Marquette Law Review

Volume 71
Issue 1 *Fall 1987*

Article 4

1987

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EMPLOYMENT RIGHTS OF THE WISCONSIN MILITARY RESERVIST UNDER FEDERAL AND STATE LAW

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For over 200 years, the United States in time of both war and peace has been served by the citizen-soldier. Indeed, due in part to the cost of a large standing military force, the federal government views a strong National Guard and reserve program as crucial components of our national defense.[1]

Wisconsin has and will continue to play a significant role in this effort. The Wisconsin Army and Air National Guard presently has 11,200 members[2] and over 12,000 additional Wisconsin residents serve in the Army, Air Force, Navy, Marine Corp, and Coast Guard Reserve.[3]

All of these individuals are Selected Reservists, that is, they are obligated to serve two-week periods of annual active duty for training at locations throughout the world. In addi-

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1. Congress has termed the National Guard and Reserve Forces an "integral part of the total force policy of the United States." Pub. L. No. 97-252, § 1130, 96 Stat. 759 (1982). Since 1973, the Department of Defense has implemented the Total Force Policy which decrees that the defense forces of the United States will consist of the minimum active duty force necessary to maintain the peace, supported by a reinvigorated, well-trained, reserve. "In 1986, the active armed force of 2.2 million was complemented by 1.6 million Ready Reservists, which includes both the Selected Reserve and the Individual Ready Reserve, both of which are considered 'active' as opposed to 'inactive' reserves." ANN. REP. RESERVE FORCES POLICY BOARD (1986) (Office of the Secretary of Defense).

2. Interview with Donald Erickson, Public Affairs Office, Wisconsin National Guard, in Madison, Wis. (April 1, 1987). Although the exact number fluctuates, as of March, 1987, the Army National Guard had approximately 9,200 active members and the Air National Guard had 2,000. *Id.*

3. Interview with Timothy Downey, Office of the Assistant Secretary of Defense for Public Affairs, in Washington, D.C. (April 7, 1987). Again, the exact number may vary at any given time but as of March, 1987, Wisconsin had 21,027 enlisted personnel and 2,697 officers, for a total of 23,724 individuals participating as Selected Reservists as part of both Guard and Reserve programs. *Id.*

tion, in most cases they must serve an initial period of four or more months of active duty for training and sixteen hours of local inactive duty for training a month, usually served on weekends. Further, they are of course subject to being called to active duty for non-training purposes for varying periods in the event of a national emergency and, in the case of the National Guard, a state emergency.[4]

This obligation often conflicts with the reservist's civilian employment, in some instances resulting in disputes with his or her employer. Understandably, one of the reservist's greatest concerns is the employment rights he or she enjoys. Every reservist would agree with the opinion of one federal court:

> The very existence of the nation depends upon its ability to have a military force trained and skilled in the complex technology of modern warfare. Those who accept the obligation of military service are entitled to more than neutral treatment, or to be treated no differently than those who do not accept this obligation.[5]

The purpose of this article is to outline the public and private sector employment protection afforded the Wisconsin reservist by federal and state law in the area of hiring, incidents and advantages of employment, and retention and restoration. Statutory provisions at both levels of government will be the primary focus. State common law rights and recent federal and state court decisions will also be discussed.

I. EMPLOYMENT PROTECTION AFFORDED THE MILITARY RESERVIST UNDER FEDERAL STATUTORY LAW

Congress has provided the military reservist with broad reemployment rights. Although some form of protection has been available since 1940,[6] the current statute, commonly re-

4. In addition, some members of the Individual Ready Reserve, which in the case of the Army Reserve numbers more than 300,000 nationwide, may serve some periods of active duty for training, although many serve no inactive or active duty for training or any other purpose.

5. Monroe v. Standard Oil Co., 446 F. Supp. 616, 620 (N.D. Ohio 1978).

6. Several acts between 1940 and 1968 provided employment protection to military personnel. *See* Selective Training and Service Act of 1940, ch. 720, § 8, 54 Stat. 885, 890 (1940); Selective Service Act of 1948, ch. 625, § 9, 62 Stat. 604, 614 (1948) (as amended by the Military Selective Service Act of 1967, Pub. L. No. 90-491, § 1, 82 Stat. 790 (1968)); Universal Military Training and Service Act, ch. 144, § 1(s), 65 Stat. 75, 86 (1951); Reserve Forces Act of 1955, ch. 665, § 262(f), 69 Stat. 598, 602 (1955).

ferred to as the Veterans' Reemployment Rights Act,[7] is the result of the Vietnam Era Veterans' Readjustment Assistance Act of 1972[8] as amended by the Veterans' Benefits Improvement and Health Care Authorization Act of 1986.[9] The key provision, section 2021(b)(3), succinctly states:

> Any person who seeks or holds a position [in federal government, state government or a subdivision thereof, or private employment] shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.[10]

A. Hiring

The protection afforded by section 2021(b)(3) in the area of hiring did not exist until the 1986 amendment. It nonetheless addresses what has been a long-standing concern: an employer's refusal to hire a military reservist because of the accommodations that will have to be granted, and the inconvenience that will result because of that individual's military obligations.[11]

The United States Department of Labor has taken the position that an employer shall be considered to have refused to hire if either:

(1) the sole reason or part of the reason to not hire was because of the military obligation; or
(2) in light of all the circumstances, and not withstanding any other reason or reasons which may have weighed in the employer's decision, the reservist would have been hired but for the military obligation.[12]

Although vaguely stated, this appears to mean that for purposes of assisting the reservist, the Department of Labor

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7. 38 U.S.C. §§ 2021-26 (1985-86). *See infra* Appendix at 98-107.

8. Act of Dec. 3, 1974, Pub. L. No. 93-508, § 404-05, 88 Stat. 1578, 1594-1600 (as amended by Act of May 14, 1976, Pub. L. No. 94-286, § 2, 90 Stat. 517, 518 (adding § 2024(g)).

9. Act effective Oct. 28, 1986, Pub. L. No. 99-576, § 331.

10. 38 U.S.C. § 2021(b)(3) (West Supp. 1987). *See infra* Appendix at 100.

11. For example, in Kemp v. Washington Post, 109 L.R.R.M. (BNA) 2394 (D.D.C. Nov. 30, 1981) (no violation was found where the employer withdrew a job offer after learning of the applicant's reserve obligation).

12. Information letter, "New Discrimination Law for Members of the Reserve/Guard," Department of Labor, Veterans' Employment and Training Service. Office of Veterans' Reemployment Rights, Madison, Wis.

will consider a discriminatory act to have occurred in a "mixed motive" situation if any part of the refusal to hire was based on the military obligation, even if there were other reasons for non-hire that would have led to the same result regardless of the military obligation. The Department of Labor apparently will allow the courts in future cases to determine the controlling standard of causation as well as set the overall parameters of the new law.[13]

B. Incidents and Advantages of Employment

The prohibition in section 2021(b)(C) against depriving reservists of the incidents and advantages of employment is very controversial and has proven to be difficult to interpret (with the exclusion of the expressly stated right to promotional opportunities).[14]

Prior to 1982, lower federal courts tended to interpret this provision broadly, consistent with congressional intent which called for a liberal construction of the entire Veterans Reemployment Rights Act.[15] The courts had gone so far as to state that employers had to take positive action to grant reservists rights that might not necessarily be afforded other employees.[16] As a result, the term "incidents and advantages of employment" covers a wide variety of situations, for example:

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13. An "in part" standard would result in a violation if any part of the reason for refusal to hire is based on the protected activity, even if there were other valid reasons for non-hiring that would have led to the same result. *See, e.g.*, Cook v. 84 Lumber Co., 118 L.R.R.M. (BNA) 2639 (N.D. Ohio July 10, 1984). A "but-for" test would require proof that hiring would have resulted but for the discriminatory motive. *See, e.g.*, Clayton v. Blachowske Truck Lines, Inc., 640 F. Supp. 172 (D. Minn. 1986), *aff'd*, 815 F.2d 1203 (8th Cir. 1987). There is uncertainty over the proper standard to be utilized in other aspects of the Veterans' Reemployment Rights Act. *See, e.g.*, Chesna v. Int'l Fueling Co., 117 L.R.R.M. (BNA) 2913 (1st Cir. Oct. 12, 1984).

14. For example, Henry v. Anderson County, Tenn. Office of Sheriff, 522 F. Supp. 1112 (E.D. Tenn. 1981) held that the demotion of a county sheriff sergeant prior to termination, due to his reserve affiliation, was a clear violation of the statute.

15. *See, e.g.*, Bottger v. Doss Aeronautical Serv., Inc., 609 F. Supp. 583 (M.D. Ala. 1985).

16. Monroe v. Standard Oil Co., 446 F. Supp. 616, 620 (N.D. Ohio 1978), *rev'd*, 613 F.2d 641 (6th Cir. 1980), *aff'd*, 452 U.S. 549 (1981).

(1) The opportunity to make up overtime missed during reserve duty even though employees on non-military leave would not get this opportunity.[17]
(2) The right to holiday pay and full vacation rights as if the reservist had not been absent.[18]
(3) Prohibition of reassignment to less desirable shifts.[19]
(4) The right to scheduling accommodations to assure a 40-hour work week.[20]

A few courts had taken a more narrow interpretation, holding for example that the right to work overtime did not accrue because of employee status but because a work requirement was fulfilled; and therefore, it was not a part of the incidents and advantages of employment.[21]

The United States Supreme Court then struck a blow against the liberal construction of this provision in *Monroe v. Standard Oil Company Co.*[22] The reservist in that case had not been permitted by his employer to make up work time lost when his rotating work schedule conflicted with military training. The federal district court held that a violation occurred because the employer should have accommodated the employee's reserve obligation. But both the court of appeals[23] and the Supreme Court disagreed. The latter, by a 5-4 vote, held that section 2021(b)(3) required only that reservists be protected against discriminations like discharge or demotion and was not intended to cover factors such as missed work hours or a duty on the employer to accommodate the reservist.[24]

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17. Carney v. Cummins Engine Co., 602 F.2d 763, 766 (7th Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980); Lott v. Goodyear Aerospace Corp., 395 F. Supp. 866, 870 (N.D. Ohio 1975).

