STEPHEN ROBERT ONSTOT
CA State Bar # 139319
1601 Barton Road, Suite 3902
Redlands, CA 92373
Stephen_onstot@yahoo.com
Phone: (805) 551-4180

THOMAS G. JARRARD, *Pro Hac Vice*
WA State Bar # 39774
Law Office of Thomas G. Jarrard, PLLC
1020 North Washington Street
Spokane, WA 99203
TJarrard@att.net
Telephone: (425) 239-7290
Facsimile: (509) 326-2932

MATTHEW Z. CROTTY, *Pro Hac Vice*
WSBA #39284, ISB #8653
Crotty & Son Law Firm, PLLC
421 West Riverside, Suite 1005
Spokane, WA 99201-0300
Telephone: (509) 850.7011

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

CHRISTOPHER JONES,

Plaintiff,

v.

MARRIOTT HOTEL SERVICES, INC.,

Defendant.

NO. CV-12-0587-WHA

MOTION FOR PARTIAL SUMMARY JUDGMENT

Hearing Date: January 24, 2013

Time: 8:00 a.m.

TABLE OF CONTENTS

CROTTY & SON LAW FIRM, PLLC
421 W. Riverside Avenue, Suite 1005
Spokane, Washington 99201-0300
Phone: 509.850.7011
Email: matt@crottyandson.com

TABLE OF AUTHORITIES

CROTTY & SON LAW FIRM, PLLC
421 W. Riverside Avenue, Suite 1005
Spokane, Washington 99201-0300
Phone: 509.850.7011
Email: matt@crottyandson.com

I. INTRODUCTION

Come back home to the refinery
Hiring man says "Son if it were up to me"
Went down to see my V.A. man
He said, "Son, don't you understand?"[1]

A. NOTICE OF MOTION - LR 7-2(B)(2).

Christopher Jones requests that his summary judgment motion against Marriott Hotel Services, Inc.'s ("Marriott") as to the issue of liability be heard on January 24, 2013 at 8:00 a.m.

B. CONCISE STATEMENT OF RELIEF – LR 7-2(B)(3).

Christopher Jones worked for Marriott as a Banquet Chef. In October 2008 Mr. Jones, a member of the United States Marine Corps Reserves, was mobilized for military duty. Mr. Jones returned from military duty in November 2009 and informed Marriott (in November) that he wanted to return to work in January 2010. Although required to do so by the Uniform Services Employment and Reemployment Rights Act (USERRA), Marriott refused to re-employ Mr. Jones. Mr. Jones moves for summary judgment as to the issue of liability. Mr. Jones' motion should be granted because:

1. The USERRA required Marriott to attempt to re-employ Mr. Jones in the Banquet Chef job he left, a job similar to that of the Banquet Chef job, or any other job that approximated the Banquet Chef job's duties - - - Marriott did not do that; and,

2. The USERRA required Marriott to examine the company's financial condition in 2010 (the year Mr. Jones requested to return to work) to determine if re-employment was possible - - - Marriott did not do that, it looked to speculative forecasts from 2008.

[1] BRUCE SPRINGSTEEN, *Born in the U.S.A.,* on BORN IN THE U.S.A. (Columbia Records 1984).

CROTTY & SON LAW FIRM, PLLC
421 W. Riverside Avenue, Suite 1005
Spokane, Washington 99201-0300
Phone: 509.850.7011
Email: matt@crottyandson.com

II. STATEMENT OF FACTS

1. Marriott Hotel Services, Inc. ("Marriott") is a subsidiary of Marriott International, Inc. with 142 properties in the United States and 10 in California. (Jarrard Decl. at Exs I & Z) Marriott hired Mr. Jones in 2001. (Jones Decl. at ¶3) From 2001 until 2010, Mr. Jones worked at four Marriott properties in two different states and received promotions and pay increases. (Dkt. 10, at ¶14: Jarrard Decl. at Ex. V)

2. In November 2006 Marriott promoted Mr. Jones to the position of Banquet Chef[2] and assigned him to work at the San Francisco Marriott Marquis. (Jones Decl. at ¶¶4-5) In order to advance from an associate position to a management position, like Banquet Chef, an employee must attend a company-internal management program. *Id.* at ¶6. Once the employee passes that program he or she is placed in a management position should such a position become available. *Id.* Mr. Jones went through the management program prior to being promoted to Banquet Chef. *Id.*

3. The San Francisco Marriott Marquis is a large facility with two separate kitchens, the "Main Kitchen" and "Banquet Kitchen." (Jones Decl. at ¶5) Mr. Jones, the Banquet Chef, worked in the Banquet Kitchen. *Id.* The Banquet Chef position was a management position in the following Marriott culinary hierarchy: the "top" culinary position was the Executive Chef; the Executive Sous Chef served as the "Number 2" to the Executive Chef; the Senior Sous Chef, Sous Chef, and Banquet Chef, followed in rank order; and, below the Banquet Chef stood non-management associate positions of which "line cook" was one

[2] Mr. Jones' declaration refers to his former position as "Banquet Sous Chef". For the purpose of this brief Banquet Sous Chef and Banquet Chef are the same thing.

