
IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DAVID MUELLER,
Plaintiff-Appellant

v.

CITY OF JOLIET; BRIAN BENTON, in his official and individual capacity as the
Chief of Police; and EDGAR GREGORY, in his individual capacity,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
(Honorable Harry D. Leinenweber, No. 1:17-cv-7938)

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF
PLAINTIFF-APPELLANT AND URGING REVERSAL

KATE S. O'SCANLAIN
Solicitor of Labor
U.S. Department of Labor
Office of the Solicitor, S-2002
200 Constitution Avenue, N.W.
Washington, D.C. 20210

JOHN R. LAUSCH, JR.
United States Attorney for the
Northern District of Illinois
219 S. Dearborn Street, 5th Floor
Chicago, IL 60604

BERNARD E. DOYLE
Attorney
National Guard Bureau
Office of Chief Counsel
111 S. George Mason Drive, Bldg. 2
Arlington, VA 22204

ERIC S. DREIBAND
Assistant Attorney General

THOMAS E. CHANDLER
CHRISTINE A. MONTA
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 11403
Washington, D.C. 20044-4403
(202) 514-2195

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INTEREST OF THE UNITED STATES

This matter arises under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. 4301 *et seq.* USERRA prohibits employment discrimination against members of the armed forces and ensures reemployment for servicemembers who are absent from civilian employment because they are called to active duty. The United States has a strong interest in ensuring that USERRA is properly interpreted. The Secretary of Labor has substantial administrative responsibilities under USERRA, 38 U.S.C. 4321-4333, and has promulgated regulations implementing the statute, 20 C.F.R. Pt.

1002. In addition, the Attorney General may enforce USERRA in court against public and private employers, and the Office of Special Counsel may enforce USERRA against federal government employers through the Merit Systems Protection Board process. 38 U.S.C. 4323-4324.

Given this federal interest, the United States has participated as intervenor or amicus in a number of private USERRA cases. See, e.g., U.S. Amicus Br., *Clark v. Virginia Dep't of State Police*, 793 S.E.2d 1 (Va. 2016) (No. 151857), cert. denied, 138 S. Ct. 500 (2017); U.S. Amicus Br., *Ramirez v. New Mexico Children, Youth & Families Dep't*, 372 P.3d 497 (N.M. 2016) (No. S-1-SC-34613); U.S. Intervenor Br., *Weaver v. Madison City Bd. of Educ.*, 947 F. Supp. 2d 1308 (N.D. Ala. 2013) (No. 5:11-cv-3558); U.S. Intervenor Br., *McIntosh v. Partridge*, 540 F.3d 315 (5th Cir. 2008) (No. 07-20440). The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE

Whether USERRA protects an Army National Guard member serving under 32 U.S.C. 112 and 502(f) in a state counter-drug operation.

STATEMENT OF THE CASE

1. USERRA And The Army National Guard

USERRA prohibits employment discrimination against members of “a uniformed service.” 38 U.S.C. 4311(a). The statute defines “uniformed services” to include the Army National Guard “when engaged in * * * full-time National Guard duty.” 38 U.S.C. 4303(16). The question in this case is whether an Army

National Guard member's service in a state counter-drug operation pursuant to orders issued under 32 U.S.C. 112 and 502(f) falls within that definition.

The Army National Guard is one of the seven reserve components of the United States armed forces. 10 U.S.C. 10101. It serves a dual federal-state role, acting as both a reserve unit to supplement the national Army with "trained units and qualified persons available for active duty in the armed forces, in time of war or national emergency, and at such other times as the national security may require," 10 U.S.C. 10102; see also 32 U.S.C. 102, and, when not in federal military service, as an organized militia for each of the 50 States, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands, 32 U.S.C. 101(1) and (4). See *Tirado-Acosta v. Puerto Rico Nat'l Guard*, 118 F.3d 852, 852-853 (1st Cir. 1997).

Army National Guard members can be called to duty in three different ways, each of which has different consequences for the member's legal status and entitlements: (1) active military duty under Title 10 of the U.S. Code (Title 10 status); (2) duty under Title 32 of the U.S. Code (Title 32 status), including full-time National Guard duty; and (3) state active duty under state law.

