

No. 18-3609

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**UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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**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.**

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**Appeal from the United States District Court  
For the Northern District of Illinois.**

**Case No. 17-CV-007938**

**The Honorable Judge Harry D. Leinenweber**

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**BRIEF AND REQUIRED SHORT APPENDIX OF PLAINTIFF-APPELLANT**

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**Maher Legal Services PC  
John N. Maher, Esq.  
Attorney for the  
Plaintiff-Appellant**

26 South 3<sup>rd</sup> Street, Number 68

Geneva, Illinois 60134

Tel: +1 (708) 468-8155

Email: [johnmaher@maherlegalservices.com](mailto:johnmaher@maherlegalservices.com)

**ORAL ARGUMENT REQUESTED**

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Appellate Court No: 18-3609

Short Caption: Mueller v. Joliet

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Attorney's Signature: John N. Maher

Date: 04/26/2019

Attorney's Printed Name: John N. Maher

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ☒ No ☐

Address: Maher Legal Services PC

7 East Main Street, Number 1053 St. Charles, Illinois 60174

Phone Number: (708) 468-8155

Fax Number: \_\_\_\_\_

E-Mail Address: johnmaher@maherlegalservices.com

**STATEMENT REGARDING ORAL ARGUMENT**

Oral arguments would be helpful in this case in order for the Court to fully understand the legal errors involving the District Court's granting of Defendants' motion to dismiss Plaintiff's USERRA claim, the legal issue(s) involved, and the trial court's analysis of all of these.

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### **JURISDICTIONAL STATEMENT**

Jurisdiction in the District Court was based on 28 U.S.C. § 1331, federal question, as Plaintiff-Appellant David Mueller (“Sergeant Mueller”) brought suit against the City of Joliet, and Brian Benton and Edgar Gregory, in their individual capacities for violations of a Federal statute, the Uniformed Service Members Employment and Reemployment Rights Act, 38 U.S.C. § 4311 (“USERRA”) (Count I) and violations of the Illinois Military Leave of Absence Act, 5 ILCS 325/1 (“IMLAA”) (Count II).

On May 2, 2018, the District Court, Judge Leinenweber, granted Defendants’ motion to dismiss Sergeant Mueller’s USERRA claim, and dismissed Sergeant Mueller’s IMLAA claim for lack of subject matter jurisdiction. (Dkt. 32.) The order granting Defendants’ motion to dismiss did not specify if it was with or without prejudice, and pursuant to Federal Rule of Civil Procedure Rule 41(a)(2), “[u]nless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.”

On May 30, 2018, Sergeant Mueller timely filed a motion for leave to file his First Amended Complaint and to reconsider the District Court’s Order of May 2, 2018. (Dkt. 33.) On June 7, 2018, the District Court granted Plaintiff’s motion for leave to file his First Amended Complaint (Dkt. 35), which Plaintiff filed later that same day (Dkt. 36).

Defendants again moved to dismiss Sergeant Mueller’s First Amended Complaint (Dkt. 37) and filed a response to Sergeant Mueller’s motion to reconsider (Dkt. 43). Sergeant Mueller filed a combined response to Defendants’ motion to dismiss and reply



in support of the motion to reconsider. (Dkt. 47.) Defendants filed a motion to strike the declaration of Colonel Robert C. Roth (Dkt. 48), to which Sergeant Mueller filed his response (Dkt. 50).

On November 16, 2018, the District Court denied Sergeant Mueller's motion to reconsider, granted Defendants' motion to dismiss Plaintiff's First Amended Complaint, and denied Defendants' motion to strike. (Dkt. 55.) On November 16, 2018, the District Court entered judgment in favor of all Defendants. (Dkt. 56.) Sergeant Mueller then timely filed his notice of appeal on December 10, 2018, and all necessary fees were paid.

This appeal addresses the District Court's orders granting Defendants' motion to dismiss Sergeant Mueller's Complaint and First Amended Complaint.

**STATEMENT OF THE ISSUES**

1. Whether the District Court erred in dismissing Plaintiff Sergeant David Mueller's USERRA claim on a motion to dismiss, failing to consider the fact that Plaintiff's military service order was for Full-Time National Guard Duty, which is specifically covered in the plain language of a Federal statute, USERRA.

2. Whether the District Court erred in dismissing Plaintiff Sergeant David Mueller's USERRA claim, finding that the Posse Comitatus Act applied to Plaintiff's Title 32 Orders, and that therefore, Plaintiff was not protected by USERRA.

3. Whether the District Court erred in dismissing Plaintiff Sergeant David Mueller's USERRA claim, holding that Plaintiff was not protected because he was not in "federal service," even though military service members who are not in federal service but are under "Federal authority," *i.e.*, Title 32, are protected under USERRA.

### **STATEMENT OF THE CASE**

Plaintiff-Appellant Sergeant David Mueller filed this action for violations of the Uniformed Service Members Employment and Reemployment Rights Act, 38 U.S.C. § 4311 (“USERRA”) (Count I) and violations of the Illinois Military Leave of Absence Act, 5 ILCS 325/1 (“IMLAA”) (Count II). The District Court had proper jurisdiction based on the existence of a federal question pursuant to 28 U.S.C. §§ 1331 and 1343. (Dkt. 1.)

Defendants filed a motion to dismiss Sergeant Mueller’s Complaint, which the District Court granted on May 2, 2018. (Dkt. 32.) Sergeant Mueller filed a motion for leave to file an amended Complaint and a Motion to Reconsider. (Dkt. 33.) The District Court granted Sergeant Mueller’s motion for leave to file Sergeant Mueller’s First Amended Complaint. (Dkt. 35.)