CROTTY & SON LAW FIRM, PLLC
421 W. Riverside Avenue, Suite 1005
Spokane, Washington 99201-0300
Phone: 509.850.7011
Email: matt@crottyandson.com

such associate position. *Id.* Customarily, the Banquet Chef and Sous Chef are equals in regards to management responsibilities although the Banquet Chef is an hourly position whereas the Sous Chef is a salaried position. *Id.* at ¶6. An employee must attend the company's management program to be promoted into either the Sous Chef or Banquet Chef position. *Id.* A Sous Chefs is generally paid more than a Banquet Chef unless the Banquet Chef works substantial overtime. *Id.* at ¶6. Approximately 20-30 associates worked in the San Francisco Marriott Marquis' culinary department. *Id.* at ¶5. As of late-September 2008, just before Mr. Jones left for military duty, one of those culinary associates was Jhurney Battung. *Id.* As of late-September 2008 Mr. Battung did not work in the Banquet Kitchen but worked as a "line cook." *Id.*

4. In 2008 Mr. Jones joined the United States Marines Corps Reserve; and, in September 2008, while working in the Banquet Chef position at the San Francisco Marriott Marquis, received orders to active military duty and gave notice of the same to Marriott. (Dkt. 10, at ¶15; Jarrard Decl. Ex. W) Mr. Jones' military service lasted until October 8, 2009, whereupon he was honorably discharged. (Jones Decl. at Ex. B) On November 17, 2009, Mr. Jones requested to return to work. (Dkt. 10, at ¶22; Jarrard Decl. Ex. W) On November 30, 2009, Marriott orally responded to Mr. Jones' November 17, 2009 request and told him that his position had been eliminated. (Jones Decl. at ¶8) Marriott's decision came as a surprise to Mr. Jones as Marriott, as recently as July 2009, sent Mr. Jones a letter **not** informing Mr. Jones of a layoff but, instead, reminding Mr. Jones that he was "required to contact [his] manager about scheduling [his] return from work." (Jones Decl. at Ex. D) On December 18, 2009, and December 31, 2009, Mr. Jones sent emails to Marriott informing Marriott, *inter alia*, that

CROTTY & SON LAW FIRM, PLLC
421 W. Riverside Avenue, Suite 1005
Spokane, Washington 99201-0300
Phone: 509.850.7011
Email: matt@crottyandson.com

federal law required that Marriott re-employ Mr. Jones. *Id.* at Exs. E & F; Jarrard Decl. at Ex. Y.

5. Upon receipt of Mr. Jones' December 31, 2009, correspondence Marriott "circled the wagons" and set about justifying its decision to not re-employ Mr. Jones. (Jarrard Decl. at Ex. J *citing* Marriott00671-672) In justifying its decision to not re-employ Mr. Jones Marriott relied on (forecasted - - not actual) business conditions and data from 2008 and 2009 - - - not 2010, the year Mr. Jones sought re-employment. *Id.*[3] To that end Marriott stated that it identified Mr. Jones' position "for elimination in November 2008 but...held off the presentation because he was on military leave." *Id.* Marriott admits to the same. (Dkt. 10, at ¶¶16&19)

Marriott's "Request for Elimination of Position" records show that Marriott's justification for the supposed position elimination was "[p]roperty-based Job Elimination not tied to a larger initiative/optimization." (Jarrard Decl. at Ex. L *citing* Marriott00543-552) The 2010 "Request for Elimination" was based on the assumption that the hotel would hold less banquets in 2009 then it did in 2008. *Id.* at 548-549. The "Request for Elimination" further stated that "no activities would be modified", meaning that the Banquet Chef work would remain the same but someone other than Mr. Jones would do that work. *Id.* at Marriott00548-549. Put differently, Marriott did not look at the company's conditions in 2010 - - the year Mr. Jones requested to return to work - - instead it based its 2010 decision not to re-employ Mr. Jones on 2008 information:

[3] Discovery confirms that the factual basis for Marriott's affirmative defenses (i.e. that it was impossible and/or "unduly burdensome" to re-employ Mr. Jones) are based on data from 2008 and 2009 - - - not 2010, the year Mr. Jones asked for his job back. (Jarrard Decl. at Exs. K and Y *citing* Marriott's Response to Interrogatories Nos. 1, 2 and 13)

CROTTY & SON LAW FIRM, PLLC
421 W. Riverside Avenue, Suite 1005
Spokane, Washington 99201-0300
Phone: 509.850.7011
Email: matt@crottyandson.com

> In response to Mr. Jones' correspondence on December 18, 2009, regarding "Marriott USERRA Compliance" and December 31, 2009, regarding "Continued Employment of Christopher A. Jones," **Defendant reviewed the business conditions at the San Francisco Marriott Marquis in 2008** which led to the decision to eliminate the Banquet Chef position and contacted Mr. Jones on December 23, 2009 and January 13, 2010 to review **that information** with him and respond to any questions he had. In addition, on December 23, 2009, Julie Fallon, Director of Human Resources for the San Francisco Marriott Marquis, emailed Mr. Jones a written summary of the business conditions at the San Francisco Marriott Marquis which led to the decision to eliminate the Banquet Chef position. (Jarrard Decl. at Ex. Y *citing* Interrogatory No. 13)(emphasis added).