First, a National Guard member can be called into active service in the Army under Title 10 of the U.S. Code. When a National Guard member is called into active federal military service under Title 10, he is deemed part of the United States Army and is "relieved from duty in the National Guard of his State" so long as his Title 10 service continues. See 10 U.S.C. 12401; 32 U.S.C. 325; *Perpich v. Department of Def.*, 496 U.S. 334, 345, 347 (1990).

Second, National Guard members may be called to perform duty under Title 32 of the U.S. Code. National Guard members in Title 32 status are generally under the command of state officials but receive their pay and benefits from the federal government. See generally Lawrence Kapp & Barbara Salazar Torreon, Cong. Research Serv., RL30802, Reserve Component Personnel Issues: Questions And Answers 19 (2018), available at <https://fas.org/sgp/crs/natsec/RL30802.pdf>. Relevant here, 32 U.S.C. 502(f) provides that National Guard members may, pursuant to federal regulations, “be ordered to perform training or other duty in addition to” the mandatory annual training required under Section 502(a). 32 U.S.C. 502(f). Among other duties, National Guard personnel may “be ordered to perform full-time National Guard duty under section 502(f) of [Title 32] for the purpose of carrying out [state] drug interdiction and counter-drug activities.” 32 U.S.C. 112(b).

Finally, National Guard members may be called up by state Governors for “state active duty” to respond to natural disasters or other such emergencies. See National Guard Regulation 680-1, *Personnel Assets Attendance and Accounting*, at 7, 40 (Apr. 15, 2019), available at <https://go.usa.gov/xEw44>; Kapp & Torreon, *supra*, at 18-19. National Guard members performing state active duty “are under state command and control and are paid from state funds.” 32 C.F.R. 536.97(a)(3). Although USERRA does not protect National Guard members serving state active duty, “many States have laws protecting the civilian job rights of National Guard members” called up for state active duty. 20 C.F.R. 1002.57(b); see also S. Rep. No.

158, 103d Cong., 1st Sess. 43-44 (1993) (explaining that the statutory definition of “uniformed services” was intended “to exclude National Guard members performing non-federally funded State National Guard duties from coverage under” USERRA).

2. *Facts And Procedural History*

a. Plaintiff David Mueller is a sergeant in the City of Joliet, Illinois, Police Department and, since 2015, a member of the Illinois Army National Guard. Doc. 1, at 3.¹ In March 2016, plaintiff received orders from the Illinois National Guard to report to the State’s National Guard Counter Drug Task Force from May 9, 2016, through September 30, 2016. Doc. 1, at 4-5; see Doc. 20-1 (deployment orders). Plaintiff’s deployment orders characterized this service as “Full-Time National Guard Duty” authorized under 32 U.S.C. 112 and 502(f). Doc. 20-1, at 1-2.

Plaintiff alleges that, after learning of plaintiff’s deployment orders, the Deputy Chief of the Joliet Police Department “yelled at and belittled” him for “fucking over the Department” and “trying to double dip on pay,” and subsequently criticized him in front of other officers for “screwing over the Department by leaving them one supervisor short.” Doc. 1, at 7 (internal quotation marks omitted).

Plaintiff further alleges that, a little over a month into his deployment, the Chief of the Joliet Police Department informed plaintiff by email that he would be placed on an unpaid leave of absence during his deployment and thus would not accrue vacation and personal days during that time. Doc. 1, at 5. According to plaintiff,

¹ Citations to “Doc. __, at __” refer to documents in the district court record, as numbered on the docket sheet, and page numbers within those documents.

the Police Department treated “similarly situated non-military” employees differently; for example, it permitted another officer to continue accruing leave and receiving pay while on non-military administrative leave. Doc. 1, at 8. Plaintiff alleges that his “decision to re-enlist with the National Guard” and his “active duty status” were a “motivating factor” in defendants’ decision to deny him leave benefits and compensation while deployed. Doc. 1, at 8. Plaintiff alleges that, as a result of that decision, he was forced to request early release from his National Guard duty, causing him to lose National Guard pension benefits. Doc. 1, at 5-6.