18. Hilliard v. N.J. Army Nat'l Guard, 527 F. Supp. 405 (D. N.J. 1981); Kidder v. Eastern Air Lines, Inc., 469 F. Supp. 1060, 1066 (S.D. Fla. 1978).

19. Carlson v. N.H. Dept. of Safety, 609 F.2d 1024 (1st Cir. 1979), *cert. denied*, 446 U.S. 913 (1980) (employee could not be assigned to rotating shifts and weekends upon return from six weeks active duty with Air Force Reserve when he had previously been assigned only to weekdays).

20. West v. Safeway Stores, Inc., 609 F.2d 147, 150 (5th Cir. 1980).

21. Breeding v. TRW, Inc., 477 F. Supp. 1177, 1182 (M.D. Tenn 1979), *aff'd*, 665 F.2d 1043 (6th Cir. 1981).

22. 452 U.S. 549 (1981).

23. Monroe v. Standard Oil Co., 613 F.2d 641 (6th Cir. 1980).

24. *Monroe*, 452 U.S. at 565-66.

Commentators were understandably quick to criticize *Monroe*, viewing it as unduly narrowing, if not virtually eliminating, the concept of incidents and advantages of employment, assuming its holding would not be restricted in the future to just scheduling situations.[25] Perhaps because of its bare majority, the impact of *Monroe* has been limited. Entitlement to seniority stock benefits and recall list eligibility, notwithstanding military leave, has still been recognized.[26]

The district court in *Waltermeyer v. Aluminum Co. of America*,[27] cited *Monroe* for the proposition that employers do not have to grant special benefits to employee-reservists that are not available to other employees.[28] Accordingly, the court held that a member of the Pennsylvania National Guard could be denied holiday pay for dates during which he was in annual training, since the collective bargaining agreement did not specify such payment. Curiously, the court was not swayed by the fact that other categories of employees (e.g., those on jury duty during the week of the holiday) were specified as being entitled to the holiday pay.[29]

The court of appeals took notice of this and reversed, agreeing that reservists are not entitled to special privileges, but holding that in this instance the reservist was simply being brought up to the level of other employees.[30] However, a dissenting judge sought a strict interpretation of *Monroe* and asserted that holiday pay for reservists—military service being a voluntary activity unlike jury duty—was essentially ordering the employer to pay the reservist wages during the absence.[31]

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25. Sharp, *Reservist Employment Rights*, 22 A.F. L. REV. 374 (1980-81); Comment, *Military Reservist-Employees' Rights Under* 38 U.S.C. Sec. 2021(b)(3)—*What is an Incident or Advantage of Employment?*, 19 SAN DIEGO L. REV. 877 (1982).

26. Winders v. People Express Airlines, Inc., 595 F. Supp. 1512, 1519 (D. N.J. 1984) (employee was entitled to reinstatement when he completed his active duty and was entitled at that time to seniority and stock benefit rights that had accrued during his leave of absence); Colon v. County of Shawnee, 124 L.R.R.M. (BNA) 3213, 3215 (10th Cir. Mar. 31, 1987) (restoration to lay off status returned employee to the employment status he enjoyed at the time he began active duty).

27. 633 F. Supp. 6 (W.D. Pa.), *rev'd*, 804 F.2d 821 (3d Cir. 1986).

28. *Id.* at 8.

29. *Id.*

30. Waltermeyer v. Aluminum Co. of Am., 804 F.2d 821, 825 (3d Cir. 1986).

31. *Id.* at 826-27 (Hunter, C.J., dissenting).

In *Sawyer v. Swift & Co.*,[32] a naval reservist on a second shift job sought time off from work to travel from Kansas City to Memphis for drills. The employer terminated him and argued in defense that *Monroe* did not require such a scheduling accommodation. The federal district court refused to construe *Monroe* so broadly holding it only restricted reservists' requests to reschedule work as opposed to a simple request for an excused absence.

On the other side, *Rumsey v. New York State Department of Correctional Services*[33] strictly construed *Monroe* and held that reservist/prison employees could be required to utilize formal shift switching procedures to avoid conflicts with reserve duty, resulting in some disadvantage, even where employees on other types of leave did not, stating that "*Monroe* makes it clear that [Congress] does not require that the employer treat the employee-reservist in every single respect as if the reservist's military obligation did not exist, even to the point of arranging 'special accommodations.' "[34]

The scope of the incidents and advantages protection thus remains unsettled. Nonetheless, it remains a viable component of the reservist's employment protection as evidenced by *Waltermyer* and *Swift*. In light of *Monroe*, the Department of Labor has taken the position that an employer need not make up lost overtime or rearrange a work schedule to avoid conflicts with military duty. The Department terms vacation eligibility a complex issue that should be evaluated in light of the particular facts of any given situation.[35]

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32. 610 F. Supp. 38 (D. Kan. 1985).

33. 569 F. Supp. 358 (N.D.N.Y. 1983), *vacated in part*, 580 F. Supp. 1052 (N.D.N.Y. 1984). *See also* Batayola v. Municipality of Metropolitan Seattle, 798 F.2d 355 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 3186 (1987). In *Batayola*, a part-time bus driver, who missed a chance to apply for full-time employment because the recruiting period occurred while he was on a one-month leave with the Marine Corps Reserve, was held to have no right to entitlement to the job on an automatic basis since the likelihood of him having been hired full-time, according to the court, depended on his fitness and ability rather than merely his status as a part-time driver; it could not be stated with reasonable certainty that he would have gotten the full-time job. However, the court did not cite *Monroe* in support of its holding. *Id.*

34. *Rumsey*, 569 F. Supp. at 361.

35. U.S. Dept. of Labor, Veterans' Employment and Training Service, Office of Veterans' Reemployment Rights, *Job Rights for Reservists and Members of the National Guard* (undated). The OVRR does attempt the following generalization, however:

C. Restoration and Retention

As noted, section 2021(b)(3) expressly requires that retention in employment shall not be denied to the military reservist.[36] Several additional provisions of the code deal in greater detail with particular circumstances the reservist may encounter and expand on this overall right.[37]

First, section 2024(c) provides that any reservist ordered to an initial period of active duty for training for three or more consecutive months[38] is entitled to be restored to his position without loss of seniority, status, or pay,[39] under the following conditions:

(1) the reservist must apply for reemployment within 31 days of release from active duty (or a period of hospitalization as a result of that active duty);

Where eligibility for vacation depends on fulfilling a work requirement, reservist employees must perform the work to be entitled to the vacation. Where the value of vacation depends upon years of service, the reservist's vacation is determined by continuous employment and absence at reserve training is to be counted toward the value of the vacation.

Id.

36. Numerous cases have arisen under these provisions. *See, e.g.*, Weber v. Logan County Home for the Aged, 623 F. Supp. 711 (D. N.D. 1985), *aff'd*, 804 F.2d 1058 (8th Cir. 1986) (discharge within 24 hours of critical inquiry by employer of National Guard status constituted a violation); Micalone v. Long Island R.R., 582 F. Supp. 973 (S.D.N.Y. 1983) (forced resignation of National Guardsman because military leave not approved held a violation); Bankston v. Stratton-Baldwin Co., 441 F. Supp. 247 (S.D. Ala. 1977) (discharge of Air Force Reservist because of 15 days annual training held to be a clear violation). The burden of justifying the discharge is on the employer. Henry v. Anderson County, Tenn. Office of Sheriff, 522 F. Supp. 1112, 1114 (E.D. Tenn. 1981).

37. All of these rights apply equally to reservists and National Guardsmen while training or under federal control, notwithstanding technical distinctions in the manner in which the duty arises. However, Guardsmen performing active duty in a state emergency are not protected since such duty does not arise under any of the listed code sections in 38 U.S.C. § 2024(f). Curiously, the overall scheme of protection outlined in § 2021(b)(3) does not contain such a limitation. *See, e.g.*, 38 U.S.C. §§ 2021(b)(3), 2024(f) (1986). *See infra* Appendix at 100, 106.

38. The three consecutive month requirement is not construed strictly. Zeczycki v. Trinity Memorial Hosp., 113 L.R.R.M. (BNA) 2163 (E.D. Wis. Jan. 20, 1983) (an initial active duty for training, split into two components each less than three months, still fit within the statute).

39. Pursuant to §§ 2021(b)(1) and (2), insurance and other benefits upon restoration are treated in the same manner as they would be for other employees on leave for other reasons, depending upon the established rules and practices of the employer. *See infra* Appendix at 99.