6. Complicating Marriott's version of the supposed elimination of Mr. Jones' position is the fact that (a) Marriott issued Worker Adjustment and Retraining Notification Act ("WARN") notifications regarding positions that were being eliminated at the San Francisco Marriott Marquis; (b) no such notice was sent to Mr. Jones; and, (c) no such WARN notice referenced any Banquet Chef position. (Jarrard Decl. at Ex. M *citing* Request for Admission Nos. 22, 23, 24, & 25)[4]

7. Marriott ignored Mr. Jones's December 18, 2009, and December 31, 2009, pleas to return to work and admits that Mr. Jones "was told that the Banquet Chef position at the San Francisco Marriott Marquis had been eliminated...and that Mr. Jones's employment would terminate effective January 29, 2010." (Dkt. 10, ¶23) But, again, in terminating Mr. Jones's position on January 29, 2010, Marriott did not take into consideration the 2010 financial affairs of the San Francisco Marriott Marquis (or any of Marriott's other 142 properties) in determining

[4] Additionally, Marriott admits that at least one of the employees subject to the WARN notifications was, unlike Mr. Jones, subsequently re-hired at Marriott. (Jarrard Decl. at Ex. N *citing* Request for Admission No. 32)

CROTTY & SON LAW FIRM, PLLC
421 W. Riverside Avenue, Suite 1005
Spokane, Washington 99201-0300
Phone: 509.850.7011
Email: matt@crottyandson.com

whether it was impossible or unreasonable to re-employ Mr. Jones. (Jarrard Decl. at Ex. K *citing* Interrogatories Nos. 1 & 2; Jarrard Decl. at Ex. Y *citing* Interrogatory No. 13)

8. On January 13, 2010, Mr. Jones spoke with Marriott's management regarding the company's decision and queried management as to how the hotel could continue to hold banquet functions if his Banquet Chef job was eliminated. (Jarrard Decl. at Ex. O *citing* Marriott000674-676) To that management replied that the job had not necessarily been eliminated but, instead, that the work Mr. Jones had been doing was "redeployed" to other culinary workers. *Id.* at Marriott000674. What Marriott's management told Mr. Jones is consistent with what Mr. Jones remembered from his January 13, 2010, telephone call with management and what Mr. Jones observed when he visited the Banquet Kitchen in early 2010. (Jones Decl. at ¶8) To wit: before going on military orders in September 2008 Jhurney Battung worked as an associate "line cook" - - - a position of lower rank than Mr. Jones' Banquet Chef position - - - in the San Francisco Marriott Marquis's culinary department. (Jones Decl. at ¶8) When Mr. Jones visited the hotel in early 2010 he observed Mr. Battung working in the Banquet Kitchen doing the Banquet Chef work that Mr. Jones previously did. *Id.* A online search revealed what Mr. Jones suspected: that Mr. Battung had been promoted to Sous Chef (a management position that usually pays more than the Banquet Chef) between September 2008 and January 2010. *Id.* at Exhs. A1 & A2. Stated differently: between 2008 and 2010, Marriott sent Mr. Battung to its management course and deployed Mr. Battung and others into Mr. Jones's position. *See id.*

9. Instead of "redeploying" Mr. Jones back to the Banquet Chef job that he left, Marriott required that Mr. Jones apply for what Marriott described as "open" positions within the Company. (Jones Decl. at ¶11) Mr. Jones applied for two such jobs but did not get them. *Id.*

CROTTY & SON LAW FIRM, PLLC
421 W. Riverside Avenue, Suite 1005
Spokane, Washington 99201-0300
Phone: 509.850.7011
Email: matt@crottyandson.com

10. In the process of applying for the openings, Mr. Jones began to assemble his performance evaluations. *Id.* at ¶13. Performance evaluations are given each year and cover a year's worth of work and are taken into consideration as part of the hiring process. *Id.* To that end, Mr. Jones inquired about what Marriott did regarding his 2008 performance evaluation - - - an evaluation that was incomplete as he was absent from Marriott for a quarter of a year because of military duty. *Id.* Marriott responded to Mr. Jones' query stating that the 2008 evaluation was "complete" even though Mr. Jones had not been present all of 2008. *Id.*[5]