b. Plaintiff sued the Joliet Police Department, its Police Chief in his official and individual capacities, and its Deputy Chief in his individual capacity (collectively, defendants), alleging that their decision to deny him compensation and leave accrual during his National Guard duty violated both USERRA, 38 U.S.C. 4311, and the Illinois Military Leave of Absence Act (IMLAA), 5 Ill. Comp. Stat. 325/1(a) (2018), repealed by P.A. 100-1101, § 90-5 (eff. Jan. 1, 2019), and replaced by the Illinois Service Member Employment and Reemployment Rights Act, 330 Ill. Comp. Stat. 61/1-1 *et seq.* (2019). Plaintiff’s USERRA claim is limited to the denial of his leave accrual as a “benefit of employment.” See Doc. 1, at 9 (citing 38 U.S.C. 4303(2), 4311).²

Defendants moved to dismiss plaintiff’s complaint. Docs. 10, 12. Relevant here, defendants argued that plaintiff’s service in the Illinois Army National Guard

² Plaintiff’s state-law IMLAA claim is based on the denial of both benefits and compensation. See Doc. 1, at 11-12 (stating that IMLAA requires public employers to compensate employees on military leave the difference between their regular compensation and military pay).

counter-drug task force was not protected by USERRA because it was state, not federal, National Guard service. Doc. 12, at 4-8. Plaintiff opposed the motion, arguing that his service constituted “full-time National Guard Duty” under Title 32 of the U.S. Code, which USERRA expressly covers. Doc. 20, at 2-7 (citing 32 U.S.C. 101(19) and 38 U.S.C. 4303(13)).

The district court granted defendants’ motion to dismiss. Doc. 32. The court agreed with defendants that the relevant question was whether plaintiff’s service in the National Guard counter-drug task force was “under state control” or “federal control,” citing a Department of Labor (DOL) USERRA regulation stating that “National Guard service under authority of State law is not protected by USERRA.” Doc. 32, at 7-8 (quoting 20 C.F.R. 1002.57(b)). The court concluded that plaintiff’s “tour of duty was clearly under the authority of the State of Illinois” (Doc. 32, at 8), noting that his order to report was issued by the Illinois Department of Military Affairs and signed by its Adjutant General (the head of the state National Guard), not by “the President of the United States” (Doc. 32, at 6). Although the federal government funded “at least some of the costs” of plaintiff’s service in the Illinois counter-drug operation, the district court concluded that such funding did not render his service “federal” such that it came within USERRA’s protections. Doc. 32, at 6. The court reasoned that deeming plaintiff’s service in the Illinois counter-drug task force to be “federal” for USERRA purposes would violate both the terms of 32 U.S.C. 112, which permits National Guard members to participate in drug interdiction programs only “while not in federal service” (Doc. 32, at 6 (quoting 32

U.S.C. 112(a)(1)), as well as the Posse Comitatus Act, 18 U.S.C. 1385, which “prohibits the use of the Army or Air Force in the execution of criminal laws” (Doc. 32, at 4; see Doc. 32, at 6-7).³

c. Plaintiff filed a motion to reconsider or, in the alternative, for leave to file an amended complaint. Doc. 33. Plaintiff argued that, contrary to the district court’s conclusion, his order to serve in the state counter-drug program was in fact “under federal authority” because it was issued pursuant to Title 32 of the U.S. Code (specifically, 32 U.S.C. 112 and 502(f)) and he “was paid by the United States Army” for his service. Doc. 33, at 4-6. Plaintiff reiterated that USERRA expressly covers “full-time National Guard duty,” which includes duty performed under 32 U.S.C. 502(f) for which the member is “entitled to pay from the United States” (Doc. 33, at 4-6 (quoting 10 U.S.C. 101(d)(5) and 32 U.S.C. 101(19))), and noted that the DOL regulation on which the district court relied confirms that “[s]ervice under federal authority” includes “full-time National Guard duty” under “Title 32 of the United States Code” (Doc. 33, at 7 (quoting 20 C.F.R. 1002.57(a)) (emphasis omitted)). Plaintiff also urged that the Posse Comitatus Act is irrelevant to this analysis, as that Act applies to Army National Guard members only when they are called up to active military duty under Title 10, not when they are “in a Title 32 status.” Doc. 33, at 10.