(2) the service rendered to the Armed Forces must have been "satisfactory";[40]
(3) the reservist is still qualified to perform the duties of the position;[41] and
(4) the position was not temporary.[42]

The statute further provides that any person restored to employment in this manner cannot be discharged from that position without cause within six months after restoration, a significant restriction on the normal employment-at-will situation.[43]

However, a possibly significant restriction in the case of state and local government and private employers (but not the federal government) is that the employer may deny these restoration rights if its "circumstances have so changed as to make it impossible or unreasonable to do so." What is impossible or unreasonable in any given instance is undoubtedly subject to differing perceptions, but the qualification has been said to be very limited in nature.[44]

Second, pursuant to section 2024(g), reservists ordered to active duty for less than ninety days under the President's emergency powers have the same rights. This is designed to parallel the rights of the reservist who is called up for such

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40. What this means is unclear since no formal discharge with its attendant characterization of service (*i.e.*, honorable) usually results from the initial active duty for training, the reservist still being obligated to a term of service. However, the reservist in this situation does receive a formal, written release from IADT which probably would serve to reflect the nature of his or her service.

41. If not qualified due to a service-related disability, the reservist is entitled to the nearest comparable job with that employer that has duties the reservist can perform. 38 U.S.C. § 2021(a)(A)(ii), *incorporated by reference* 38 U.S.C. § 2024(c) (1985-86). *See infra* Appendix at 98.

42. A temporary position is one in which there is no reasonable expectation of continued employment. Schilz v. City of Taylor, 640 F. Supp. 160, 163 (E.D. Mich. 1986), *rev'd*, 825 F.2d 944 (6th Cir. 1987). Also, the reservist must be an employee and not, for example, an independent contractor. Travis v. Schwartz Mfg. Co., 216 F.2d 448, 453 (7th Cir. 1954).

43. 38 U.S.C. § 2024(c) (1986). *See infra* Appendix at 104-05.

44. For example, where reinstatement would create a useless job or where there has been a reduction in the work force that reasonably would have included the reservist, there is no obligation to rehire. Davis v. Halifax County School System, 508 F. Supp. 966, 968 (E.D.N.C. 1981). Sale of the business is also sufficient to deny reemployment. Anthony v. Basic Am. Foods, Inc., 600 F. Supp. 352, 357 (N.D. Cal. 1984). But a restoration that might result in loss of efficiency or economy of operations does not alone render a refusal to rehire reasonable. Loeb v. Kivo, 77 F. Supp. 523, 528 (S.D.N.Y. 1947), *aff'd*, 169 F.2d 346 (2d Cir. 1948), *cert. denied*, 335 U.S. 891 (1948).

periods for operational missions as opposed to routine training.[45]

Finally, pursuant to section 2024(d), a catch-all provision, reservists performing any inactive or active duty for training (other than the initial active duty for training) for any length of time[46] that conflicts with work are entitled to return to their employment with such seniority, status, pay and vacation as would have been due but for the absence, provided:

(1) the leave of absence was requested;[47]

(2) the request was reasonable;[48]

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45. *See* 10 U.S.C.A. § 673(i) (West Supp. 1987).

46. *See, e.g., Anthony*, 600 F. Supp. at 357 (four and a half months of non-initial active duty for training covered).

47. This request is actually more of a notice since in most circumstances the employer will have no right to deny the request or veto the timing, duration, etc., of the military duty. Department of Labor, Veterans' Employment and Training Service, Office of Veterans' Reemployment Rights, *Fact Sheet No. OASVET-86-1* (1986). The reservist also need not present written military orders since they frequently are not available until after the duty has started. *Id.* The reservist should, of course, give the employer as much advance notice as possible although no particular minimum period is established by law.

The request/notice requirement must be taken seriously. An employee can be lawfully discharged for failure to comply. Harrell v. C.C. Mayes Co., 113 L.R.R.M. (BNA) 2287 (E.D. Tenn. Mar. 15, 1983); Blackmon v. Observer Transp. Co., 119 L.R.R.M. (BNA) 2417 (W.D.N.C. Oct. 28, 1982). However, if the request is wrongfully refused, the reservist can take the leave nonetheless and still be entitled to restoration upon his or her return. Green v. Spartan Stores, Inc., 112 L.R.R.M. (BNA) 2099, 2102 (W.D. Mich. Aug. 24, 1982). It should be stressed that this request requirement does not apply to initial active duty for training, sec. 2024(c) containing no such language. 38 U.S.C. § 2024(c) (1986). *See infra* Appendix at 104-05.

48. Although not required by statute, many courts have imposed a requirement that the request be reasonable in the context of both the military obligation and the needs of the employer. *See, e.g.*, Lee v. City of Pensacola, 634 F.2d 886, 888 (5th Cir. 1981); Bottger v. Doss Aeronautical Services, Inc., 609 F. Supp. 583 (M.D. Ala. 1985). These courts appear to interpret this liberally in favor of the reservist. In *Bottger*, the reservist was held to be reasonably entitled to twenty-six days of leave for active duty for training even though he had just come back from his annual training and thirty to fifty percent of the employer's personnel were reservists with this leave occurring at the height of the annual training "season". The court noted that the training opportunity was only to be offered at that time with no other dates available. *Id.* at 587. Similarly, in *Anthony*, 600 F. Supp. at 355-57, the request was considered reasonable even though the need for the active duty was not pressing from the reservist's standpoint and perhaps could have been accomplished by correspondence courses. *Id.* However, in Gulf States Paper Corp. v. Ingram, 633 F. Supp. 908 (N.D. Ala. 1986), *rev'd*, 811 F.2d 1464 (11th Cir. 1987), an army reservist was held to have resigned without reemployment rights where she took an unauthorized one year absence to attend a civilian nursing school. The court noted that this caused the employer hardship due to a shortage of employees in the reservist's area and the schooling was only to enhance her reserve

(3) the reservist reports for work at the beginning of the next working period after returning from duty or attendant hospitalization (or within a reasonable time if there is an unavoidable delay in returning); delays beyond this result in discipline in accordance with the employer's rules regarding absences;
(4) the reservist is still qualified to perform the duties of the position; and
(5) the position was not temporary.[49]

Congress does not require employers to pay the reservist during any of these types of absences.

D. Enforcement Mechanisms

Section 2025 directs the Department of Labor, through its Veterans' Employment and Training Service, Office of Veterans' Reemployment Rights, to "render aid" to individuals seeking to assert their rights under the statute.[50] If the area agent believes a violation may have occurred, a contact will be made with the employer and negotiations will ensure resolution of the matter.[51]

If the matter is not settled in this fashion, either the reservist or the area agent can, pursuant to section 2022, and free of any state statute of limitation, commence an action in the local federal district court to compel compliance and the pay-

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promotional opportunities by qualifying her for transfer to a different military occupational specialty. *Id.* at 911-12.

49. *See* 38 U.S.C. § 2024(d) (1986). *See infra* Appendix at 105-06.

50. The sole OVRR office in Wisconsin, located in Madison, investigated 236 reservist claims between December, 1983, and March, 1987, but in that span referred none to the U.S. Attorney for litigation. Interview with James F. Purtell, Area Agent, OVRR, in Madison, Wis. (March 31, 1987). However, previous Wisconsin cases in the 1980's have resulted in federal litigation. *See, e.g.*, Gellendin v. Village of Brown Deer, 115 L.R.R.M. (BNA) 2889 (E.D. Wis. Nov. 30, 1983); Zeczycki v. Trinity Memorial Hosp., 113 L.R.R.M. (BNA) 2163 (E.D. Wis. Jan. 20, 1983).

Rights of federal employees are not handled through the OVRR, but through appeal procedures of the U.S. Office of Personnel Management. 38 U.S.C. § 2023(a) (1986). Upon finding a violation, the OPM is directed to order the offending agency to comply and to compensate the reservist for the lost wages and benefits. *Id. See infra* Appendix at 101.

51. 38 U.S.C. § 2025 (1986). *See infra* Appendix at 107. The reservist may also contact the National Committee for Employer Support of the Guard and Reserve, 1734 N. Lynn St., Suite 206, Arlington, VA. 22209, (800) 336-4590, an agency connected with the Department of Defense that conducts an ombudsman program to advise reservists and their employers about their rights and obligations under the law. The committee may also contact the employer to resolve the problem on an informal basis.

ment of lost wages and benefits.[52] The court may not tax fees or costs against the reservist and must advance the matter on its calendar in order to provide a "speedy hearing." The local U.S. Attorney is directed to appear on behalf of the reservist to effect either an "amicable adjustment" or prosecute the action, provided he is "reasonably satisfied" of the validity of the reservist's claim.[53]

II. EMPLOYMENT PROTECTION AFFORDER THE MILITARY RESERVIST UNDER WISCONSIN STATUTORY AND COMMON LAW

With several exceptions, the broad protection from employment discrimination against reservists that is present in the federal statutes is not matched, much less expanded,[54] by Wisconsin statutory and common law.

A. Hiring

Wisconsin has no counterpart to federal protection in this area. The Wisconsin Fair Employment Act prohibits discrimination in hiring on the basis of a wide variety of factors in-

52. 38 U.S.C. § 2022 (1986). *See infra* Appendix at 100. Prejudgment interest can also be awarded. Hanna v. American Motors Corp., 724 F.2d 1300, 1311 (7th Cir. 1984), *cert. denied*, 467 U.S. 1241 (1984) (good faith of employer not an issue); Green v. Oktibbeha County Hosp., 526 F. Supp. 49 (N.D. Miss. 1981). However, in Micalone v. Long Island R.R., 582 F. Supp. 973, 980 (S.D.N.Y. 1983), the court refused to award prejudgment interest where no dilatory tactics or bad faith on the part of the employer were involved.

53. 38 U.S.C. § 2022 (1986). *See infra* Appendix at 100. There is, however, no entitlement to a jury trial, the statute being governed by principles of equity. Pomon v. General Dynamics Corp., 574 F. Supp. 147 (D. R.I. 1983).