11. Work was available for Mr. Jones to do upon his return in January 2010: Marriott admits to continuing to employ Banquet Chefs, hiring Banquet Chefs, and promoting other Banquet Chefs in 2010 at its other properties. (Jarrard Decl. at Ex. P *citing* Req. for Admission Nos. 8, 28, 29) Marriott admits that employees of the San Francisco Marriott Marquis received salary increases and were promoted in 2010. (Jarrard Decl. at Ex. Q *citing* Request for Admission Nos. 6 & 7) Marriott admits that Mr. Jones was qualified to perform work as a Banquet Chef and that Mr. Jones was not terminated for performance issues. *Id.* at Ex. R *citing* Request for Admission Nos. 12 & 13. Marriott's SEC filings for calendar years ending in 2009, 2010 and 2011 prove that Marriott was a profitable and expanding organization capable of re-employing a Banquet Chef. (Jarrard Decl. *citing* Ex S).

---

[5] Marriott admits that its decision to eliminate Mr. Jones' performance was not based on Mr. Jones' performance. (Jarrard Decl. at Ex. R *citing* Request for Admission No. 13) Thus, plaintiff's submission of the facts set out in Paragraph 9 does not create an issue of fact on that point. Instead plaintiff submits paragraph 9 to illustrate Marriott's violations of USERRA's requirement that an employer not create additional bars - - - like forcing the employee to apply for his or her job as if he or she had not previously worked at the company - - - to employment for a service member returning from duty. 38 U.S.C. §4302(b) (1994)("supersed[ing] any...policy [or] establishment of additional prerequisite to the exercise of such [reemployment] right.").

CROTTY & SON LAW FIRM, PLLC
421 W. Riverside Avenue, Suite 1005
Spokane, Washington 99201-0300
Phone: 509.850.7011
Email: matt@crottyandson.com

12. Indeed, on September 10, 2010, months after Marriott informed Mr. Jones that it could not re-employ him because of implied financial difficulties, Marriott employee Julie Fallon, posited that a reason that Mr. Jones did not receive the severance payments it offered Mr. Jones was that he "may have been re-employed by Marriott." (Jarrard Decl. at Ex. T *citing* Marriott000654)

13. After Marriott refused to re-employ Mr. Jones he sought employment elsewhere. (Jones Decl. at ¶14) Mr. Jones sought employment at 12 other establishments but was not offered a job. *Id.* Having nowhere else to go, Mr. Jones returned to military service and now serves in Afghanistan. *Id.* at ¶15.

III. POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

A. MOTION FOR SUMMARY JUDGMENT STANDARD.

Summary judgment is proper when "the pleadings. . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party and a dispute is "material" only if it could affect the outcome of the suit under the governing law. *Anderson, v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Once the moving party has done so, the burden shifts to the opposing party to set forth specific facts showing there is a genuine issue for trial. *In re Barboza*, 545 F.3d 702, 707 (9th Cir. 2008).

There are no triable issues of fact as to the liability aspects of Mr. Jones's USERRA re-employment claim. As a matter of law Marriott cannot establish that it was "impossible" or that

CROTTY & SON LAW FIRM, PLLC
421 W. Riverside Avenue, Suite 1005
Spokane, Washington 99201-0300
Phone: 509.850.7011
Email: matt@crottyandson.com

it was a "undue hardship" for it - - - a billion dollar company - - - to re-employ Mr. Jones upon his 2010 return from military duty.

B. SUMMARY JUDGMENT ADJUDICATION AS TO MR. JONES' 38 U.S.C. §§ 4312 & 4313 RE-EMPLOYMENT CLAIM IS PROPER.

1. Mr. Jones has standing to bring his re-employment claim.

In order to enjoy USERRA's re-employment protections, the plaintiff must: (a) be a member of the Armed Forces of the United States; (b) give notice to his employer of the plaintiff's military obligations; (c) receive an honorable discharge from military service; (d) give timely notification, to the employer, of plaintiff's intent to return to work; and, (e) serve less than five years with the military (absent varied exceptions). 38 U.S.C. § 4312.

Marriott admits points (b) and (d) above. (Dkt. 10, at ¶¶15, 18). There is no dispute as to points (a), (c), and (e) Mr. Jones's Certificate of Discharge from the military reflects that Mr. Jones was in the military, was honorably discharged, and served less than five years. (Jones Decl. at Ex. B; Jarrard Decl. at Ex. W *citing* Request for Admission Nos. 2 and 3) Certain protections apply once the service member meets the standing requirements. One protection includes being given one's pre-military service job back.

2. Once standing is established an employer must re-employ an employee in one of three USERRA re-employment positions - - - Marriott failed to do that.