The district court granted plaintiff leave to file an amended complaint and set a briefing schedule for plaintiff’s motion to reconsider. Doc. 35. Plaintiff filed an

³ Having dismissed plaintiff’s USERRA claim, the district court declined to exercise supplemental jurisdiction over his state-law IMLAA claim. Doc. 32, at 8-9.

amended complaint that same day, which included additional allegations that he was entitled to, and received, pay from the United States for his service in the state counter-drug task force. Doc. 36, at 6; see 32 U.S.C. 101(19) (defining full-time National Guard duty to be duty for which, among other things, the member is “entitled to pay from the United States”).

Defendants opposed plaintiff’s reconsideration motion and, in the same filing, moved to dismiss his amended complaint. Doc. 43. Defendants argued that the district court had correctly concluded that plaintiff’s service in the counter-drug operation was under state, not federal, authority within the meaning of 20 C.F.R. 1002.57, and contended that how plaintiff was paid was irrelevant to whether his service was state or federal for USERRA purposes. Doc. 43, at 6-13. Defendants acknowledged that plaintiff’s orders were issued under both Sections 112 and 502(f) of Title 32 and that Section 502(f) “literally fall[s] within the legal definition of ‘Full-Time National Guard Duty.’” Doc. 43, at 11. They argued, however, that the relevant question was whether his service was under state or federal authority, and that service in a state counter-drug operation under 32 U.S.C. 112 can, by definition, never be “federal” because Section 112 on its face states that National Guard personnel may participate in such programs only when they are “not in Federal service.” Doc. 43, at 8-11 (quoting 32 U.S.C. 112(c)(2)).

d. The district court denied plaintiff’s reconsideration motion and granted defendants’ motion to dismiss plaintiff’s amended complaint based on the same reasoning in its original dismissal order. Doc. 55. Specifically, the court concluded

that because plaintiff, “as a member of a state drug interdiction task force, was attempting to enforce a state criminal law,” his service in the task force was necessarily state, not federal, for USERRA purposes. Doc. 55, at 3. The court noted, as it did in its earlier order, that 32 U.S.C. 112 permits National Guard members to participate in state counter-drug operations only when “not involved in federal service,” and reiterated its belief that deeming plaintiff’s service federal for USERRA purposes would run afoul of the Posse Comitatus Act. Doc. 55, at 3.

SUMMARY OF ARGUMENT

1. A straightforward application of USERRA’s statutory definitions demonstrates that the statute covers plaintiff’s service in the Illinois National Guard Counter Drug Task Force. USERRA applies to members of “a uniformed service,” 38 U.S.C. 4311(a), which it defines to include “the Army National Guard * * * when engaged in * * * full-time National Guard duty,” 38 U.S.C. 4303(16). “Full-time National Guard duty,” in turn, is defined in Title 32 to mean “training or other duty * * * performed by a member of the Army National Guard * * * in the member’s status as a member of the National Guard of a State under,” *inter alia*, Section 502 of Title 32, “for which the member is entitled to pay from the United States.” 32 U.S.C. 101(19).

Plaintiff’s service in the Illinois National Guard Counter Drug Task Force plainly satisfies that definition. His service involved “duty” by a “member of the Army National Guard” in his “status as a member of the National Guard of a State”— Illinois. 32 U.S.C. 101(19). The service was “under” Section 502(f) of Title

32, *ibid.*, which authorizes other duties in addition to National Guard members' mandatory training, including "carrying out drug interdiction and counter-drug activities" under "a State drug interdiction and counter-drug activities plan" approved by the Secretary of Defense, 32 U.S.C. 112(a) and (b)(1). And plaintiff was "entitled to pay from the United States" for his service. 32 U.S.C. 101(19); see 32 U.S.C. 502(f)(1) (stating that duty under Section 502(f) must be "with the pay and allowances provided by law" unless the National Guard member consents otherwise).