Plaintiff-Appellant Sergeant Mueller’s First Amended Complaint set out among the following facts. Sergeant Mueller was hired by the City of Joliet Police Department as a police officer on January 3, 1995. (Dkt. 36 ¶ 9.) Officer Mueller was subsequently promoted to Sergeant. (Dkt. 36 ¶ 10.) Sergeant Mueller is currently employed as a Sergeant of Operations. (Dkt. 36 ¶ 11.)

On or about August 15, 2015, Sergeant Mueller re-enlisted in the National Guard to offer military service to our Country, in addition to public service to the citizens of Joliet, Illinois. (Dkt. 36 ¶ 12.) Sergeant Mueller had previously served in the active duty Army from approximately 1998 to 2005. (Dkt. 36 ¶ 12.) Since August 15, 2015 to the

present, Sergeant Mueller has continued to serve in the National Guard, being called to active duty service multiple times over the years. (Dkt. 36 ¶ 13.)

At all times relevant, Sergeant Mueller's United States military identification card shows that Sergeant Mueller was in the "Uniformed Services" for the "United States Government," carrying a "Geneva Conventions Identification Card," with a "United States Department of Defense (DOD) identification number." (Dkt. 36 ¶ 14; Dkt. 33-3.)

In or about March 2016, Sergeant Mueller received notice from the National Guard advising him of a job opening in the full-time National Guard Counter Drug Task Force (FTNGD-CD). (Dkt. 36 ¶ 24.) Sergeant Mueller took all the necessary steps to apply for the position on the task force, including filling out an application and interviewing for the position. (Dkt. 36 ¶ 25.) On or about March 23, 2016, Sergeant Mueller received orders authorized by the federal government, detailing his mobilization orders and to report for active duty to the full-time National Guard Counter Drug Task Force (FTNGD-CD). (Dkt. 36 ¶ 26.) Sergeant Mueller's military orders were that he would serve "Full-Time National Guard Duty" from May 9, 2016 through September 30, 2016. (Dkt. 36 ¶ 27.) Sergeant Mueller's military orders clearly state that they are authorized under federal authority pursuant to Title 32 USC Subsection 112, 502(f), a federal statute. (Dkt. 36 ¶ 27.) His orders also stated that his travel was governed by the "Joint Federal Travel Regulation," and invoked guidance to secure travel through the "Defense Travel Service" and U.S. "Government contracted" carriers. (Dkt. 41.)

As Sergeant Mueller alleged in his First Amended Complaint, Title 32 was expanded as a result of the terror attacks that occurred on September 11, 2001. As we know, the attacks of September 11 occurred within the geographic boundaries of the sovereign states of New York, Virginia, and Pennsylvania. No one would argue that the September 11 attacks were merely those states' internal domestic emergencies or that the attackers aimed to attack these individual states; they were national emergencies and attacks upon our collective, and United States. (Dkt. 36 ¶ 29.)

Since the terror attacks of September 11, the National Guard had been federalized pursuant to the amendments to Title 32, and as such, Sergeant Mueller's orders were under federal authority, and thus covered by USERRA. (Dkt. 36 ¶ 30.) Sergeant Mueller's Orders clearly state he was on full-time National Guard duty Counter-Drug (FTNGD-CD), under the authority of Title 32, U.S.C., Subsections 112 and 502(f). (Dkt. 36 ¶ 31.) Sergeant Mueller's military deployment orders were under Federal authority, and thus, covered under USERRA. Sergeant Mueller was paid solely through the Federal government for his deployment in the FTNGD-CD. (Dkt. 36 ¶ 33.)

Sergeant Mueller's military orders contain an "accounting classification" or fund citation – enlisted pay and enlisted allowances – on the face of the orders. The numbers beginning with "2162060" translates into: "21," which is the Department of the Army, "6," which is Federal Fiscal Year 2016, and "2060," which is Army National Guard pay and allowances. (Dkt. 36 ¶ 34.) Sergeant Mueller was paid by the United States Army,

through the Federal government and Federal authority, through congressionally authorized and appropriated Federal dollars for this Title 32 duty. (Dkt. 36 ¶ 35.) Sergeant Mueller was paid for his military service for the entire time by the federal government. (Dkt. 36 ¶ 36.)

Upon receiving the Orders, Sergeant Mueller immediately advised Defendants, through his civilian chain of command, of his mobilization orders and his upcoming active duty with the full-time National Guard. (Dkt. 36 ¶ 37.) On April 4, 2016, Defendant Benton sent a memorandum to Police Department staff alerting them to Sergeant Mueller's upcoming leave of absence due to active military duty. (Dkt. 36 ¶ 38.)

On May 9, 2016, Sergeant Mueller began his active duty with the full-time National Guard Counter Drug Task Force (FTNGD-CD). (Dkt. 36 ¶ 39.) On June 15, 2016, Defendant Benton sent an email to Sergeant Mueller stating, in relevant part, that during Sergeant Mueller's military leave of absence, Sergeant Mueller would be placed on an "unpaid leave of absence," that he would have to use his benefit time for his military service, and that he would "not continue to accrue leave time, such as vacation or personal days." (Dkt. 36 ¶ 40.) As alleged in the First Amended Complaint, Sergeant Mueller was forced to choose between being in an "unpaid leave" status, or use his accrued benefit time, including vacation and personal days, in violation of USERRA and in violation of the IMLAA. (Dkt. 36 ¶ 41.)