Under the USERRA, Marriott had to re-employ Mr. Jones in either: (1) the Banquet Chef position, i.e. the job Mr. Jones would have held but for his military service (i.e. the "escalator position"); (2) the Sous Chef position, i.e. a job of like seniority, status, and pay to that of Mr. Jones's pre-military service Banquet Chef job following reasonable efforts by Marriott to qualify Mr. Jones for that job (i.e. the "pre-service position"); or, if options (1) and

CROTTY & SON LAW FIRM, PLLC
421 W. Riverside Avenue, Suite 1005
Spokane, Washington 99201-0300
Phone: 509.850.7011
Email: matt@crottyandson.com

(2) did not work, then; (3) in "any other position" that nearly approximated Mr. Jones' Banquet Chef job with full seniority (i.e. the "qualifying alternative position"). 20 C.F.R. §§ 1002.191-197; 38 U.S.C. §§ 4313(a)(2)(A)-(B) & (a)(4); 20 C.F.R. § 1002.197. These three reemployment positions are referred to as the "section 4313 order of priority." 20 C.F.R. § 1002.197 ("the employee must be reemployed according to the following priority"). Marriott also had to re-employ Mr. Jones within 14 days of Mr. Jones' November 2009 request for reemployment. 20 C.F.R. § 1002.181. Here Marriott failed to reemploy Mr. Jones in any position at all, let alone within 14 days of Mr. Jones' November 17, 2009, request to return to work in January 2010. Here Marriott failed to offer Mr. Jones any retraining or take steps to help him qualify for any position at Marriott, although required to do so by law. 38 U.S.C. §§ 4313(a)(1)(B)-(2)(B) & (3)(A)-(4). *See* S. Rep. No. 103-158 at 54 (1993) *available at* 1993 WL 43256*54.

3. Marriott's sole defense fails because it was not impossible or unreasonable to re-employ Mr. Jones.

The USERRA recognizes three affirmative defenses to Mr. Jones' 38 U.S.C. §4312 "re-employment" claim. Those affirmative defenses are: (1) the employer's circumstances changed making re-employment impossible or unreasonable; (2) re-employing the service member would impose "an undue hardship on the employer" due to a service connected disability or lack of qualifications; or, (3) the employee had no reasonable expectation of re-employment due to the seasonal or temporary nature of the job. 38 U.S.C. §4312(d)(1)(A)-(C). Marriott does not assert affirmative defense (3). (Dkt. 10, at ppg. 9-11)

Marriott's affirmative defense is that re-employing Mr. Jones in 2010 was "impossible and/or unreasonable." *Id.* The factual bases for Marriott's "impossibility/undue hardship"

CROTTY & SON LAW FIRM, PLLC
421 W. Riverside Avenue, Suite 1005
Spokane, Washington 99201-0300
Phone: 509.850.7011
Email: matt@crottyandson.com

affirmative defenses fail for three reasons. First, Marriott bases its early 2010 decision to not re-employ Mr. Jones on data from 2008 and 2009. (Jarrard Decl. at Exs. K and Y *citing* Interrogatory Nos. 1, 2, & 13) Second, the "data" from 2008 and 2009 that Marriott relied on was speculative - - - it related to what Marriott forecasted might happen in 2009 and beyond, not what actually did happen during that time or in 2010. (Jarrard Decl. at Ex. J *citing* Marriott00671-672) Put differently: Marriott made its 2010 reemployment decision on old information. Third, Marriott is a billion dollar company with at least 142 properties located throughout the country - - - it had the resources to place Mr. Jones in a Banquet Chef, a comparable Sous Chef position, or other position in 2010 at its other properties. (Jarrard Decl. at Ex. S) Indeed, Ms. Fallon implicitly recognized this in September 2010 when she noted that Mr. Jones may have been reemployed by the company. *Id.* at Ex. T.

(A) Marriott bears the burden of showing that it was impossible to employ Mr. Jones in any position in 2010.

In order to prevail on a 38 U.S.C. §4312(d)(1) affirmative defense Marriott must prove, by preponderance of the evidence, that changed circumstances and/or undue hardship made it "impossible" or "unreasonable" to re-employ Mr. Jones in a Banquet Chef position, in a job of like seniority, status, and pay to the Banquet Chef position, and "any other position" that nearly approximated Mr. Jones's pre-military service job. *United States v. Nevada*, 817 F.Supp.2d 1230, 1244 (D. Nev. 2011)(holding that as a matter of law the defendant employer must look for three different jobs for the returning service member (e.g. the "section 4313 order of priority") and must show that re-employing the service member in each of those three positions would be unreasonable, impossible, or pose an undue hardship under 38 U.S.C. §4312(d)(1)).

CROTTY & SON LAW FIRM, PLLC
421 W. Riverside Avenue, Suite 1005
Spokane, Washington 99201-0300
Phone: 509.850.7011
Email: matt@crottyandson.com

Marriott has produced no evidence, and Mr. Jones is aware of none, that it attempted to place Mr. Jones in the Banquet Chef position or any other position at Marriott. Instead Marriott will likely argue that Mr. Jones' supposed 2008 layoff absolved it of conducting that analysis. But in undertaking the 38 U.S.C. §4313 analysis the employer must look prospectively (i.e. at the conditions facing the employer upon the service member's return from duty and becoming eligible for re-employment (here 2010)) and not retrospectively (i.e. at the conditions that (may have) existed in 2008). On that point the USERRA regulations state, in part, that "[f]or example, if an employee's seniority of job classification would have resulted in the employee being laid off during the period of service, and the layoff continued after the date of re-employment, re-employment would reinstate the employee to layoff status." 20 C.F.R. §1002.194 (emphasis added).

