



U.S. Department of Justice

Civil Rights Division

---

Appellate Section  
Ben Franklin Station  
P.O. Box 14403  
Washington, DC 20044-4403

March 19, 2013

Margaret Carter  
Clerk of the Court  
United States Court of Appeals  
for the First Circuit  
John Joseph Moakley U.S. Courthouse  
1 Courthouse Way  
Boston, MA 02210

Re: *Rivera-Melendez v. Pfizer Pharmaceuticals*, No. 12-1023 (1st Cir.)

Dear Ms. Carter:

During the March 5 oral argument in this case, Judge Lynch asked counsel for the United States a question regarding the type of notice a returning servicemember is required to give an employer under the Uniformed Services Employment and Reemployment Act of 1994 (USERRA), 38 U.S.C. 4301 *et seq.* Specifically, Judge Lynch inquired whether a servicemember could, in effect, sit on his or her rights under USERRA, accepting a reemployment position that was not the escalator position, and then requesting, after a period of time had passed, placement in the escalator position. She asked that the United States respond to this question within two weeks of the argument date. This letter responds to Judge Lynch's question.

Servicemembers' reemployment notification requirements vis-à-vis their employers are set forth in 38 U.S.C. 4312(e). As it relates to *Rivera-Melendez*, USERRA provides that a person "whose absence from a position of employment is necessitated by reason of service in the uniformed services," and whose period of service "was for more than 180 days," "shall, upon the completion of a period of service in the uniformed services, notify the employer \* \* \* of the person's intent to return to a position of employment with such employer \* \* \* by submitting an application for reemployment with the employer not later than 90 days after the completion of the period of service." 38 U.S.C. 4312(a) and (e)(1)(D). The regulations to USERRA are clear that "an application for reemployment need not follow any particular format. The employee may apply orally or in writing. The application should indicate that the employee is a former employee returning from service in the uniformed services and that he or she seeks reemployment with the pre-service employer. The employee is permitted but not required to identify a particular reemployment position in which he or she is interested." 20 C.F.R. 1002.118.

Pursuant to these regulations, the employee thus *need not specify that he or she seeks the escalator position*. Rather, upon giving appropriate notification as required by 38 U.S.C. 4312(e), a person, such as Rivera-Melendez, whose period of uniformed service was for more than 90 days, “shall be promptly 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”; *i.e.*, the escalator position. 38 U.S.C. 4313(a)(2)(A).

Thus, USERRA and its regulations clearly indicate a servicemember’s right to be reemployed in the escalator position (“a person entitled to reemployment \* \* \* shall be promptly reemployed”), and do not require the employee to specify the position he or she seeks, as long as the servicemember complies with the statutory notification requirement. Accordingly, if the servicemember complies with the notification requirement, he or she cannot properly be deemed to have waived entitlement to the escalator position. This is so even if the servicemember was initially placed in and accepted an incorrect reemployment position, and did not request reassignment to the escalator position until after the statutory notification period had expired. In this regard, we note that, pursuant to an October 2008 amendment, USERRA explicitly states that no statutes of limitation apply to its requirements. See 38 U.S.C. 4327(b) (“If any person seeks to file a complaint or claim with the Secretary, the Merit Systems Protection Board, or a Federal or State court under this chapter alleging a violation of this chapter, there shall be no limit on the period for filing the complaint or claim.”). Because Rivera-Melendez applied for reemployment in 2009, this amendment precludes the application of a statute of limitations to his claim.

To be sure, we acknowledge that other principles, such as the doctrine of laches, might nevertheless operate to preclude a servicemember from requesting an appropriate escalator position long after accepting another position. See 20 C.F.R. 1002.311 (“[I]f an individual unreasonably delays asserting his or her rights, and that unreasonable delay causes prejudice to the employer, the courts have recognized the availability of the equitable doctrine of laches to bar a claim under USERRA.”); *K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 911 (1st Cir. 1989) (“The equitable doctrine of laches bars assertion of a claim where a party’s delay in bringing suit was 1) unreasonable, and 2) resulted in prejudice to the opposing party.”); *Rogers v. City of San Antonio*, 392 F.3d 758, 773 (5th Cir. 2004) (stating, in a USERRA case, that “[i]n order to invoke the doctrine of laches, [defendant] must show an inexcusable delay in asserting a right and undue prejudice \* \* \* as a result of that delay.”), cert. denied, 545 U.S. 1129 (2005). But even in cases involving delay by servicemembers in requesting their escalator positions, courts should bear in mind the Supreme Court’s command that legislation protecting servicemembers “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). Accordingly, in cases in which a servicemember asserts entitlement to an escalator position long after accepting another position, a case-by-case analysis is required, taking into account such factors as the reason for the delay,

any resulting prejudice to the employer, whether the servicemember freely and knowingly rejected the escalator position, and the like.

Sincerely,

Dennis J. Dimsey  
Deputy Chief

s/Holly A. Thomas  
Holly A. Thomas  
Attorney  
Appellate Section  
Civil Rights Division  
Holly.Thomas@usdoj.gov  
(202) 307-3714

cc: Counsel of Record

## **CERTIFICATE OF SERVICE**

I hereby certify that on March 19, 2013, I electronically filed a true and correct copy of the foregoing letter with the Clerk of the Court United States Court of Appeals for the First Circuit 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.

s/ Holly A. Thomas  
HOLLY A. THOMAS  
Attorney