54. The Veterans' Reemployment Rights Act expressly provides in §§ 2021(a)-(c) that states may expand their provisions. 38 U.S.C. §§ 2021(a)-(c) (1986). *See infra* Appendix at 98-100. *See also*, Peel v. Florida Dept. of Transp., 443 F. Supp. 451 (N.D. Fla. 1977), *aff'd*, 600 F.2d 1070 (5th Cir. 1979). However, the states cannot limit what Congress has provided since that would impair a uniformity vital to the national interest. *Id.* at 460.

Wisconsin has often enacted or retained legislation essentially parallel to that of the federal government in order to expand on it, provide a dual means of enforcement to assure compliance, or simply as a statement of policy. The fair employment scheme embodied in WIS. STAT. §§ 111.31-.395 (1985-86) which is a companion to federal equal opportunity laws is a good example. *See also* Goodyear Tire & Rubber Co. v. DILHR, 87 Wis. 2d 56, 81, 273 N.W.2d 786, 799 (Ct. App. 1978) (Wisconsin's "massive amount" of sex discrimination legislation "touches interests deeply rooted" in the state).

cluding age, race and creed.[55] Military service or reserve affiliation is not one of the protected categories.

Some anomalies are present in this scheme of protection. Most relevant is the fact that individuals may not be the subject of a refusal to hire based on a "conviction record." This is defined to include a less than honorable discharge or any criminal sentence by military authority.[56] As a result, in theory an employer may refuse to hire an individual because of his continuing honorable service as a military reservist but cannot refuse to hire a former member of the military who has been dishonorably discharged unless the conviction relates to the circumstances of the particular job sought.[57] Hopefully, this is not an accurate reflection of the state legislature's perception of values and priorities.

Prior to 1983, the state legislature did provide some very limited protection in this area. Individuals who "willfully deprived" National Guardsmen (other reservists not included) "of employment" were subjected to a fine ranging from $50 to $200 and even, at one time, imprisonment of up to six months.[58] This arguably could have prohibited discrimination in hiring although no civil remedy for the injured guardsman was provided.[59] The legislature repealed even this limited provision noting that the guard was still protected by similar provisions under federal law.[60] However, as previously noted, there was no federal hiring protection until 1986, so it is ques-

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55. WIS. STAT. §§ 111.321-.322 (1985-86).

56. WIS. STAT. § 111.32(3) (1985-86).

57. WIS. STAT. § 111.335(1) (c) (1985-86). The legislature has also seen fit in WIS. STAT. § 21.35 to require the Wisconsin National Guard to accept members without regard to sexual orientation (a questionable requirement in any event in light of federal rulings on the issue of homosexuals in the military) without protecting individuals once in the Guard from discriminatory actions because of their military status. WIS. STAT. § 21.35 (1985-86).

58. WIS. STAT. § 21.14 (1981-82), *repealed by* 1983 Act 27, § 621 (1983). The six-month imprisonment provision had been repealed by 1979 Act 221, § 222 (1980).

59. It clearly required employers to grant leave for periods of active duty although no obligation to compensate the Guardsman for salary lost in the process was imposed. 64 Op. Att'y Gen. 196 (1975).

60. The analysis by the Legislative Reference Bureau, contained in the drafting files to the repealing act, located in the LRB, State Capitol, Madison, states: "[This] repeal[s] law on employment and association discrimination against guard members. The guard retains its authority to enforce conduct proscribed by the repealed law under similar provisions contained in federal law." *Id.*

tionable whether the repealed provision was ever intended to cover discriminatory hiring.

B. Incidents and Advantages of Employment

Wisconsin also provides no statutory or common law protection in this area to supplement the federal protection unless the reservist is a permanent state employee or official. Such individuals are granted leaves of absence for periods of three to fifteen work days (excluding weekends and holidays) per year to attend "annual field training or annual active duty for training" and military schools.[61] During this absence, the state will pay the base state pay less the base military pay.[62] The various military allotments, such as travel and per diem expenses, are not figured into the calculation.[63]

C. Restoration and Retention

1. Statutory Protection

The scope of statutory rights to restoration and retention after reserve military duty is unsettled due to vaguely worded legislation and probably is non-existent in most instances. However, under any interpretation it is definitely not as comprehensive as the federal scheme.

Permanent state employees who have attended up to fifteen days of annual training or military school are entitled to full restoration of employment. The previously discussed statutory right to pay supplement also provides that such leaves of absence do not affect seniority, pay or pay advancement, or performance awards.[64] This obviously contemplates, without expressly so stating, that the reservist enjoys full restoration and retention rights notwithstanding this type of military service.

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61. WIS. STAT. § 230.35(3) (a) (1985-86).

62. *Id.* This, of course, assumes that the state pay during the period would have exceeded military pay. The reservist retains the option to use accumulated vacation time for the military duty, rather than the statutory leave, and collect both salaries. If the employee is a Guardsman serving on active duty because of a state emergency, the statute provides that he may elect to receive the normal state salary as full military pay; this leads to the same net recovery.

63. WIS. ADMIN. CODE § ER-Pers 29.03(7) (Oct. 1984).

64. WIS. STAT. § 230.35(3) (a) (1985-86).

However, none of this applies to "extended active duty or service as a member of the active armed forces."[65] Yet another statutory provision[66] provides that a permanent, "classified"[67] state employee who "enlists, is ordered or is inducted into active service in the armed forces of the United States" is to be restored to the same position upon completion with no interruption in job status except for receipt of pay and accumulation of sick leave and vacation; all benefits of seniority, status, pay, pay advancement, performance awards, and pension rights are retained. Miscellaneous protections are provided on vacation computation and restoration to probationary and seasonal status.[68]

In order to reclaim the job position, five factors must be met:

1. The employee must present evidence of satisfactory completion of service *and* that the discharge is other than dishonorable or by sentence of general court-martial.[69]
2. The active duty cannot exceed four years unless the excess is imposed involuntarily.
3. The employee must still be qualified to perform the job.
4. Application for restoration must be made within 180 days of release.
5. The circumstances of the employing agency "have not changed so as to make it impossible or unreasonable" to restore the employee.[70]

As with the federal code, the last of these is troubling. The employee is clearly dependent on the exercise of good faith by the state if restoration is to be attained without controversy.

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65. *Id.*

66. WIS. STAT. § 230.32(1) (1985-86). *See infra* Appendix at 111.

67. State of Wisconsin employees are divided into classified and unclassified categories. Unclassified workers include elected officials, University of Wisconsin faculty and academic staff, many individuals appointed by elected officials, and a variety of others. WIS. STAT. § 230.08(2) (1985-86). All those who are not designated unclassified are considered classified. WIS. STAT. § 230.08(3) (1985-86). Classified employees generally enjoy greater promotion and tenure protections. *See, e.g.*, WIS. STAT. § 230.15 (1985-86) (regular appointments and promotion in the classified service).

68. WIS. STAT. § 230.32(1), (2)(a), (2)(c) (1985-86). *See infra* Appendix at 111-112.

69. Accordingly, a general court-martial can result in a bad conduct discharge, which is "other than dishonorable" but would still be disqualifying under the statute.

70. WIS. STAT. § 230.32(1)(a)-(e) (1985-86). *See infra* Appendix at 111-112.

A question arises as to whether these statutory protections are available to the reservist after serving the initial four or more months of active duty for training or some other period of active duty for training in excess of the normal two weeks of annual training.[71] The discharge contemplated by the statute is, in the absence of unusual circumstances, not something a reservist receives after completion of such duty since his military status continues. The military differentiates between active duty for training and other, more permanent, periods of active duty. It is not clear what differentiation the legislature intended, if any, by the reference to "active service in the armed forces of the United States."[72] Fortunately, for whatever impact it may have, the Attorney General of Wisconsin has stated that the reservist's initial period of active duty for training would be covered by a predecessor to the present statute.[73]

Employees of other Wisconsin governmental entities—counties, towns, cities, villages, school districts and VTAE districts—do not have an absolute statutory right to restoration after military service, whether as a reservist or otherwise,[74] with one limited exception.[75] These entities are

71. Presumably there is no question that the statute covers a period of active service by a reservist as part of an extensive call-up of reserve forces in response to a national emergency.

72. WIS. STAT. § 230.32(1) (1985-86). *See infra* Appendix at 111.

73. 48 Op. Att'y Gen. 58 (1959) asserted that the then existing WIS. STAT. §§ 16.275-76, the forerunner of WIS. STAT. § 230.32, protects reservists serving the initial six or more months of active duty for training. Opinions of the Attorney General of Wisconsin, although not controlling, are deserving of judicial consideration. State *ex rel.* City of West Allis v. Dieringer, 275 Wis. 208, 81 N.W.2d 533 (1957).

74. WIS. STAT. § 45.51 (1985-86). *See infra* Appendix at 109.

75. Pursuant to WIS. STAT. § 63.06 (1985-86), a "person in the classified service [of a] county who . . . becomes an active member of the military or naval forces of the United States during a period officially proclaimed to be a national emergency or limited national emergency or under Pub. L. No. 87-117" is entitled to leave and reinstatement. WIS. STAT. § 63.06 (1985-86).