Here Marriott did not, as required by regulation, consider whether Mr. Jones' layoff would have continued after Mr. Jones returned to work in 2010. Instead Marriott's own evidence proves that it relied on data from 2008 in deciding not to re-employ Mr. Jones in 2010. (Jarrard Decl. at Ex. J *citing* Marriott000671; Jarrard Decl. at Ex. Y *citing* Interrogatory No. 13)

(B) Even if Marriott eliminated Mr. Jones's Banquet Chef position in 2008 Marriott was still required to re-employ Mr. Jones under the 4313(a) "order of priority."

Courts of this circuit hold:

> But the right to "reemployment" under USERRA is not limited to the service member's former position. *See id.* And the fact that the service member is no longer qualified for reemployment in his former position cannot justify applying the section 4312(d) exemptions to deny any reemployment whatsoever. Section 4313(a) establishes an "order of priority" for positions of reemployment and expressly accounts for the circumstance that a returning service member is no longer qualified for reemployment in his former position. Because that section provides that a person

CROTTY & SON LAW FIRM, PLLC
421 W. Riverside Avenue, Suite 1005
Spokane, Washington 99201-0300
Phone: 509.850.7011
Email: matt@crottyandson.com

> who is unqualified for reemployment in his former position under subsection (a)(2) is nonetheless entitled to reemployment in an alternative position under subsection (a)(4), it simply cannot be said that such lack of qualifications makes reemployment "impossible or unreasonable" for purposes of the changed circumstances exemption. *U.S. v. Nevada,* 817 F.Supp.2d at 1243 n.4. (emphasis added).

Such a holding is consistent with other courts' USERRA analysis as:

> Employers must tailor their workforces to accommodate returning veterans' statutory rights to reemployment. Although such arrangements may produce temporary work dislocations for nonveteran employees, those hardships fall within the contemplation of the Act, which is to be construed liberally to benefit those who "left private life to serve their country." *Goggin v. St. Louis*, 702 F.2d 698, 704 (8th Cir. 1983) (*citing Fishgold v. Sullivan Drydock & Repair*, 328 U.S. 275, 285 (1946)).

Here Marriott failed to tailor its workforce to accommodate Mr. Jones's return. For example, Marriott allowed Jhurney Battung, who was a "line cook" associate when Mr. Jones left for military duty in September 2008, to attend the company's management program, get promoted to Sous Chef (a position that pays more than Mr. Jones' Banquet Chef job), and take over for Mr. Jones in the Banquet Kitchen. (Jones Decl. at ¶8) When Mr. Jones returned from military duty in late 2009, and requested to return to work in early 2010, Marriott was required to dislocate Mr. Battung, or other employees who occupied Mr. Jones' billet, and allow Mr. Jones to return to work at one of its other 142 properties. Thus, the undue hardship defense is a narrow defense for the employer. *Lapine v. Town of Wellesley*, 167 F.Supp.2d 132, 138 (D. Mass. 2001).

And the circumstances under which re-employment is impossible or unreasonable are rare. To wit:

CROTTY & SON LAW FIRM, PLLC
421 W. Riverside Avenue, Suite 1005
Spokane, Washington 99201-0300
Phone: 509.850.7011
Email: matt@crottyandson.com

> Conceivably, a case could arise where placement under § 4313 is impossible because the returning servicemember is no longer qualified and cannot become qualified to perform the duties of the (a)(2) position, and there is no eligible (a)(4) position, in that no alternative position exists or the person is not or cannot become qualified to perform any existing alternative position. **In that exceptional circumstance, lack of qualifications may present a basis for application of the changed circumstances affirmative defense, insofar as the person's lack of qualifications for any existing position makes reemployment in accordance with § 4313 "impossible or unreasonable."** 38 U.S.C. § 4312(d)(1)(A). But of course, the impossibility would still have to be related as well to a change in "the employer's circumstances." *U.S. v. Nevada*, 2012 U.S. Dist. LEXIS 60486*10 n.2 (D. Nev. 2012) (emphasis added), **such as where layoffs have eliminated any alternative position** for which the person might have been qualified. *Id.* (emphasis added).