Due to Defendants' failure to compensate Sergeant Mueller for the difference between his military pay and his Police Department salary (commonly referred to as "differential pay"), and depriving Sergeant Mueller of benefits to which he is entitled by Federal and state law, Sergeant Mueller was forced to request early release from his active duty with the full-time National Guard in order to return to his position at the Police Department and have his pay reinstated. Sergeant Mueller also lost pension benefits with the full-time National Guard, paid by the United States Government, through the DOD, as a result. (Dkt. 36 ¶ 42.)

On August 1, 2016, Sergeant Mueller returned to full-time civilian status with the Joliet Police Department and resigned from the full-time National Guard Counter Drug Task Force. (Dkt. 36 ¶ 43.) From his active duty employment on May 9, 2016, to his return to full-time status with the Police Department on August 1, 2016, Sergeant Mueller was forced to use 120 hours of accrued time and benefits. (Dkt. 36 ¶ 44.)

On or about April 6, 2016, after being informed by Sergeant Mueller that he was ordered to active duty on May 9, 2016, Defendant Gregory called Sergeant Mueller into his office and yelled at and belittled Sergeant Mueller stating that "he was f\_cking over the Department" by leaving and trying to "double dip on pay." (Dkt. 36 ¶ 51.) Sergeant Mueller alleges that Defendants' discrimination and retaliation of Sergeant Mueller based on his military service continued even after he was ordered to FTNGD-CD. (Dkt. 36 ¶ 52.) On May 6, 2016, during the Staff and Command Graduation, Defendant

Gregory told Sergeant Mueller in front of other Police Department officers that Sergeant Mueller was screwing over the Department by leaving them one supervisor short. (Dkt. 36 ¶ 53.)

Sergeant Mueller also alleged that Defendants did not treat similarly situated non-military service members in the same way that Defendants treated him. For example, Defendants paid another officer, Jay Sanders, while he was on administrative leave (non-military related) for at least 9 months, despite the fact that Sanders had criminal charges pending against him, wherein it was alleged that he was being investigated for criminal sexual abuse of a minor. Defendants did not force Sanders to use his vacation or benefit time and paid him while he was on an administrative leave. Defendants also allowed Sanders to accrue benefit time, including vacation time, while he was on administrative leave with pay. (Dkt. 36 ¶ 59.)

Sergeant Mueller complained that Defendants were violating USERRA and the IMLAA and provided Defendants with a copy of both statutes. Despite Sergeant Mueller's complaints that Defendants were violating USERRA and the IMLAA, Defendants did not change its policy or practice of violating USERRA and the IMLAA. (Dkt. 36 ¶¶ 55-58.)

Sergeant Mueller alleged in his Complaint and First-Amended Complaint that Sergeant Mueller's military active duty status and his decision to re-enlist with the National Guard were was a motivating factor in Defendants' decision to deny Sergeant



Mueller his benefits and compensation, conditions of employment, and to discriminate and retaliate against Sergeant Mueller. Defendants' anti-military animus, that is, conduct in denying Sergeant Mueller his accrual of vacation days and benefit time, forcing Sergeant Mueller on unpaid leave, and denying Sergeant Mueller his required compensation during his active duty compelling his early release from active duty, are direct violations of USERRA and IMLAA. (Dkt. 36 ¶ 54.)

Defendants moved to dismiss Sergeant Mueller's First Amended Complaint (Dkt. 37) and filed a response to Sergeant Mueller's motion to reconsider (Dkt. 43). Sergeant Mueller filed a combined response to Defendants' motion to dismiss and reply in support of the motion to reconsider. (Dkt. 47.) On November 16, 2018, the District Court denied Sergeant Mueller's motion to reconsider, granted Defendants' motion to dismiss Sergeant Mueller's First Amended Complaint, and denied Defendants' motion to strike. (Dkt. 55.) On November 16, 2018, the District Court entered judgment in favor of all Defendants. (Dkt. 56.)

### **SUMMARY OF ARGUMENT**

This Court reviews *de novo* the District Court's grant of a Rule 12(b)(6) motion to dismiss. Here, because the District Court erred in dismissing Sergeant Mueller's Complaint and First Amended Complaint, where Sergeant Mueller has stated a cause of action under USERRA, this Court should reverse the District Court's decision dismissing Sergeant Mueller's Complaint and First Amended Complaint, and remand the case with instructions so that Sergeant Mueller may proceed with discovery.

Congress chose words that clearly indicate its intent for the Uniformed Service Members Employment and Reemployment Rights Act, 38 U.S.C. § 4311 ("USERRA") to protect civilian employees mobilized to active duty service in the full-time National Guard. USERRA is to be liberally construed for the benefit of those who left private life to serve their country. The statutory definitions make USERRA applicable to Sergeant Mueller. The definitions of "service in the uniformed services" includes "full-time National Guard duty," which is exactly what Plaintiff Sergeant Mueller's orders entailed, "Full Time National Guard Duty," in the counter drug unit.

"Full-time National Guard Duty" has a distinct meaning, which is set forth in Title 32. Title 32 allows the Governor, with the approval of the President or the Secretary of Defense, to order a member to duty for operational Homeland Defense activities in accordance with U.S. Code (USC): 32 U.S.C. § 502(f). Sergeant Mueller's orders themselves reflect not only Title 32, but also Section 502(f), which is clearly under

Federal authority. To suggest that any orders, including Sergeant Mueller's orders, to Full-time National Guard Duty" (FTNGD) do not fall under USERRA, not only contradicts the plain language of USERRA, but would also deprive all other 1.1 million National Guard service members, who could be called at any time to Full-time National Guard Duty, protection under USERRA. Congress did not intend such a result.