It should be noted that there is another possible broad exception. WIS. STAT. § 45.50(1) (1985-86), imposes expanded reemployment rights under the conditions stated therein and requires "any political subdivision of the state" to adhere. If that refers to counties, cities, etc., it obviously is in conflict with the permissive tones of § 45.51 and, if interpreted strictly, would effectively render it surplusage. Perhaps the best interpretation under the circumstances is that § 45.51 should control for such entities since it is the more specific of the two statutes with reference to them. *See, e.g.*, Donaldson v. State, 93 Wis. 2d 306, 315, 286 N.W.2d 817, 821 (1980) (statutes should be construed to avoid words being rendered surplusage); Schlosser v. Allis-Chalmers

permitted, but not required, to grant a leave of absence with reinstatement and pension rights safeguarded to an employee or officer[76] who is "inducted or who enlists in the U.S. armed forces" for a period of not more than four years, unless involuntarily retained for a longer period. However, the statute expressly prohibits these entities from paying any compensation during the absence.[77]

The extent to which this is intended to potentially cover the reservist is uncertain, again due to vague language. Nothing is stated about the nature of the military service that can or cannot be covered. However, the reference to being inducted contemplates a non-reservist situation. The alternative—enlistment—while consistent with reserve enlisted service, technically would not cover officers who are commissioned, but there is no apparent reason for such disparate treatment. The best that can be stated is that a loose reading of the statute permits such governmental agencies to protect the reemployment status of enlisted and officer reservists serving active duty periods of varying lengths.

The final and most important category under consideration— employees of private employers—are entitled to reemployment if "enlisted or . . . inducted or ordered into active duty in the armed forces of the United States pursuant to the Selective Training and Service Act of 1940 or the National Guard and Reserve Officers Mobilization Act of 1940, the Selective Service Act of 1948 and any acts amendatory thereof or supplementary thereto or P.L. 87-117."[78] Consistent with the other statutes discussed above, the application of this scheme of protection to the reservist for active duty short of an extended call-up is suspect.

While the "ordered into active service" language is vague enough to cover a reservist's relatively short period of active

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Corp., 65 Wis. 2d 153, 161, 222 N.W.2d 156, 160 (1974) (where two statutes deal with the same subject matter the more specific controls).

76. Special provisions to protect the unique status of elected officials are also provided in WIS. STAT. § 45.51(4)-(6) (1985-86). *See infra* Appendix at 110-111.

77. WIS. STAT. § 45.51 (1985-86) was enacted pursuant to 1971 Wis. Laws ch. 154. Prior to that time, these entities were not prohibited by statute from compensating military personnel during absences. Cayo v. City of Milwaukee, 41 Wis. 2d 643, 165 N.W.2d 198 (1969) (upheld a city ordinance that provided for varying degrees of compensation for military leave taken by reservists).

78. WIS. STAT. § 45.50 (1985-86). *See infra* Appendix at 107.

duty for training, it is restricted by the requirement that it be pursuant to the specified federal legislation. The Adjutant General of Wisconsin, on behalf of the Wisconsin National Guard, has taken the position that a Guardsman on two weeks annual training is not covered by the statute because such service is pursuant to different legislation. The Wisconsin Court of Appeals has agreed.[79] The same is true for other periods of active duty for training, such as the initial four-plus months of service performed by Guardsmen and other reservists, so presumably that is not covered as well.[80]

On the positive side, the returning employee need not provide evidence of a favorable discharge, unlike the state employee, but need only present "evidence that he has satisfactorily completed his period of training," language that is consistent with the nature of a reservist's service during active duty for training.[81] However, it is doubtful that this is sufficient to overcome the restrictive language of coverage noted earlier; it clearly was not adequate to alter the Adjutant General's position or that of the court of appeals.

Were the statute applicable to reservists, a seemingly impressive array of additional protections and enforcement mechanisms would be available. Not only would restoration be granted, but the reservist would be immune from discharge without cause within one year after restoration,[82] a significant exception to Wisconsin's normal employment-at-will doctrine. Enforcement would first occur with a mandated referral to the Department of Industry, Labor and Human Relations.[83] Failing resolution of the dispute at that level, the

79. The attorney general has appeared as amicus curiae in Weyenberg Shoe Mfg. Co. v. Seidl, 140 Wis. 2d 373, 410 N.W.2d 604 (Ct. App. 1987), discussed *infra*, where the employee was serving two weeks annual training in the Wisconsin Army National Guard pursuant to 32 U.S.C. § 502 (1982) which regulates participation in field exercises by National Guard personnel.

80. Inactive and active duty for training non-Guard reservists is regulated by 10 U.S.C. § 270(a) (1982) (originally enacted as Act of Sept. 2, 1958, Pub. L. No. 85-861, § 1(5)(A), 72 Stat. 1438).

81. Other conditions parallel those for state employees as discussed earlier. One significant difference is that the employee must reapply and resume work within 90 days of completion of service, as opposed to a 180 day limitation on reapplication for the state employee.

82. WIS. STAT. § 45.50(2) (1985-86). *See infra* Appendix at 108-09.

83. WIS. STAT. § 45.50(1) (1985-86). *See infra* Appendix at 107-108. However, DILHR has never acted in this area, having referred all inquiries to the federal OVRR.

employee could commence an action in the circuit court of the employer's county to recover lost wages and benefits.[84] This type of action receives preferential treatment: the courts must order a speedy hearing, advance the case on the calendar, and tax no fees or costs against the employee.[85]

2. Common Law Protection

Assuming none of the statutory provisions discussed above expressly apply to the reservist other than one who is a state employee, the next inquiry is whether Wisconsin common law provides reemployment and related protections. In fact, recent developments in this area of law impact significantly upon the reservist.

Prior to 1983, except where the legislature expressly required otherwise, Wisconsin followed the employment-at-will doctrine. This doctrine recognized that where employment was for an indefinite term, an employer could discharge an employee for good cause, no cause, or even a morally wrong cause, without being guilty of a legal wrong. However, in *Brockmeyer v. Dun & Bradstreet*,[86] the Supreme Court of Wisconsin recognized the existence of a claim for relief, in the form of reinstatement and back pay, for wrongful discharge when the discharge is contrary to fundamental and well-defined public policy as evidenced by existing law. The wrongful discharge prohibition incorporates declarations of public policy—the state constitution and legislation—into every employment-at-will relationship. The court stressed that this concept was "limited" and "narrowly circumscribed" and urged courts to proceed "cautiously." It was emphasized that no claim would exist merely because the discharged employee's conduct was praiseworthy or because the public may have derived some benefit from it.[87]

The doctrine has already undergone substantial refinement. The latest case from the state supreme court, *Bushko v.*

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and is generally unaware of its powers in this regard. Interview with Michael McClips. Office of Information and Public Affairs, DILHR, in Madison, Wis. (May 8, 1987).

84. WIS. STAT. § 45.50(3). *See infra* Appendix at 109.

85. *Id.* Appeals can follow by utilizing the normal appellate procedure except that the individual is not required to file an appeal bond for the security for costs.

86. 113 Wis. 2d 561, 335 N.W.2d 834 (1983).

87. *Id.* at 577-78, 335 N.W.2d at 840-41.

Miller Brewing Co.,[88] reemphasized the restrictiveness of the doctrine by holding that activities by the employee that are merely consistent with public policy do not provide a basis for a wrongful discharge claim. A claim exists only if the discharge results from refusing a command to violate a public policy as established by statutory or constitutional provisions. For example, *Bushko* held that a supervisor who alleged he was discharged for complaining about his employer's policies on plant safety and other matters had no claim for wrongful discharge.[89] Commentators have viewed *Bushko* as leaving little doubt about the limited scope of the wrongful discharge principle although acknowledging the possible "tenuous" nature of this limitation in light of contrary views by three concurring justices.[90]

The availability of a wrongful discharge claim to a reservist terminated because of military obligations was squarely faced in *Weyenberg Shoe Manufacturing Co. v. Seidl*.[91] Allan Seidl was employed by Weyenberg as Chief Accountant from 1975 to June 13, 1983 and also served in the Wisconsin Army National Guard with the rank of Sergeant Major. Weyenberg had a written policy requiring employees to give notice of absences to their superiors, although notification in writing was not required. Seidl had given sufficient notice of an upcoming two-week absence for annual training. However, the issue centered on whether he had given ample notice to Weyenberg of his need to miss an additional day of work at the beginning of this two-week period. Seidl himself was given only a few hours notice that he had to report early. He claimed he repeatedly attempted to call his supervisor—the company treasurer—but found him unavailable. As an alternative, he informed one of his own subordinates as well as the person in charge of time records and then left.[92]

Weyenberg terminated Seidl on the day he returned from annual training. Citing other alleged absences without notice

88. 134 Wis. 2d 136, 396 N.W.2d 167 (1986).

89. *Id.* at 147, 396 N.W.2d at 172.

90. Whyte & Duffy, *Supreme Court Clarifies Scope of Wrongful Discharge*, 60 WIS. B. BULL. 25 (March 1987).

91. 140 Wis. 2d 373, 410 N.W.2d 604 (Ct. App. 1987). No petition for review was filed with the Supreme Court of Wisconsin.