Here "layoffs [did not] eliminate[] alternative position[s]" - - - as Mr. Battung and others were "deployed" into Mr. Jones' job. *See id.* Indeed, although Marriott claims that the Banquet Chef position was eliminated in 2008, its management, in 2010, informed Mr. Jones that Mr. Jones' co-workers had been "deployed" to do the Banquet Chef work. (Jones Decl. at ¶13) Marriott admits that it hired Banquet Chefs in 2010, promoted Banquet Chefs in 2010, and increased the salaries of San Francisco Marriott Marquis employees in 2010. (Jarrard Decl. at Ex. P *citing* Req. for Admission Nos. 8, 28, 29) Yet Marriott failed to promptly reemploy Mr. Jones to any position at all, failed to offer Mr. Jones any training or assistance to qualify him for an alternative position, and forced Mr. Jones to apply for open positions. Marriott improperly put the burden on Mr. Jones to find work at Marriott and placed additional requirements on his reemployment in violation of the law. *See* 38 U.S.C. §4302(b). Further, even if Marriott eliminated Mr. Jones's Banquet Chef (i.e. escalator) position in 2008, Marriot is still not excused from failing to place Mr. Jones in "a position of like seniority, status, and pay" to that

CROTTY & SON LAW FIRM, PLLC
421 W. Riverside Avenue, Suite 1005
Spokane, Washington 99201-0300
Phone: 509.850.7011
Email: matt@crottyandson.com

of Mr. Jones's pre-service Banquet Chef position as neither 38 U.S.C. §§ 4312, 4313, or 20 C.F.R. §§ 1002.191 to 198, require that the so called *pre-service position* be the identical location and position the employee held prior to service. Stated differently: Marriott cannot argue that its re-employment obligations extend only to the walls of the San Francisco Marriott Marquis and not to its 142 other facilities in the United States.

Even when an employer experiences legitimate reductions in force during the service member's military absence, the employer must still prove its affirmative defense of changed circumstances -- that such a reduction in force would have necessarily included the returning service member. *Milhauser v. Minco Prods.*, 855 F. Supp. 2d 885, 904 (D. Minn. 2012)(order on Plaintiff's post-trial Motion for Judgment as a Matter of Law or, alternatively, for a New Trial). For example in *Milhauser* the court determined that the employer had carried its burden at trial by presenting evidence that the service member was selected for termination (in a reduction in force) because the service member had significant performance and behavior problems, numerous complaints about the quality of his work, and there was "overwhelming evidence" that the service member "lacked the skills, expertise, or versatility" of other employees the employer did not choose for the reduction in force. *Id.* The court went on to note that the employer would still be required rehire the service member and displace an existing employee if that employee was hired as a replacement for the service member while the service member was on leave or when the employee was junior to the service member on a seniority ladder. *Id.* at 901.

In this case Marriott admits that Mr. Jones was not selected for termination based on performance and that Mr. Jones was fully qualified to perform the duties of his position.

CROTTY & SON LAW FIRM, PLLC
421 W. Riverside Avenue, Suite 1005
Spokane, Washington 99201-0300
Phone: 509.850.7011
Email: matt@crottyandson.com

Additionally, unlike in *Milhauser,* an employee junior to Mr. Jones (Mr. Battung) was promoted into Mr. Jones's former position during the military related absence.

(C) The law supports Mr. Jones' argument.

The following cases show that an employer cannot use actual (or speculative) low work volume, layoffs, or internal re-organization as facts supportive of its impossibility/undue hardship defense. In *Dunlap v. Grupo Antolin Ky., Inc.,* the court granted the service member summary judgment on his reemployment claim. Grupo Antolin claimed that it was experiencing a time of low work and was laying workers off at the time the service member reported back to work from military service. Grupo Antolin, unlike Marriott, considered the conditions affecting the company at the time the service-member requested re-employment. The Court held that, "as a matter of law, mere low work load, layoffs, and a hiring freeze do not make reemployment impossible or unreasonable enough to invoke the exemption of 38 U.S.C. § 4312(d)(1)(A)." *Dunlap v. Grupo Antolin Ky., Inc.*, 181 L.R.R.M. 2831, 2007 WL855335, at *3 (W.D. Ky. 2007).

Likewise, in *Fitz v. Board of Education of Port Huron Area Schools*, 662 F.Supp. 1011, 1013-1015 (E.D. Mich. 1985), the court held that despite the fact that the employer had to lay off 75 tenured teachers before the service member's return from military absence and would violate a collective bargaining agreement by reemploying the reservist, the service member was entitled to judgment as a matter of law on his re-employment claim.

In *Loeb v Kivo* 77 F. Supp 523 (N.Y.D.C. 1947) *aff'd* 169 F.2d 346 (2d Cir. 1948), the court held that the abolition of a whole department was no excuse for failure to reemploy the service member. To that end, when an employer reorganizes its operations and it is certain that

CROTTY & SON LAW FIRM, PLLC
421 W. Riverside Avenue, Suite 1005
Spokane, Washington 99201-0300
Phone: 509.850.7011
Email: matt@crottyandson.com

it would have abolished the returning service member's position if the service member had been present during the reorganization, the employer is still be required to show that there were no equivalent positions for which service member was qualified. *Rivera-Melendez v. Pfizer Pharm., Inc.*, 2011 U.S. Dist. LEXIS 121841 (D.P.R. Oct. 21, 2011)("When an internal reorganization results in the elimination of the veteran's position, the employer must still make an effort to offer the veteran a similar position."). *See also Allyn v Abad* 167 F.2d 901 (1948) (holding circumstances of employer had not so changed as to render the reinstatement of veteran "unreasonable" when, during the veteran's military absence, the employer reorganized its business and changed is operations).