2. The district court failed to conduct this statutory analysis. Rather, the court concluded that a DOL USERRA regulation, 20 C.F.R. 1002.57(b), required it to perform a case-specific analysis of whether plaintiff's service was best characterized as "federal," which USERRA would cover, or "state," which USERRA would not. Deeming plaintiff's service in the counter-drug task force fundamentally state service, the court concluded that it fell outside USERRA's protection. In doing so, the district court ignored USERRA's plain language and misinterpreted this DOL regulation, which clearly states that "[s]ervice under Federal authority" for USERRA purposes "includes duty under Title 32 of the United States Code, such as * * * full-time National Guard duty." 20 C.F.R. 1002.57(a). Furthermore, the court overlooked 20 C.F.R. 1002.5(l), which provides that "[s]ervice in the uniformed services includes * * * National Guard duty under Federal statute."

The district court also suggested that considering plaintiff to be a federal employee for USERRA purposes while performing state drug interdiction operations

would violate the Posse Comitatus Act, 18 U.S.C. 1385, and the funding restrictions of 32 U.S.C. 112(a)(1). Doc. 32, at 6-7. But recognizing that USERRA protects plaintiff's service in the Illinois counter-drug task force does not run afoul of the Posse Comitatus Act, 18 U.S.C. 1385, as that Act applies only to National Guard members performing active federal military service under Title 10, not to National Guard members performing service in a Title 32 status. Nor does the language of 32 U.S.C. 112, the statute governing National Guard counter-drug activities, prohibit a conclusion that a National Guard member's participation in such activities is protected by USERRA. To the contrary, Section 112(b)(1) provides that state National Guard members may "be ordered to perform full-time National Guard duty under [32 U.S.C.] 502(f)" to carry out a state drug interdiction plan—a type of duty that USERRA expressly covers, 38 U.S.C. 4303(16), 4311(a).

Finally, the district court's decision creates unnecessary tension with other areas of law—such as the Federal Tort Claims Act and the doctrine of intra-military immunity—which recognize National Guard members performing service under Title 32 to be federal employees. The district court's decision could also potentially deter qualified and capable individuals from serving in the National Guard, thereby undermining one of USERRA's key purposes. See 38 U.S.C. 4301(a).

ARGUMENT

USERRA'S PROTECTIONS APPLIED TO PLAINTIFF'S SERVICE IN THE ILLINOIS NATIONAL GUARD COUNTER-DRUG TASK FORCE

A. *USERRA Protects An Army National Guard Member When That Member Performs Full-Time National Guard Duty In A State Counter-Drug Operation Pursuant To 32 U.S.C. 112 And 502(f)*

Plaintiff's Title 32 service in the Illinois Army National Guard counter-drug task force was covered by USERRA under a straightforward reading of the relevant statutory terms.⁴

USERRA protects members of "a uniformed service." 38 U.S.C. 4311(a). USERRA expressly defines "uniformed services" to include the Army National Guard "when engaged in * * * full-time National Guard duty." 38 U.S.C. 4303(16). Title 32 of the U.S. Code governs the National Guard. Title 32 defines "[f]ull-time National Guard duty" to mean "training or other duty" performed by an Army National Guard member in the member's "status as a member of the National Guard of a State * * * *under section 316, 502, 503, 504, or 505* of [Title 32] for which the member is entitled to pay from the United States." 32 U.S.C. 101(19) (emphasis added). Plaintiff's service in the Illinois Army National Guard counter-drug task force satisfies the three elements of that definition.

First, plaintiff's service in the counter-drug task force was "duty" performed in his "status as a member of the National Guard of a State," namely, Illinois. 32 U.S.C. 101(19).

⁴ The United States takes no position on the merits of plaintiff's USERRA claim.