92. *Id.* at 378-79, 410 N.W.2d at 606.

as well as this latest incident, the company said that one of the main reasons for discharge was his failure to keep his supervisor advised of his whereabouts.[93] The company commenced an action to recover a loan made to Seidl and he counterclaimed alleging, in relevant part, that he had been wrongfully discharged because of his military obligations in violation of 38 U.S.C. section 2021-26[94] and section 45.50 of the Wisconsin Statutes.[95] The circuit court refused to allow Seidl to pursue his claim on the basis of the federal legislation but allowed the wrongful discharge claim based on state law to continue. A jury found that Seidl had been wrongfully terminated from his employment contrary to public policy and awarded him $57,000 in "damages" (presumably lost pay), $15,000 in "lost employee benefits," and $35,000 in "lost future earnings." The circuit court awarded Seidl judgment for $107,000, plus costs, less the loan, in accordance with the verdict.[96]

The Wisconsin Court of Appeals both affirmed in part and reversed in part. It reversed the circuit court on whether there was a state law basis for the action, concluding that there was no claim under section 45.50 because National Guard annual training is not "active service in the Armed Forces of the United States" pursuant to the specified federal statutes.[97] The Court of Appeals next read *Bushko* in strict fashion and held that Seidl could not claim wrongful discharge because his action in going to annual training was consistent with public policy rather than a refusal to violate public policy.[98]

However, the appellate court reversed on the issue of whether Seidl should have been permitted to assert his federal rights in state court. The court found no express congressional prohibition of such a course of action, section 2022 merely designating the federal district court as empowered to hear such claims without indicating state courts could not do

93. *Id.* at 378-90, 410 N.W.2d at 106-07.

94. 38 U.S.C. §§ 2021-26 (1986).

95. WIS. STAT. § 45.50 (1985-86). *See infra* Appendix at 107.

96. *Weyenberg Shoe*, 140 Wis. 2d at 376, 410 N.W.2d at 605.

97. *Id.* at 318-83, 410 N.W.2d at 607-08. This conclusion was apparently reached largely because the Adjutant General of Wisconsin conceded the point, as discussed earlier. *Id.*

98. *Id.* at 382-83, 410 N.W.2d at 608.

the same. Thus, the court held that the presumption in favor of state court concurrent jurisdiction over civil causes of action arising under federal statutes was controlling.[99] The court added that the reservist would be advantaged by "greater accessibility" to local state courts.[100] Since the court of appeals upheld the jury's conclusion that Seidl's termination was for his participation in National Guard exercises as established by the sufficiency of the evidence, it also affirmed the judgment on his behalf, but, as noted, based on federal rather than state law.[101]

The assessment of the impact of *Weyenberg Shoe* on the military reservist's employment protections in Wisconsin is mixed. On the negative side, it confirms the suspicion that, at least for National Guardsmen, the state statutes provide no assistance. It also confirms, in a reservist employment context, the unavailability of the narrow wrongful discharge theory.

On a positive note, the *Weyenberg Shoe* holding reaffirms the strength of the federal statutory scheme and supports the proposition that it can be pursued in state court. The benefit of these conclusions is debatable. Although in some cases the reservist might be geographically closer to the state court, those courts probably are not able to process a case of this type faster than a federal court in light of the burden on the latter to hold a "speedy hearing." In addition, state courts have less expertise than their federal counterparts in these types of cases. Finally, by proceeding in state court the reservist loses the potential for free representation by the U.S. Attorney.

III. CONCLUSION

The Wisconsin military reservist, as does his or her counterpart throughout the United States, enjoys broad protections against adverse treatment in the workplace occasioned

99. *Id.* at 384-87, 410 N.W.2d at 609-10. *See, e.g.*, Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-78 (1981); Terry v. Kolski, 78 Wis. 2d 475, 482, 254 N.W.2d 704, 711 (1977).

100. *Weyenberg Shoe*, 140 Wis. 2d at 387, 410 N.W.2d at 610.

101. *Id.* at 387-89, 410 N.W.2d at 610. Seidl was also awarded prejudgment interest but was denied attorney's fees in accordance with the federal statutes. *Id.* at 389-90, 410 N.W.2d at 610-11.

by the military obligation. Nondiscriminatory hiring, treatment while employed, and retention are guaranteed, with qualification existing only as to the scope of the protection in certain areas relating to incidents and advantages of employment. Further, an effective enforcement mechanism is in place: The reservist can utilize the services of the Department of Labor's Office of Veteran's Reemployment Rights to assure compliance and, where necessary, commence suit in federal court, possibly with the assistance of the Department of Justice, to recover the lost position, back wages, etc. These rights all exist as a result of federal legislation.

The federal statutes permit the states to grant additional rights to the military reservist. However, unless the reservist is a state employee, nothing additional—or even equivalent—is present in this state. Wisconsin has no prohibition against a discriminatory refusal to hire; no prohibition against disparate treatment in the workplace; and no guarantee of retention after active duty unless it is in conjunction with active duty resulting from a call-up, as opposed to routine training, and even this is uncertain. Wisconsin's once developing common law against wrongful discharge might have provided an avenue for relief in some circumstances, but the recent decisions of *Bushko* and *Weyenberg Shoe* have greatly restricted that possibility.

Wisconsin's oft-asserted and touted progressivism has not yet been clearly activated by the state legislature to protect the reservist. Particularly in the area of incidents and advantages of employment, in which federal protections may be limited, and when a National Guardsman is performing state active service, Wisconsin should certainly act to protect the reservist. The state definitely has a legitimate local public interest to protect its reservists—particularly its National Guardsmen who perform state service in time of disaster and emergency—that justifies such legislation.

Regardless of the legal protection afforded to the reservist, in the end, the best assurance of smooth interaction between civilian and military responsibilities with minimal disruption and loss to both is voluntary compliance by the employer. The reservist can help foster that attitude on the part of the employer by full and timely disclosure of the nature of the reserve obligation.

APPENDIX

FEDERAL STATUTES (38 U.S.C. (1986))

§ 2021. RIGHT TO REEMPLOYMENT OF INDUCTED PERSONS; BENEFITS PROTECTED

(a) In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act (or under any prior or subsequent corresponding law) for training and service and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its territories, or possessions, or political subdivisions thereof, or the District of Columbia, such person shall—

(i) if still qualified to perform the duties of such position, be restored to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position, by reason of disability sustained during such service, but qualified to perform the duties of any other position in the employ of the employer, be offered employment and, if such person so requests, be employed in such other position the duties of which such person is qualified to perform as will provide such person like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such person's case;

(B) If such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or the employer's successor in interest to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service, but qualified to perform the duties of any other position in the employ of such employer or the employer's successor in interest, be offered employment and, if such person so requests, be employed by such employer or the employer's successor in interest in such other position the duties of which such person is qualified to perform as will provide such person like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such person's case, unless the employer's circumstances have so changed as tomake it impossible or unreasonable to do so. Nothing in this chapter shall excuse noncompliance with any statute or ordinance of a State or political subdivision thereof establishing greater or additional rights or protections than the rights and protections established pursuant to this chapter.

(b)(1) Any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section shall be considered as having been on furlough or leave of absence during such person's period of training and service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration or reemployment.

(2) It is hereby declared to be the sense of the Congress that any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section should be so restored or reemployed in such manner as to give such person such status in the person's employment as the person would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment.

(3) Any person who seeks or holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

(c) The rights granted by subsections (a) and (b) of this section to persons who left the employ of a State or political subdivision thereof and were inducted into the Armed Forces shall not diminish any rights such persons may have pursuant to any statute or ordinance of such State or political subdivision establishing greater or additional rights or protections.

§ 2022. ENFORCEMENT PROCEDURES

If any employer, who is a private employer or a State or political subdivision thereof, fails or refuses to comply with the provisions of section 2021(a), (b)(1), or (b)(3), or 2024 of this title, the district court of the United States for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carriers [sic] out its functions, shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. Any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits provided for in such provisions. Upon application to the United States attorney or comparable official for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, by any person claiming to be entitled to the benefits provided for in such provisions, such United States attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof specifically to require such employer to comply with such provi-

sions. No fees or court costs shall be taxed against any person who may apply for such benefits. In any such action only the employer shall be deemed a necessary party respondent. No State statute of limitations shall apply to any proceedings under this chapter.

§ 2023. REEMPLOYMENT BY THE UNITED STATES, TERRITORY, POSSESSION, OR THE DISTRICT OF COLUMBIA

(a) Any person who is entitled to be restored to or employed in a position in accordance with the provisions of clause (A) of section 2021(a) and who was employed, immediately before entering the Armed Forces, by any agency in the executive branch of the Government or by any territory or possession, or political subdivision thereof, or by the District of Columbia, shall be so restored or reemployed by such agency or the successor to its functions, or by such territory, possession, political subdivision, or the District of Columbia. In any case in which, upon appeal of any person who was employed, immediately before entering the Armed Forces, by any agency in the executive branch of the Government or by the District of Columbia, the Director of the Office of Personnel Management finds that—

(1) such agency is no longer in existence and its functions have not been transferred to any other agency; or

(2) for any reason it is not feasible for such person to be restored to employment by such agency or by the District of Columbia;the Director shall determine whether or not there is a position in any other agency in the executive branch of the Government or in the government of the District of Columbia for which such person is qualified and which is either vacant or held by a person having a temporary appointment thereto. In any case in which the Director determines that there is such a position, such person shall be offered employment and, if such person so requests, be employed in such position by the agency in which such position exists or by the government of the District of Columbia, as the case may be. The Director is authorized and directed to issue regulations giving full force and effect to the provisions of this section insofar as they relate to persons entitled to be restored to or employed in positions in the executive branch of the

Government or in the government of the District of Columbia, including persons entitled to be reemployed under the last sentence of subsection (b) of this section. The agencies in the executive branch of the Government and the government of the District of Columbia shall comply with such rules, regulations, and orders issued by the Director pursuant to this subsection. The Director is authorized and directed when the Director finds, upon appeal of the person concerned, that any agency in the executive branch of the Government or the government of the District of Columbia has failed or refuses to comply with the provisions of this section, to issue an order specifically requiring such agency or the government of the District of Columbia to comply with such provisions and to compensate such person for any loss of salary or wages suffered by reason of failure to comply with such provisions, less any amounts received by such person through other employment, unemployment compensation, or readjustment allowances. Any such compensation ordered to be paid by the Director shall be in addition to and shall not be deemed to diminish any of the benefits provided for in such provisions, and shall be paid by the head of the agency concerned or by the government of the District of Columbia out of appropriations currently available for salary and expenses of such agency or government, and such appropriations shall be available for such purpose. As used in this chapter, the term "agency in the executive branch of the Government" means any department, independent establishment, agency, or corporation in the executive branch of the United States Government (including the United States Postal Service and the Postal Rate Commission).