The District Court erred in finding that the Posse Comitatus Act ("PCA") applied, dismissing Sergeant Mueller's original Complaint. The District Court heavily relied on Defendants' misplaced and erroneous argument that the PCA applied and was proof that Sergeant Mueller was under state authority in dismissing Sergeant Mueller's Complaint. Defendants later abandoned this argument, acknowledging that the PCA was a red herring, when it was pointed out in Sergeant Mueller's motion to reconsider that Title 32 was amended after the terrorist attacks of 9/11 to provide that the PCA does not apply. The PCA does not apply to Title 32 Orders. By authorizing the States to place National Guard personnel in full-time National Guard duty under 32 U.S.C. § 502(f) to carry out drug interdiction and counter-drug activities, 32 U.S.C. § 112(b) ensures that it is absolutely clear that PCA does not restrict the National Guard from carrying out those activities. The new authority under Title 32 for the operational use of the National Guard ultimately allows for DOD funding of federally trained and uniformed National Guard personnel to enforce domestic law, which would otherwise be precluded by the PCA if they instead served in their federal status.

The District Court further erred in failing to understand the distinction between “federal authority,” *e.g.*, Title 32, and “federal service,” Title 10. Federal authority is protected under USERRA, even if not in federal service. Sergeant Mueller’s full-time National Guard Duty in the counter-drug unit (FTNGD-CD) *was*, in fact, under federal authority, which is protected under USERRA. When National Guard service members are in Title 32 status, which is the case here, they are under Federal authority, which allows the Governor, with the approval of the President or the Secretary of Defense, to order a member to duty for operational Homeland Defense activities in accordance with 32 U.S.C. § 502(f). The District Court erred in its suggested holding that Sergeant Mueller must be in “federal service” in order to be protected under USERRA.

The District Court further erred in creating a carve-out exception for FTNGD-CD as not being protected under USERRA. The plain language of the statute does not provide for any exceptions, but covers FTNGD. There is also no case law supporting the argument that USERRA distinguishes between certain types of FTNGD and others. Sergeant Mueller’s orders to the FTNGD-CD were pursuant to Title 32 and 502(f), and as such, Sergeant Mueller is protected by USERRA. As such, the District Court’s decision dismissing Sergeant Mueller’s Complaint and First Amended Complaint should be reversed.

## ARGUMENT

### **I. STANDARD OF REVIEW**

This Court reviews *de novo* the District Court's grant of a Rule 12(b)(6) motion to dismiss. *Regains v. City of Chicago*, 918 F.3d 529, 533 (7th Cir. 2019), *as amended on denial of reh'g* (Apr. 17, 2019). In construing the Complaint, the court of appeals accepts all well-pleaded facts as true and draws all reasonable inferences in the plaintiff's favor. *Id.* Here, because the District Court erred in dismissing Sergeant Mueller's Complaint and First Amended Complaint, where Sergeant Mueller has stated a cause of action under USERRA, this Court should reverse the District Court's decision dismissing Sergeant Mueller's Complaint and First Amended Complaint, and remand the case with instructions so that Sergeant Mueller may proceed with discovery.

### **II. SERGEANT MUELLER'S TITLE 32 ORDERS TO THE FULL-TIME NATIONAL GUARD ARE PROTECTED UNDER THE PLAIN LANGUAGE OF USERRA**

Congress chose words that clearly indicate its intent for the Uniformed Service Members Employment and Reemployment Rights Act, 38 U.S.C. § 4311 ("USERRA") to protect civilian employees mobilized to active duty service in the full-time National Guard. "[C]ourts have universally held that [USERRA and] the veterans' reemployment statute is 'to be liberally construed for the benefit of those who left private life to serve their country.'" *Leib v. Georgia-Pac. Corp.*, 925 F.2d 240, 245 (8th Cir. 1991), citing *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); *Shadle v. Superwood Corp.*, 858 F.2d 437, 439 (8th Cir. 1988); *Dyer v. Hinky Dinky, Inc.*, 710 F.2d 1348, 1350 (8th Cir. 1983);

*Goggin v. Lincoln St. Louis*, 702 F.2d 698, 704 (8th Cir. 1983). The Supreme Court held that that the veterans' reemployment rights statute, the precursor to USERRA, "clearly manifests a purpose and desire on the part of Congress to provide as nearly as possible that persons called to serve their country in the armed forces should, upon returning to work in civilian life, resume their old employment without any loss because of their service to their country." *Accardi v. Pennsylvania R.R.*, 383 U.S. 225, 228 (1966); *Leib*, 925 F.2d at 245.

The statutory definitions make USERRA applicable to Sergeant Mueller. USERRA provides that:

A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service *in a uniformed service* shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

38 U.S.C. § 4311(a) (emphasis added). "[S]ervice in the uniformed services" is defined under the statute as "... the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, *full-time National Guard duty*. . . ." 38 U.S.C. § 4303(13). The federal statute further defines "uniformed services" as the "... Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or *full-time National Guard duty*. . .

." *Id.* at (16). Congress made its intent clear by the plain language of the statute that all "full-time National Guard duty" ("FTNGD")<sup>1</sup> are protected under USERRA. Congress also made its intent clear when it included language that USERRA's provisions should be interpreted liberally to afford protection to the civilian mobilizing to active duty. *See, e.g., Leib v. Georgia-Pac. Corp.*, 925 F.2d at 245.