Second, plaintiff's deployment orders state that he was called up under Section 502(f) of Title 32 to serve "Full-time National Guard Duty" in the counter-drug task force. Doc. 20-1, at 2; see 32 U.S.C. 112(b) (providing that National Guard members may "be ordered to perform full-time National Guard duty under section 502(f) of [Title 32] for the purpose of carrying out drug interdiction and counter-drug activities"). Duty performed under Section 502(f) qualifies as "[f]ull-time National Guard duty." 32 U.S.C. 101(19). As such, the First Circuit has recognized that participation in a state drug interdiction program under 32 U.S.C. 112 and 502(f) constitutes "the performance of full-time National Guard duty." *Tirado-Acosta v. Puerto Rico Nat'l Guard*, 118 F.3d 852, 856 (1st Cir. 1997) (internal quotation marks omitted).

Third, National Guard members performing duty under Section 502(f) are "entitled to pay from the United States" for that service. 32 U.S.C. 101(19); see 32 U.S.C. 502(f) (providing that a National Guard member is entitled to "the pay and allowances provided by law" for duty performed under section 502(f) unless he consents to perform such duty "without pay and allowances"). Indeed, plaintiff alleges in his amended complaint that he was both entitled to, and received, pay from the United States Army for his service in the Illinois counter-drug task force. See Doc. 36, at 6.

Thus, because plaintiff's service in the Illinois counter-drug task force constituted "[f]ull-time National Guard duty" as that term is defined in Title 32, 32 U.S.C. 101(19), it qualified as a "uniformed service" within the meaning of

USERRA, 38 U.S.C. 4303(16). See also 20 C.F.R. 1002.5(l) (“Service in the uniformed services includes * * * National Guard duty under Federal statute.”). Accordingly, plaintiff was entitled to USERRA’s protection while serving in the state counter-drug task force. 38 U.S.C. 4311(a).

B. The District Court’s Analysis Was Erroneous In Several Respects

The district court did not perform the statutory analysis outlined above to determine whether plaintiff’s service constituted “full-time National Guard duty” and, consequently, a “uniformed service” protected by USERRA. Instead, citing a DOL USERRA regulation, the district court attempted to answer the more abstract question whether plaintiff’s service in the counter-drug task force was “under state control” or “federal control.” Doc. 32, at 7; see Doc. 32 at 8 (citing 20 C.F.R. 1002.57(b)). Finding that plaintiff’s service “was clearly under the authority of the State of Illinois” (Doc. 32, at 8)—namely, because his orders came from the Illinois Adjutant General and he was performing a state criminal-law function—the district court concluded that it was not protected by USERRA. In doing so, the district court erred in several respects.

1. First and foremost, the district court ignored the plain language of the statute. As discussed above, USERRA defines “uniformed services” to include “full-time National Guard duty,” 38 U.S.C. 4303(16), and plaintiff’s service in the counter-drug task force under 32 U.S.C. 502(f) fell squarely within the statutory definition of “full-time National Guard duty” provided in 32 U.S.C. 101(19). Thus, whether plaintiff’s full-time National Guard duty in the counter-drug task force is

deemed “under state control” or “federal control” is beside the point, as Congress expressly extended USERRA’s protection to plaintiff’s service.

The DOL regulation on which the district court relied, 20 C.F.R. 1002.57, does not provide otherwise; to the contrary, that regulation is consistent with USERRA’s text. As the district court noted, the regulation explains that USERRA protects “only Federal National Guard service,” 20 C.F.R. 1002.57, not “service under authority of State law,” 20 C.F.R. 1002.57(b). But under subsection (a), the regulation defines “[s]ervice under Federal authority” to include not only “active duty performed under Title 10” but also “duty under Title 32,” including “active duty for training, inactive duty training, or *full-time National Guard duty*.” 20 C.F.R. 1002.57(a) (emphasis added); see also 20 C.F.R. 1002.5(l). Thus, consistent with USERRA’s statutory definition of “uniformed services,” the regulation recognizes that USERRA protects “full-time National Guard duty” under Title 32, including plaintiff’s duty under 32 U.S.C. 502(f)—in other words, that such duty is deemed “[s]ervice under Federal authority” for purposes of USERRA. 20 C.F.R. 1002.57(a).