Here Marriott asserts that, due to a decline in reservations and banquet activity, Mr. Jones's position was slated for elimination in November 2008. But Marriott admits that it terminated Mr. Jones's employment on January 29, 2010, not before. Even if Marriott's assertion that Mr. Jones's was terminated in 2008 was accurate, that excuse is "insufficient for the changed circumstances defense to apply" because this narrow defense only applies when there are no alternative positions. *See supra U.S. v. Nevada.* Marriott has thousands of properties across the U.S., but shirked its obligation by failing to offer Mr. Jones a similar position in San Francisco or elsewhere.

C. MARRIOTT'S VIOLATION OF MR. JONES' USERRA RIGHTS WAS WILLFUL.

A willful violation of USERRA occurs if the defendant knew of its obligations under USERRA but did not comply with the statute. *Serriccho v. Wachovia Secs., LLC*, 606 F.Supp.2d 256, 265-266 (D. Conn. 2009). A willful violation means that Marriott either knew that its actions towards Mr. Jones violated the law or Marriott acted in reckless disregard of the

CROTTY & SON LAW FIRM, PLLC
421 W. Riverside Avenue, Suite 1005
Spokane, Washington 99201-0300
Phone: 509.850.7011
Email: matt@crottyandson.com

law. 20 C.F.R. §1002.312(c).

Mr. Jones informed Marriott of his USERRA rights on December 18, 2009, and December 31, 2009, but Marriott took no action. (Jarrard Decl. at Ex. X *citing* Requests for Admission Nos. 4, 10, 11, and 30 & Ex. Y) Marriott admits that it was on notice of its obligations under USERRA and Mr. Jones gave Marriott notice of his USERRA rights. (Jarrard Decl. at 19-20. *citing* Ex. X and Y) Marriott also admits that its human resources professionals, managers and directors involved in the decision not to reemploy Mr. Jones were all familiar with USERRA rights. *Id.* Marriott also admits that it maintained the required notice of USERRA rights posted at its employment locations in 2009 and 2010. *Id.* Nevertheless, Marriott ignored its obligations. Yet Marriott did not: (1) consider Mr. Jones for any of three re-employment provisions required under 38 U.S.C. §4313; or, (2) look prospectively at the company's current affairs in determining whether it could afford to re-employ Mr. Jones as required by 20 C.F.R. §1002.194. Marriott's actions were willful.

IV. CONCLUSION

Unfortunately, what Bruce Springsteen sang about in 1984 is still true in 2012. Fortunately, Mr. Jones has the opportunity to be heard in the courts of our country and respectfully requests that his Motion for Summary Judgment be granted.

//

//

//

//

//

CROTTY & SON LAW FIRM, PLLC
421 W. Riverside Avenue, Suite 1005
Spokane, Washington 99201-0300
Phone: 509.850.7011
Email: matt@crottyandson.com

Respectfully submitted this 30th day of November 2012.

CROTTY & SON LAW FIRM, PLLC

//S//

By: _____
MATTHEW Z. CROTTY, *Pro Hac Vice*

LAW OFFICE OF THOMAS G. JARRARD, PLLC

//S//

By: _____
THOMAS G. JARRARD, *Pro Hac Vice*

LAW OFFICE OF STEPHEN ROBERT ONSTOT

//S//

By: _____
STEPHEN R. ONSTOT
Attorneys for Plaintiff

CROTTY & SON LAW FIRM, PLLC
421 W. Riverside Avenue, Suite 1005
Spokane, Washington 99201-0300
Phone: 509.850.7011
Email: matt@crottyandson.com

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2012, I caused to be electronically filed Plaintiff's MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following:

Michele Ballard Miller, Email: mbm@millerlawgroup.com

Janine Syll Simerly, Email: jss@millerlawgroup.com

Noah A. Levin, Email: nal@millerlawgroup.com

Stephen Onstot,
Email: stephen_onstot@yahoo.com

Matthew Zachary Crotty, Pro Hac Vice,
Email: matt@crottyandson.com

Thomas G. Jarrard, Pro Hac Vice,
Email: Tjarrard@att.net, tjarrard@lawschool.gonzaga.edu

2. I hereby certify that I have mailed by United States Postal Service the document to the following CM/ECF participants at the address listed below: none.

3. I hereby certify that I have hand-delivered the document to the following participants at the addresses listed below: none.

Matthew Z. Crotty

WA State Bar # 39284, ISB # 8653
Crotty & Son Law Firm, PLLC
421 W. Riverside Ave. Ste 1005
Spokane, WA 99201
Telephone: (509) 850-7011
Email: matt@crottyandson.com