(b) Any person who is entitled to be restored to or employed in a position in accordance with the provisions of clause (A) of section 2021(a) of this title, and who was employed, immediately before entering the Armed Forces, in the legislative branch of the Government, shall be so restored or employed by the officer who appointed such person to the position which such person held immediately before entering the Armed Forces. In any case in which it is not possible for any such person to be restored to or employed in a position in the legislative branch of the Government and such person is otherwise eligible to acquire a status for transfer to a position

in the competitive service in accordance with section 3304(c) of Title 5, the Director of the Office of Personnel Management shall, upon appeal of such person, determine whether or not there is a position in the executive branch of the Government for which such person is qualified and which is either vacant or held by a person having a temporary appointment thereto. In any case in which the Director determines that there is such a position, such person shall be offered employment and, if such person so requests, be employed in such position by the agency in which such position exists.

(c) Any person who is entitled to be restored to or employed in a position in accordance with the provisions of clause (A) of section 2021(a) of this title and who was employed, immediately before entering the Armed Forces, in the judicial branch of the Government, shall be so restored or reemployed by the officer who appointed such person to the position which such person held immediately before entering the Armed Forces.

§ 2024. RIGHTS OF PERSONS WHO ENLIST OR ARE CALLED TO ACTIVE DUTY; RESERVES

(a) Any person who, after entering the employment on the basis of which such person claims restoration or reemployment, enlists in the Armed Forces of the United States (other than in a Reserve component) shall be entitled upon release from service under honorable conditions to all of the reemployment rights and other benefits provided for by this section in the case of persons inducted under the provisions of the Military Selective Service Act (or prior or subsequent legislation providing for the involuntary induction of persons into the Armed Forces), if the total of such person's service performed between June 24, 1948, and August 1, 1961, did not exceed four years, and the total of any service, additional or otherwise, performed by such person after August 1, 1961, does not exceed five years, and if the service in excess of four years after August 1, 1961, is at the request and for the convenience of the Federal Government (plus in each case any period of additional service imposed pursuant to law).

(b)(1) Any person who, after entering the employment on the basis of which such person claims restoration or reemployment, enters upon active duty (other than for the purpose

of determining physical fitness and other than for training), whether or not voluntarily, in the Armed Forces of the United States or the Public Health Service in response to an order or call to active duty shall, upon such person's relief from active duty under honorable conditions, be entitled to all of the reemployment rights and benefits provided for by this chapter in the case of persons inducted under the provisions of the Military Selective Service Act (or prior or subsequent legislation providing for the involuntary induction of persons into the Armed Forces), if the total of such active duty performed between June 24, 1948, and August 1, 1961, did not exceed four years, and the total of any such active duty, additional or otherwise, performed after August 1, 1961, does not exceed four years (plus in each case any additional period in which such person was unable to obtain orders relieving such person from active duty).

(2) Any member of a Reserve component of the Armed Forces of the United States who voluntarily or involuntarily enters upon active duty (other than for the purpose of determining physical fitness and other than for training) or whose active duty is voluntarily or involuntarily extended during a period when the President is authorized to order units of the Ready Reserve or members of a Reserve component to active duty shall have the service limitation governing eligibility for reemployment rights under subsection (b)(1) of this section extended by such member's period of such active duty, but not to exceed that period of active duty to which the President is authorized to order units of the Ready Reserve or members of a Reserve component. With respect to a member who voluntarily enters upon active duty or whose active duty is voluntarily extended, the provisions of this subsection shall apply only when such additional active duty is at the request and for the convenience of the Federal Government.

(c) Any member of a Reserve component of the Armed Forces of the United States who is ordered to an initial period of active duty for training of not less than twelve consecutive weeks shall, upon application for reemployment within thirty-one days after (1) such member's release from such active duty for training after satisfactory service, or (2) such member's discharge from hospitalization incident to such active duty for training, or one year after such member's release

from such training, whichever is earlier, be entitled to all reemployment rights and benefits provided by this chapter for persons inducted under the provisions of the Military Selective Service Act (or prior or subsequent legislation providing for the involuntary induction of persons into the Armed Forces), except that (A) any person restored to or employed in a position in accordance with the provisions of this subsection shall not be discharged from such position without cause within six months after that restoration, and (B) no reemployment rights granted by this subsection shall entitle any person to retention, preference, or displacement rights over any veteran with a superior claim under those provisions of Title 5 relating to veterans and other preference eligibles.

(d) Any employee not covered by subsection (c) of this section who holds a position described in clause (A) or (B) of section 2021(a) shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training, or upon such employee's discharge from hospitalization incident to that training, such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes. Such employee shall report for work at the beginning of the next regularly scheduled working period after expiration of the last calendar day necessary to travel from the place of training to the place of employment following such employee's release, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control. Failure to report for work at such next regularly scheduled working period shall make the employee subject to the conduct rules of the employer pertaining to explanations and discipline with respect to absence from scheduled work. If such an employee is hospitalized incident to active duty for training or inactive duty training, such employee shall be required to report for work at the beginning of the next regularly scheduled work period after expiration of the time necessary to travel from the place of discharge from hospitalization to the place of employment, or within a reasonable

time thereafter if delayed return is due to factors beyond the employee's control, or within one year after such employee's release from active duty for training or inactive duty training, whichever is earlier. If an employee covered by this subsection is not qualified to perform the duties of such employee's position by reason of disability sustained during active duty for training or inactive duty training, but is qualified to perform the duties of any other position in the employ of the employer or such employer's successor in interest, such employee shall be offered employment and, if such person so requests, be employed by that employer or such employer's successor in interest in such other position the duties of which such employee is qualified to perform as will provide such employee like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such employee's case.

(e) Any employee not covered by subsection (c) of this section who holds a position described in clause (A) or (B) of section 2021(a) shall be considered as having been on leave of absence during the period required to report for the purpose of being inducted into, entering, or determining, by a pre-induction or other examination, physical fitness to enter the Armed Forces. Upon such employee's rejection, upon completion of such employee's pre-induction or other examination, or upon such employee's discharge from hospitalization incident to such rejection or examination, such employee shall be permitted to return to such employee's position in accordance with the provisions of subsection (d) of this section.

(f) For the purposes of subsections (c) and (d) of this section, full-time training or other full-time duty performed by a member of the National Guard under sections 316, 502, 503, 504, or 505 of Title 32 is considered active duty for training. For the purposes of subsection (d) of this section, inactive duty training performed by that member under section 502 of title 32 or sections 206, 301, 309, 402, or 1002 of title 37 is considered inactive duty training.

(g) Any member of a Reserve component of the Armed Forces of the United States who is ordered to active duty for not more than 90 days under section 673(b) of Title 10, United States Code, whether or not voluntarily, shall be entitled to all reemployment rights and benefits provided under

subsection (c) of this section for persons ordered to an initial period of active duty for training of not less than twelve consecutive weeks; and shall have the service limitation governing eligibility for reemployment rights under subsections (a) and (b)(1) of this section extended by the period of such active duty.

§ 2025. Assistance in obtaining reemployment

The Secretary of Labor, through the Office of Veterans' Reemployment Rights, shall render aid in the replacement in their former positions or reemployment of persons who have satisfactorily completed any period of active duty in the Armed Forces or the Public Health Service. In rendering such aid, the Secretary shall use existing Federal and State agencies engaged in similar or related activities and shall utilize the assistance of volunteers.

§ 2026. Prior rights for reemployment

In any case in which two or more persons who are entitled to be restored to or employed in a position under the provisions of this chapter or of any other law relating to similar reemployment benefits left the same position in order to enter the Armed Forces, the person who left such position first shall have the prior right to be restored thereto or reemployed on the basis thereof, without prejudice to the reemployment rights of the other person or persons to be restored or reemployed.

Wisconsin Statutes

§ 45.50 Reemployment in civil employment after completion of military service.

(1) Any person who has enlisted or enlists in or who has been or is inducted or ordered into active service in the armed forces of the United States pursuant to the selective training and service act of 1940 or the national guard and reserve officers mobilization act of 1940, the selective service act of 1948 and any acts amendatory thereof or supplementary thereto or P.L. 87-117, and any person whose services are requested by the federal government for national defense work as a civilian during a period officially proclaimed to be a national emer-

gency or a limited national emergency, who, in order to perform such training or service, has left or leaves a position, other than a temporary position, in the employ of any political subdivision of the state or in the employ of any private or other employer, shall be restored to such position or to a position of like seniority, status, pay and salary advancement as though his service toward seniority, status, pay or salary advancement had not been interrupted by such absence; provided that (a) he presents to the employer evidence that he has satisfactorily completed his period of training or civilian service, or that he has been discharged from the armed forces under conditions other than dishonorable, (b) he is still qualified to perform the duties of such position, (c) he makes application for reemployment and resumes work within 90 days after he completed such training or services, military or civilian, or was so discharged from the armed forces, or within 6 months after release from hospitalization for service-connected injury or disease, (d) the employer's circumstances have not so changed as to make it impossible or unreasonable to so restore such person, and (e) the military service was not for more than 4 years unless extended by law. In the event of any dispute arising under this subsection the matter shall be referred to the department of industry, labor and human relations for determination except as such matters pertain to any classified employee of the state, in which case the matter shall be referred to the director of personnel. Orders and determinations of the department of industry, labor and human relations under this section may be reviewed in the manner provided in ch. 227.