2. Second, the district court incorrectly concluded (see Doc. 32, at 6-7; Doc. 55, at 3) that deeming plaintiff’s service in the Illinois counter-drug task force to be covered by USERRA would run afoul of the Posse Comitatus Act. The Posse Comitatus Act prohibits the use of “any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws” except where “expressly authorized by

the Constitution or Act of Congress.”⁵ 18 U.S.C. 1385. A National Guard member, however, is not “part of the Army,” *ibid.*, unless he has been ordered into active military service under Title 10. See 10 U.S.C. 12401, 12405; *Clark v. United States*, 322 F.3d 1358, 1368 (Fed. Cir. 2003) (“National Guard members are only serving in the federal military when they are called into formal military service.”); see generally *Perpich v. Department of Def.*, 496 U.S. 334, 343-347 (1990). Accordingly, a National Guard member serving in a Title 32 status, as plaintiff was, is not subject to the Posse Comitatus Act. See *Gilbert v. United States*, 165 F.3d 470, 473-474 (6th Cir. 1999); *United States v. Hutchings*, 127 F.3d 1255, 1258 (10th Cir. 1997); *United States v. Benish*, 5 F.3d 20, 25-26 (3d Cir. 1993).⁶

3. The district court likewise erred in concluding that Section 112’s language—namely, its qualification that National Guard members may participate in drug interdiction programs only when they are “not in Federal service,” 32 U.S.C. 112(a)(1) and 112(c)(2)—dictates that plaintiff’s service in the Illinois counter-drug

⁵ A posse comitatus is a “group of citizens who are called together to help the sheriff keep the peace or conduct rescue operations.” *Posse Comitatus*, Black’s Law Dictionary (10th ed. 2014).

⁶ See also *Use of the National Guard to Support Drug Interdiction Efforts in the District of Columbia*, 13 Op. OLC 91, 92 (Apr. 4, 1989) (Office of Legal Counsel opinion concluding that National Guard members’ participation in state-level drug interdiction efforts does not violate the Posse Comitatus Act), available at <https://www.justice.gov/file/24191/download>; National Guard Regulation 500-5, *National Guard Domestic Law Enforcement Support and Mission Assurance Operations*, App. D, at 40 (Aug. 18, 2010) (stating that the Posse Comitatus Act does not apply to National Guard members “when serving in a state active duty or Title 32 status”), available at <https://go.usa.gov/xE8f9>; *Posse Comitatus Act*, Black’s Law Dictionary (10th ed. 2014) (“The Act does not usu[ally] apply to members of * * * the National Guard.”).

task force could not qualify as “service under Federal authority” for USERRA purposes. See Doc. 33, at 6-7; Doc. 55, at 3. The phrase “in Federal service” in Section 112 refers to National Guard members called into active federal military service under Title 10. See, *e.g.*, 10 U.S.C. 12401 (noting that National Guard members “are not in active Federal service except when ordered thereto under law”). As the district court correctly noted, the “obvious reason” for including this limitation in Section 112 was “to comply with the Posse Comitatus Act.” Doc. 55, at 3; see *Hutchings*, 127 F.3d at 1258; *Tirado-Acosta*, 118 F.3d at 853; H.R. Rep. No. 989, 100th Cong., 2d Sess. 455 (1988) (commenting on a prior version of the bill enacting Section 112). But nothing in Section 112 suggests that National Guard members performing federally-funded state drug interdiction work cannot be performing “[s]ervice under Federal authority” for USERRA purposes. 20 C.F.R. 1002.57(a). To the contrary, Section 112 expressly provides that a National Guard member may “be ordered to perform full-time National Guard duty under section 502(f)” to carry out a counter-drug plan, 32 U.S.C. 112(b)(1)—a type of duty that USERRA plainly covers, 38 U.S.C. 4303(16), 4311(a).⁷

Indeed, both Congress and the courts have recognized the federal nature of Title 32 duty in other contexts. For example, National Guard members engaged in full-time National Guard duty under Title 32 are statutorily designated as federal

⁷ Congress added the reference to Section 502(f) to Section 112 in 1996, two years after USERRA was enacted, to “clarify the legal status of National Guard personnel participating in” state counter-drug activities. H.R. Rep. No. 450, 104th Cong., 2d Sess. 840 (1996); see National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 426.

employees for purposes of the Federal Tort Claims Act. 28 U.S.C. 2671; see *Stanford v. United States*, 992 F. Supp. 2d 764, 778 (E.D. Ky. 2014).