Sergeant Mueller's orders clearly state: "You are ordered to *Full Time National Guard Duty*." (Dkt. 36 ¶ 31) (emphasis added). Full-time National Guard Duty is covered under the definitions of "uniformed services" under USERRA. USERRA protects all Title 32 orders under the plain language of the Act and does not carve out an exclusion for Title 32 FTNGD-CD Orders. Accordingly, pursuant to *de novo* review, the District Court failed to give the statute its plain and ordinary meaning.

Sergeant Mueller also alleges in his First Amended Complaint that "Plaintiff's Orders clearly state he was on full-time National Guard duty Counter-Drug (FTNGD-CD), under the authority of Title 32, U.S.C., Subsections 112 and 502(f)" (Dkt. 36 ¶ 31), that "Plaintiff was paid by the United States Army, through the Federal government and Federal authority, for this Title 32 duty," and that "Plaintiff was paid for his military service for the entire time through the federal government." (Dkt. 36 ¶¶ 35, 36).

If Sergeant Mueller's orders were under State authority, his orders would read "SAD" – State Active Duty – and not Title 32. *See, e.g.,* Dkt. 33-4, Been There, Doing That

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<sup>1</sup> As discussed below, FTNGD is distinguished from State Active Duty ("SAD"). Sergeant Mueller was ordered to FTNGD and not ordered to SAD (*see* Dkt. 41).

in a Title 32 Status. The National Guard Now Authorized to Perform Its 400-Year Old Domestic Mission in Title 32 Status, MAY 2008, THE ARMY LAWYER, DA PAM 27-50-420, *Major Christopher R. Brown* at 34 (“National Guard members serving in SAD status are protected by state liability laws. In the alternative, state controlled National Guard members serving in a Title 32 status are covered by the provisions and protections of the Federal Tort Claims Act.”).

Under Title 32, which applies to mission types of “Training, Other Duty; Counterdrug, and CST,” USERRA applies. (*See* Dkt. 33-2.) Another simple explanation of the distinctions between SAD, Title 32 Full-time National Guard, and Title 10 Active-Duty can also be found at <https://www.ngaus.org/sites/default/files/Guard%20Statues.pdf>; *see also* Dkt. 47-2.

“Full-time National Guard Duty” has a distinct meaning, which is set forth in Title 32. “Title 32 allows the Governor, *with the approval of the President or the Secretary of Defense*, to order a member to duty for operational Homeland Defense activities in accordance with . . . U.S. Code (USC): 32 U.S.C. § 502(f). . . .” *Id.* (emphasis added). Title 32 U.S.C. § 502(f) “allows members of the National Guard to be ordered to full-time National Guard duty to perform operational activities. It was used for the Airport Security mission after 9/11 and also for Hurricane Katrina and Rita response effort.” *Id.* Even Wikipedia explains that “Title 32 activation can only be done *by the President or*



*SECDEF* with the approval and consent of the state Governor,” [https://en.Wikipedia.org/wiki/National\\_Guard\\_of\\_the\\_United\\_States](https://en.Wikipedia.org/wiki/National_Guard_of_the_United_States), thus, under Federal authorities.

As Defendants conceded before the District Court, “[i]n 2006, ‘other duty’ was again expanded to encompass ‘[s]upport of operations or missions undertaken by the member’s unit at the request of the President or Secretary of Defense,’” and that “all of the aforementioned Title 32 duties are federally authorized, in the sense that when a National Guard member is ordered to attend training or perform homeland security duties, he is doing so under ‘Federal authority,’ *i.e.*, pursuant to a legal obligation imposed by federal law.” (Dkt. 43 at 7, citing 32 U.S.C. § 502(f)(2)(A).)

Sergeant Mueller’s orders themselves reflect not only Title 32, but also Section 502(f), which is clearly under Federal authority, and not State authority. To suggest that any orders, including Sergeant Mueller’s orders, to “Full-time National Guard Duty” (FTNGD) do not fall under USERRA, not only contradicts the plain language of USERRA, but would also deprive all other 1.1 million National Guard service members, who could be called at any time to Full-time National Guard Duty, protection under USERRA. There is no indication that Congress intended such a result.

Indeed, to carve out an exception in this instance would also deprive volunteer service members of protections that were intended under USERRA and dissuade them from active service. It is these service members that have, for example, assisted civilian law enforcement agencies in seizing \$8.4 billion worth of illicit drugs, supported 24,880

cases nationwide, and contributed to dismantling more than 2,866 drug trafficking organizations just in 2015. (*See* Dkt. 47-1, Exhibit 1, Declaration of Colonel Roth ¶ 10.)

As is clear from the amendments to USERRA and other related statutes after 9/11, it was the intent of Congress to protect these military service members to ensure a volunteer ready reserve to protect us and Our Nation. In sum, USERRA applies to full-time National Guard members on active duty and to Sergeant Mueller, and the District Court erred in finding no federal question jurisdiction.

### **III. THE DISTRICT COURT ERRED IN HOLDING THAT THE POSSE COMITATUS ACT APPLIED TO SERGEANT MUELLER'S MILITARY ORDERS**

The District Court erred in finding that the Posse Comitatus Act ("PCA") applied, dismissing Sergeant Mueller's original Complaint. (Dkt. 32 at 6.) In Defendants' first motion to dismiss, Defendants relied heavily on the PCA, arguing that "taking Plaintiffs interpretation of Title 32 to its logical extreme would mean that the federal government likely violated the [PCA] by having Plaintiff engage in law enforcement activities while allegedly a federalized National Guard member." (Dkt. 24 at 5.) The District Court heavily relied on Defendants' misplaced and erroneous argument that the PCA applied and was proof that Sergeant Mueller was under state authority in dismissing Sergeant Mueller's Complaint. Defendants later abandoned this argument, acknowledging that the PCA was a red herring (Dkt. 43 at 15), when it was pointed out in Sergeant Mueller's motion to reconsider that Title 32 was amended after the terrorist attacks of 9/11 to provide that the PCA does not apply. (Dkt. 33 at 9-11).

