D. Mass. 2001), aff'd, 304 F.3d 90 (1st Cir. 2002), as well as any promotions that it was reasonably certain he would have attained, *Criddell*, 1992 WL 240272, at *1; *Schilz*, 825 F.2d at 945-946; *Goggin*, 702 F.2d at 702; *Barrett*, 581 F.2d at 136; *Thomas*, 434 F. Supp. at 746; *Leite*, 109 M.S.P.R. at 234-235; cf. *Milhauser* v. *Minco Prods., Inc.*, No. 09-CV-3379, 2012 WL 684007, at *9-11 (D. Minn. Mar.

2, 2012) (discussing reduction in force); *Moore*, 1979 WL 1866, at *4-5 (discussing licensure).

To determine whether it is reasonably certain that the servicemember would have been promoted had he been continuously employed, the employer may look at the servicemember's work history, length of service, and qualifications, as well as whether similarly situated employees were promoted. See 20 C.F.R. 1002.192-1002.193, 1002.213; *Serricchio*, 658 F.3d at 184; *Loeb* v. *Kivo*, 169 F.2d 346, 351 (2d Cir.), cert. denied, 335 U.S. 891 (1948); *Jeong Ko*, 2011 WL 1792820, at *4; *Brown* v. *Consolidated Rail Corp.*, 605 F. Supp. 629, 635 (N.D. Ohio 1985).

Thus, regardless of whether a promotional opportunity that arose during the servicemember's military service is discretionary or automatic, the inquiry remains the same. After considering the returning servicemember's employment history and prospects for future earnings and advancement, the employer must determine to a reasonable degree of certainty what position the servicemember would have attained if his employment had not been interrupted by military service. See 20 C.F.R. 1002.191-1002.193. The employer must then reemploy the servicemember in that position or in a position of like seniority, status, and pay. 38 U.S.C. 4313(a)(2)(A); 20 C.F.R. 1002.193.

Here, the district court set out the correct reemployment standard in its opinion denying Pfizer's second motion to dismiss. See *Rivera-Meléndez I*, 788 F.

Supp. 2d at 36 ("Plaintiff * * * now has the burden of showing that had he been notified, with a reasonable degree of certainty he would have applied to and obtained the pay, benefits, seniority, and other job perquisites * * * of one of the eleven positions created."). But in later decisions, the district court misinterpreted the role of the escalator position and the reasonable certainty test. See *Rivera-Meléndez III*, 2011 WL 5442370, at *1-2; *Rivera-Meléndez II*, 2011 WL 5025930, at *9. The district court relied upon *McKinney* without reference to *Tilton*, and erroneously focused on whether the promotion that Rivera-Meléndez sought was automatic. *Rivera-Meléndez II*, 2011 WL 5025930, at *9. Finding that it was not automatic, in practice or otherwise, the district court held that Rivera-Meléndez was not entitled to the promotion to the API team leader position. See *Rivera-Meléndez III*, 2011 WL 5442370, at *1-2; *Rivera-Meléndez II*, 2011 WL 5025930, at *9. In doing so, the district court misinterpreted the uniform application of the escalator principle to USERRA reinstatement claims and erroneously equated "reasonably certain" with "automatic." See *Rivera-Meléndez III*, 2011 WL 5442370, at *2 ("Plaintiff has not cited any evidence showing that the API Team Leader position was merely labeled discretionary, but was in fact a 'reasonably certain' and relatively automatic progression from the API Group Leader position.").

The correct inquiry is not whether advancement to the API team leader position was automatic, but whether it was reasonably certain that Rivera-Meléndez would have attained the promotion if he had been continuously employed. In rejecting his reemployment claim on the ground that appointment to the API team leader position was not automatic, the district court committed reversible error. The United States takes no position on whether Rivera-Meléndez could ultimately prove that it was reasonably certain that he would have been promoted to the API team leader position, but USERRA requires that he be allowed the opportunity to do so.

CONCLUSION

This Court should vacate the district court's grant of summary judgment to Pfizer on Rivera-Meléndez's USERRA reinstatement claim, and remand the case for disposition of that claim under the correct legal standard: whether Pfizer reemployed Rivera-Meléndez in the position that, to a reasonable degree of certainty, he would have attained but for his military service, or in a position of like seniority, status, and pay.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation imposed by Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B). The brief was prepared using Microsoft Word 2007 and contains 5,830 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

I further certify that the electronic version of this brief, prepared for submission via ECF, has been scanned with the most recent version of Trend Micro Office Scan (version 8.0) and is virus-free.

s/ Erin Aslan
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Dated: March 27, 2012

CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2012, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS AND URGING VACATUR IN PART with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

I further certify that all participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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