Likewise, courts have held that National Guard members serving under orders issued pursuant to 32 U.S.C. 502(f) are federal employees for purposes of the *Feres* doctrine of intra-military immunity. See *Matreale v. New Jersey Dep't of Mil. & Veterans Affairs*, 487 F.3d 150, 154-157 (3d Cir. 2007), cert. denied, 552 U.S. 1099 (2008); cf. *United States ex rel. Conover v. Anthony*, 781 F. Supp. 2d 257, 260-264 (D. Md. 2011) (holding that Air National Guard members training under 32 U.S.C. 502 were federal employees for purposes of the False Claims Act's intra-military immunity provision).

And one district court recently held that National Guard members performing full-time National Guard duty in a state counter-drug operation under 32 U.S.C. 112 and 502(f) were federal employees, and thus that the United States, rather than the state National Guard, was the correct defendant in a 42 U.S.C. 1983 and state-law employment discrimination lawsuit. *Cordry-Martinez v. Oregon Army Nat'l Guard*, No. 6:17-cv-663, 2017 WL 4778591, at *2 (D. Or. Oct. 20, 2017) (citing *Matreale*); cf. 32 U.S.C. 715 (providing that the United States may settle claims for personal injury or death caused by a National Guard member performing full-time National Guard duty under Title 32). The district court's conclusion that National Guard members engaged in Title 32 duty cannot be federal employees for USERRA purposes creates unnecessary tension with these settled areas of law.

4. Finally, the district court's conclusion significantly undermines USERRA's protections and could potentially impact the willingness of individuals, who do not control their deployment assignments, to serve in the National Guard. Congress enacted USERRA for the express purpose of "encourag[ing] noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service." 38 U.S.C. 4301(a)(1). Taken to its logical conclusion, the district court's reasoning could be read to exclude from USERRA's coverage a large swath of National Guard service that Congress expressly intended to protect—namely, any full-time National Guard duty under Title 32 that is federally funded but under state control.

In short, although National Guard members performing full-time National Guard duty under Title 32 may be under state control, they are paid by the federal government and deemed to be performing "[s]ervice under Federal authority," 20 C.F.R. 1002.57(a), for purposes of USERRA and its implementing regulations. Congress determined that National Guard members serving full-time National Guard duty under 32 U.S.C. 502(f), as plaintiff was here, are entitled to USERRA's protections against employment discrimination. 38 U.S.C. 4303(16), 4311. The district court erred in concluding otherwise.

CONCLUSION

This Court should reverse the judgment of the district court.

Respectfully submitted,

KATE S. O'SCANNLAIN
Solicitor of Labor
U.S. Department of Labor
Office of the Solicitor, S-2002
200 Constitution Avenue, N.W.
Washington, D.C. 20210

JOHN R. LAUSCH, JR.
United States Attorney for the
Northern District of Illinois
219 S. Dearborn Street, 5th Floor
Chicago, IL 60604

BERNARD E. DOYLE
Attorney
National Guard Bureau
Office of Chief Counsel
111 S. George Mason Drive, Bldg. 2
Arlington, VA 22204

ERIC S. DREIBAND
Assistant Attorney General

s/ Christine A. Monta
THOMAS E. CHANDLER
CHRISTINE A. MONTA
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 11403
Washington, D.C. 20044-4403
(202) 514-2195

CERTIFICATE OF COMPLIANCE

I certify that the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND URGING REVERSAL:

(1) complies with Circuit Rule 29 because it contains 5097 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface requirements of Circuit Rule 32(b) and Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word, in 12-point Century Schoolbook font.

s/ Christine A. Monta
CHRISTINE A. MONTA
Attorney

Dated: June 27, 2019

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2019, I filed a true and correct copy of the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND URGING REVERSAL with the United States Court of Appeals for the Seventh Circuit using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Christine A. Monta
CHRISTINE A. MONTA
Attorney