The PCA prohibits the use of the Army or Air Force in the execution of criminal laws of the United States. (Dkt. 32 at 4.) However, the PCA does not apply to Title 32 Orders. *See* Lieutenant Colonel Steven B. Rich, *The National Guard, Drug Interdiction and Counterdrug Activities, and Posse Comitatus: The Meaning and Implications of "In Federal Service"*, *Army Law*, JUNE 1994, at 35, 42; *see also* Dkt. 33-4, *Been There, Doing That in a Title 32 Status. The National Guard Now Authorized to Perform Its 400-Year Old Domestic Mission in Title 32 Status*, MAY 2008, *THE ARMY LAWYER*, DA PAM 27-50-420, *Major Christopher R. Brown*.

By authorizing the States to place National Guard personnel in full-time National Guard duty under 32 U.S.C. § 502(f) to carry out drug interdiction and counter-drug activities, 32 U.S.C. § 112(b) ensures that it is absolutely clear that PCA does not restrict the National Guard from carrying out those activities. (Dkt. 47-1, Exhibit 1, Declaration of Colonel Roth ¶ 9; *see also* Dkt. 33-5 at 13, NGR 500-2/ANGI 10-801.) Indeed, Congress specifically authorized this construct to coincide with, not replace, the PCA.

As a result of the terrorist attacks of September 11, 2001, Title 32 was substantially amended to allow for the United States Department of Defense to fund state military operations to respond to national crises in a Title 32 status. Major Brown explained in great detail the amendments to Title 32 as a result of the tragic events of 9/11, and which provide that Sergeant Mueller's Title 32 orders are, in fact, pursuant "Federal authority" protected under USERRA.

Since 2001, with the recognition of new national domestic threats coupled with the historic capabilities of the National Guard as “citizen soldiers,” Congress significantly increased the authority for the Federal Government to fund these National Guard domestic operations in Title 32 status. Dkt. 33-4 at 1. As Major Brown noted in his article in THE ARMY LAWYER:

As we know, the attacks of September 11 occurred within the geographic boundaries of the sovereign states of New York, Virginia, and Pennsylvania. No one would argue, though, that the September 11 attacks were merely those states’ internal domestic emergencies or that the attackers aimed to attack these individual states- they were national emergencies and attacks upon our collective, and United States. Although this was an attack on our nation, to which all of the nation’s citizens should arguably bear the cost of response, when it came to the governors calling upon their militias to respond, Title 32 as written in 2001 did not clearly allow for the DOD to fund this state controlled militia response to this national crisis in a Title 32 status.

Shortly after the attacks, the DOD released its required Quadrennial Defense Review (QDR) Report. The QDR stated that “before the attack . . . the senior leaders of the Defense Department set out to establish a new strategy for America’s defense . . . [because] America must be safe at home,” and that the “attacks confirm[ed] the strategic direction and planning principles that resulted from [the QDR], particularly its emphasis on homeland defense.” Ultimately, the terrorist attacks of September 11 energized the DOD’s focus on homeland defense-the National Guard’s historic mission. Since that fateful day, the publication of the 2001 QDR, and the nation’s recognition of the collective and individual threats the United States’ face, Congress has implemented the most significant statutory changes to Title 32 regarding the domestic, operational use of the National Guard since its colonial roots.

Dkt. 33-4 at 9. “The new authority under Title 32 for the operational use of the National Guard ultimately allows for DOD funding of federally trained and uniformed National Guard personnel to enforce domestic law, which would otherwise be precluded by the PCA if they instead served in their federal status.” *Id.* at 33.

The PCA only applies to Title 10 forces, that is, the active, full time, professional standing military forces of the United States. It does not apply to the National Guard when in a Title 32 status. *See* Dkt. 33-5, NGR 500-2, paragraph 2-1e, at 13. The National Guard Regulation 500-2, which applies to National Guard Counterdrug Support (FTNGD-CD), clearly states: “The Posse Comitatus Act (18 USC § 1385) does not apply to National Guard personnel on duty under authority of Title 32.” *Id.*

The “Comparison of Duty Statuses for National Guard Personnel” Chart (Dkt. 33-2) is helpful in understanding the differences in National Guard duty statuses: State Active Duty (“SAD”), versus Title 32, versus Title 10. When on duty or training, National Guard personnel serve in one of three general statuses: State Active Duty (SAD) under State law, or Title 32 training or duty under Federal authority, or Title 10 federal active duty.

As NGR 500-2 (Dkt. 33-5) makes clear, Full Time National Guard Counter Drug duty (FTNGD-CD) is a law enforcement type-mission. The reason 32 U.S.C. § 112(a) prohibits FTNGD-CD duty in “Federal service” is because when the National Guard is in Federal service under Title 10 (above), it is subject to the PCA. So, to avoid carving out another

PCA exception, Congress limited FTNGD-CD duty to Title 32 FTNGD, which although considered a State service *is under Federal authority*. See Lieutenant Colonel Steven B. Rich, The National Guard, Drug Interdiction and Counterdrug Activities, and Posse Comitatus: The Meaning and Implications of “In Federal Service,” Army Law, JUNE 1994, at 35, 41. By contrast, when the National Guard or a member of the National Guard is in State service under Title 32, it is not subject to the PCA and can (and does) conduct law enforcement missions. Therefore, the District Court erred in its reliance on the PCA in dismissing Sergeant Mueller’s original Complaint (Dkt. 32 at 4-5) as Congress intended for the PCA only to apply to Title 10 personnel, not Title 32 personnel.