(2) The service of any person who is or was restored to a position in accordance with sub.(1) shall be deemed not to be interrupted by the absence, except for the receipt of pay or other compensation for the period of the absence and he or she shall be entitled to participate in insurance, pensions, retirement plans or other benefits offered by the employer under established rules and practices relating to employes on furlough or leave of absence in effect with the employer at the time the person entered or was enlisted, inducted or ordered into the forces and service, and shall not be discharged from the position without cause within one year after restoration; and the discharge is subject to all federal or state law affecting

any municipal or private employment; and subject to the provisions of contracts that may exist between employer and employe. Each county, town, city or village shall contribute or pay from September 16, 1940, all contributions of the employer to the applicable and existent pension, annuity or retirement system as though the service of the employe had not been interrupted by military service.

(3) In case any employer fails or refuses to comply with the provisions of subs. (1) and (2), any court of record whether created by general or special act in the proper county having jurisdiction of an action on contract for an amount exceeding $500 may, upon the filing of a motion, petition or other appropriate pleading and on reasonable notice, which shall not be less than 10 days, to such employer by the person entitled to the benefits of such provisions, specifically require such employer to comply with such provisions, and, as an incident thereto, compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. No fees or court costs shall be taxed against the person so applying for such benefits. The place of the commencement of the action or proceeding hereunder against a private employer, and the trial or hearing thereof, shall be in any county in which the employment took place or in which such private employer maintains a place of business, and in all other cases shall be as provided in § 801.50. No person who is appointed in the service of the state or of any county, city or village to fill the place of a person so entering the federal armed forces shall acquire permanent tenure during such period of replacement service.

(4) Any individual or employer aggrieved by the decision of the court provided in sub. (3) may appeal in accordance with the provisions of appealable orders referred to in chs. 808 and 809; and the employe need not file an appeal bond for the security for costs on said appeal.

(5) The restoration of classified employes of the state shall be governed by § 230.32. The restoration of unclassified state employes shall be governed by this section.

§ 45.51 EMPLOYES OR OFFICERS IN MILITARY SERVICE.

(1) The governing body of any county, town, city, village, school district or vocational, technical and adult education district may grant a leave of absence to any employe or officer who is inducted or who enlists in the U.S. armed forces for a period of military service of not more than 4 years unless such employe is involuntarily retained for a longer period. No salary or compensation of such employe or officer shall be paid, nor claim therefor exist during such leave of absence.

(2) The governing body may provide for safeguarding the reinstatement and pension rights, as herein limited, of any employe or officer so inducted or enlisted.

(3) No employe or officer who is appointed to fill the place of any employe or officer so inducted or enlisted shall acquire permanent tenure during such period of replacement service.

(4) If such leave of absence is or has been granted to an elected or appointed official or employe and he has begun his federal service, a temporary vacancy shall be deemed to exist and a successor may be appointed to fill the unexpired term of such official or employe, or until such official or employe returns and files his election to resume his office as hereinafter provided for if the date of such filing be prior to the expiration of such term. Such appointment shall be made in the manner provided for the filling of vacancies caused by death, resignation or otherwise, except that no election need be held to fill any part of such temporary vacancy. The appointee shall have all the powers, duties, liabilities and responsibilities and shall be paid and receive the compensation and other emoluments pertaining to the office or position, unless otherwise provided by the governing body. Within 40 days after the termination of such federal service such elected or appointed official or employe, upon filing with the clerk his statement under oath of such termination and that he elects to resume his office or position, may resume such office or position for the remainder of the term for which he was elected or appointed. The person temporarily filling the vacancy shall thereupon cease to hold the office.

(6) In cities of the 3rd class with a commission plan of government, in case of temporary or permanent vacancies in the office of mayor, the vice mayor shall temporarily succeed

to the office of mayor for the balance of the unexpired term for which the mayor was elected unless sooner terminated as provided in § 17.035(3). The temporary or permanent vacancy thereby created in the office of council member may thereupon be filled as provided in this section. The term of the person appointed temporarily to the office of council member shall not extend beyond the expiration of the term of the office vacated and the temporary term shall be vacated sooner as provided in § 17.035(3).

§ 230.32 RESTORATION AFTER MILITARY LEAVE.

(1) Any classified employe of this state, except a limited term employe, who enlists, is ordered or is inducted into active service in the armed forces of the United States or who is requested to work for the federal government during a national emergency or a limited national emergency, shall be restored to the same or similar position in the classified service and his or her employment shall be deemed not to have been interrupted by such leave except for the receipt of pay or other compensation, accumulation of sick leave and accumulation of vacation for the period of such absence and the employe shall be given all the benefits of seniority, status, pay, pay advancement, performance awards and pension rights under ch. 40 as though the state employment was continuous, if:

(a) The employe presents to the appointing authority a certificate or other evidence that he or she has satisfactorily completed the period of training or service, and discharge is other than dishonorable or other than by reason of the sentence of a general court martial, or other than on the ground of being a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authorities, or other than as a deserter or of an officer by the acceptance of a resignation for the good of the service.

(b) The period of service is not more than 4 years unless involuntarily retained for a longer period.

(c) The employe is still qualified to perform the duties of such position.

(d) The employe makes application for restoration within 180 days after release from such training or services, or

hospitalization continuing after discharge because of injuries or sickness resulting from such training or service.

(e) The circumstances of the employing agency have not changed so as to make it impossible or unreasonable to so restore such employe.

(2)(a) Any employe with permanent status in class who leaves state service for the reasons specified in this section and who has used the yearly vacation in anticipation of a full year's employment is presumed not to have interrupted employment as far as vacation pay is concerned, and any portion of the vacation for which the employe was paid which is unearned at the time of being called to duty may be made up upon return to state service. If the employe does not return to the state service, the employe shall within 2 years after termination of leave repay the state the amount not earned. The application of this provision is retroactive to all state employes called to active duty under P.L. 87-117 (10 U.S.C. 263).

(b) Any classified employe who was serving the probationary period, except in the capacity of a substitute, when he or she left state service shall, under this section, be restored to that point of service in the probationary period as though state employment had not been so interrupted.

(c) Any classified employe who had attained restoration rights as a seasonal employe when he or she left state service shall, under this section, be restored to such seasonal position or eligibility as though the service or eligibility had not been so interrupted.

(3)(a) Any classified employe who leaves state service and enters the armed forces of the United States shall, under this section, be granted written military leave of absence by the appointing authority. Notice of such leave from state service and the terms of any such leave shall be given in writing by the appointing authority to the secretary for purposes of record.

(b) Any classified employe who leaves state service for civilian employment in response to a specific request or order of the federal government or any of its agencies in connection with manpower redistribution and utilization shall, under this section, make written application to the appointing authority for civilian leave of absence presenting such specific request or order of the federal government as supporting evi-

dence. Such civilian leave shall be allowed by the appointing authority and its terms, which shall conform to the rules of the secretary, shall be in writing. Notice of such leave from state service shall be made in writing by the appointing authority to the secretary for purposes of record.

(c) All such military or civilian leaves of absence as heretofore may have been granted are validated and shall be deemed to be sufficient and effective hereunder. Such leaves shall be recorded with the secretary.

(4) Any person appointed to fill the position of an employe on such military or civilian leave shall be designated as a substitute or replacement employe and upon the return and reemployment of the original employe the substitute employe shall be transferred to a similar position with the same employing agency if one is available, or if not, he or she shall be eligible for reinstatement or have the right of restoration in accordance with this subchapter and the rules of the administrator. The status of any person who is appointed to fill the place of an employe on military or civilian leave under this section shall be governed by the rules of the administrator pursuant thereto.

(5) The restoration of classified former employes of the state shall be governed by this section and by the rules of the administrator.

(6) Any classified employe on June 5, 1953, who entered the service of the United States in civilian war emergency employment on or after January 1, 1942, and who was not at the time of such entry an employe of the state, and who on November 16, 1946, in accordance with P.L. 79-549 was transferred to the service of this state shall have such seniority rights as though having been a member of the classified service of the state during the period of employment in the service of the United States.

§ 230.35 STATE OFFICE HOURS; STANDARD WORK WEEK; LEAVES OF ABSENCE; HOLIDAYS

(3)(a) Officials and employes of the state who have permanent status and who are members of the national guard, the state guard, or any other reserve component of the military forces of the United States or this state now or hereafter organized or constituted under federal or state law, are entitled

to leaves of absence without loss of time in the service of the state, to enable them to attend military schools and annual field training or annual active duty for training, and any other state or federal tours of active duty, except extended active duty or service as a member of the active armed forces of the United States which have been duly ordered but not exceeding 15 days, excluding Saturdays, Sundays and holidays enumerated in sub. (4) in the calendar year in which so ordered and held. During this leave of absence, each state official or employe shall receive base state pay less the base military pay received for and identified with such attendance but such reduction shall not be more than the base state pay. Such leave shall not be granted for absences of less than 3 days. A state official or employe serving on state active duty as a member of the national guard or state guard, may elect to receive pay from the state under § 20.465(1) in an amount equal to base state salary for such period of state active duty. Leave granted by this section is in addition to all other leaves granted or authorized by any other law. For the purpose of determining seniority, pay or pay advancement and performance awards the status of the employe shall be considered uninterrupted by such attendance.