#### **IV. THE DISTRICT COURT ERRED IN FINDING THAT USERRA DOES NOT APPLY TO SERGEANT MUELLER**

The District Court erred in dismissing Sergeant Mueller’s original Complaint by erroneously finding that “USERRA does not apply to Sergeant Mueller due to the fact that he was in state service while on active duty” in the Full-Time National Guard. (Dkt. 32 at 3.) The District Court erred in failing to understand the distinction between federal authority, *e.g.*, Title 32, and federal service. Sergeant Mueller’s full-time National Guard Duty in the counter-drug unit (FTNGD-CD) *was*, in fact, under federal authority. Further, USERRA protects all Title 32 orders under the plain language of the Act and does not carve out an exclusion for Title 32 FTNDG-CD orders.

*A. Federal Authority v. Federal Service Explained*

Defendants sowed great confusion, which resulted in the misapplication of the Federal law, by not acknowledging the basic structure of the United States Military, and how the National Guard fits into it, as delineated by Congress. Major Brown's article, Christopher R. Brown, May-2008 ARMY LAW, discusses this exact issue. (Dkt. 33-4; *see also* 44-3 at 2 (explaining that under Title 32 the National Guard is "The Federally – recognized militia (*i.e.*, National Guard)".) When a person joins the National Guard, he/she is joining two separate and distinct military organizations, at the same time: (1) the State Army or Air National Guard (essentially, the state militia), which is commanded by the Governor; and (2) the Army or Air National Guard of the United States, which a reserve component of United States Army or United States Air Force, commanded by the President, under both Title 32 and Title 10. 10 U.S.C. §§ 10101, 10105. A National Guard officer receives two commissions: one from the Governor as a State Militia officer, and another from the President as a Reserve Officer of the Army or Air Force. *See also* 20 ILCS 1805/40.

As Major Brown's article points out, when National Guard service members are in Title 32 status, which is the case here, they are under Federal authority, which allows "the Governor, *with the approval of the President or the Secretary of Defense*, to order a member to duty for operational Homeland Defense activities in accordance with . . . U.S. Code (USC): 32 USC 502(f). . . ." *Id.* (emphasis added). However, when the National

Guard is in State Active Duty (“SAD”) status, it is under state authority, exclusively under the command of the Governor, with no federal involvement, oversight, funding, or federal statutory authority. (Dkt. 33-4 at 30.)

Sergeant Mueller’s Title 32 Orders to the FTNGD-CD were under federal authority and not SAD. If Sergeant Mueller had been ordered in a SAD status, the orders would have reflected as much, and Sergeant Mueller would not be covered by USERRA because SAD is not protected by USERRA. *See also* 20 C.F.R. § 1002.57 (“(a) National Guard service under Federal authority is protected by USERRA. Service under Federal authority includes active duty performed under Title 10 of the United States Code. Service under Federal authority *also includes* duty under Title 32 of the United States Code, such as active duty for training, inactive duty training, or *full-time National Guard duty.*”) (emphasis added). Sergeant Mueller was ordered to “full-time National Guard duty,” under the authority of Title 32, which is pursuant to federal authority, and not SAD. Thus, he is protected under USERRA, and as such, the District Court possessed jurisdiction to entertain Sergeant Mueller’s claims.

In accordance with its constitutional authority, Congress has established that the military policy of the United States is critically dependent on the State National Guard. It “is essential that the strength and organization of the Army National Guard and the Air National Guard [defined in both Title 10 and Title 32 as the organized, Federally-recognized State militia] as an integral part of the first line of defenses of the United



States be maintained and assured at all times.” 32 U.S.C. § 102. To help achieve this goal – maintaining the State National Guard as a ready force trained to Federal standards so it can perform Federal missions, if needed – Congress has conferred Federal reemployment rights protection on National Guard personnel when are they are performing training or duty under any provision of Title 32. (Dkt. 47-1, Declaration of Colonel Roth.) As part of the all-volunteer U.S. Military, the State National Guard would have a very difficult time recruiting and retaining personnel if Congress denied it USERRA protection - it would be totally dependent on State laws, which vary considerably.

Also, USERRA coverage of the National Guard levels the playing field with the other reserve components – the US Army/Air Force/Navy/Marine Corps Reserves – when they do their training. The same protections are available for the National Guard when performing Federally authorized service, *i.e.*, Title 32, training or other duty. Again, Title 32 clearly authorizes “under regulations prescribed by the [United States] Secretary of Defense” for National Guard personnel “to be ordered to perform full-time National Guard duty under section 502(f) . . . for the purpose of carrying out drug interdiction and counter-drug activities.” 32 U.S.C. § 112(b)(1). Section 112(b)(1) provides that Sergeant Mueller’s FTNGD-CD is proscribed by federal authority.

Defendants erroneously argued in the court below that “Section 502(f) simply is the funding mechanism by which the federal government funnels money to states. In other

words, the reference to Section 502(f), while literally falling within the legal definition of 'Full-Time National Guard Duty,' simply accommodates the significant qualifier for 'Counterdrug' service that places Sergeant Mueller's National Guard duty under state authority." (Dkt. 43 at 11.) There is absolutely no case law or legal authority for this position, and this position is not only contradicted by the plain language of USERRA that provides that "Full-time National Guard Duty" is protected, but is it also contradicted by the language of 32 U.S.C. § 112 and 32 U.S.C. § 502, entitled "Required drills and field exercises," which specifically provides that it is "under regulations to be prescribed by the Secretary of the Army or the Secretary of the Air Force," and that it may include "[s]upport of operations or missions undertaken by the member's unit at the request of the President or Secretary of Defense." 32 U.S.C. § 502(f)(1), (f)(2)(A). No where in USERRA is there a carve out provision that Defendants try to suggest should exist for "except orders under 502(f)," as none exists.

Because USERRA specifically protects "Full-time National Guard Duty" 38 U.S.C. § 4303(13), (16), and because Sergeant Mueller was ordered to "Full-time National Guard Duty," this should end the inquiry. Just in case it has not, and to clear up any confusion that Defendants created in the court below, Sergeant Mueller specifically pled that his orders were under Federal authority. To the extent necessary, Sergeant Mueller would retain a military expert to explain and present evidence and opinions that in fact Sergeant Mueller's orders were under Federal authority, and therefore, he is protected

by USERRA. As such, the District Court's orders dismissing Sergeant Mueller's Complaint and First Amended Complaint should be reversed, and Sergeant Mueller's USERRA claim (and supplemental claim) should be reinstated.

***B. Sergeant Mueller's FTNGD-CD Is Under Federal Authority***

The District Court appears to have confused "federal authority" with "federal service," which have two separate and distinct meanings that are important for purposes of USERRA. Sergeant Mueller is protected under USERRA because his orders were under "federal authority" (Title 32), even if he was not acting in "federal service."

In dismissing Sergeant Mueller's First Amended Complaint, the District Court held:

Plaintiff argues that the guardsmen's annual training activities and homeland security activities are under federal *authority*. This is true, but the purpose of such activities is to ensure that the National Guard is ready if needed for federal services, and such training is required by the Act of the President of the United States. Thus, members who are undergoing annual or periodic training may be in federal *service* and thus qualify for the protection of the USERRA. This is not the case here.

(Dkt. 55 at 4 (emphasis added).)

The District Court erred in its suggested holding that Sergeant Mueller must be in "federal service" in order to be protected under USERRA. The key issue is that Sergeant Mueller's orders were under Title 32, and more specifically 502(f), which means that they were pursuant to "federal authority," and protected under USERRA. "Title 32 allows the Governor, *with the approval of the President or the Secretary of Defense*, to order a

member to duty for operational Homeland Defense activities in accordance with . . . U.S. Code (USC): 32 USC 502(f). . . .” *Id.* (emphasis added).

Defendants argued below that “local law enforcement drug enforcement activities that are federally funded pursuant to 32 U.S.C. § 112 are not protected by USERRA, because they are not in ‘Federal service’ and do not fall under ‘Federal authority.’” (Dkt. 43 at 5.) “Federal service” and “federal authority” are two very different things. Despite Defendants’ attempts to suggest otherwise, 32 U.S.C. § 112 is not just a funding mechanism to funnel money to the States for this purpose. Title 32 authorizes “under regulations prescribed by the [United States] Secretary of Defense” for National Guard personnel “to be ordered to perform full-time National Guard duty under section 502(f). . . . for the purpose of carrying out drug interdiction and counter-drug activities.” 32 U.S.C. § 112(b)(1); *see also* Exhibit 1, ¶ 7. Section 112(b)(1) provides that Sergeant Mueller’s FTNGD-CD is prescribed by federal authority.

There is no mention in § 112 that such personnel are somehow different from other FTNGD personnel for USERRA coverage. Absent a clearly stated Congressional intent to carve out FTNGD-CD personnel, there is no basis for a court to do so. Sergeant Mueller was in FTNGD, therefore he was serving in the “uniformed services” as defined in 38 U.S.C. § 4303(13) and (16), therefore he is entitled USERRA protection.

*C. USERRA Protects All Title 32 Orders Under the Plain Language of the Act, And Does Not Carve Out An Exclusion for Title 32 FTNGD-CD Orders*

Defendants went to great lengths to try to confuse the District Court, or it shows Defendants fundamental lack of understanding of how the United States Military works for National Guard Members. Defendants' argument boils down to Defendants trying to suggest that Title 32 full-time National Guard Duty Counter Drug ("FTNGD-CD") duty is somehow different from all other Title 32 FTNGD and is excluded from coverage under USERRA, despite the plain language of USERRA, wherein the statute provides that "Full-Time National Guard Duty" is protected under USERRA. 38 U.S.C. § 4303.

Defendants conceded before the District Court that all other FTNGD is covered by USERRA, but try to argue that somehow the language in 32 U.S.C. § 112, under either subsection (a) or (g), excludes FTNGD-CD from the definition of "service in the uniformed services" under USERRA. Defendants cited no authority supporting this position. Congress' statutory language in 38 U.S.C. § 4303(13) and (16) are absolutely clear: "service in the uniformed services" includes "full-time National Guard duty," 38 U.S.C. § 4303(13), and the term "uniformed services" includes "the Army National Guard . . . when engaged in . . . full-time National Guard duty. . . ." 38 U.S.C. § 4303(16). There is *no* statutory language qualifying or differentiating types of FTNGD, and as such, this Court cannot and should not carve out an exception at Defendants' suggestion that one exists, when it does not. There is also no case law supporting the

argument that USERRA distinguishes between certain types of FTNGD and others. (*See* Dkt. 47-1, Declaration of Colonel Roth.) Defendants are simply wrong. There is no statutory language or case law supporting Defendants' argument below that Congress intended to "carve-out" an exception for FTNGD-CD from the rest of FTNGD and exclude it from USERRA protection.

Despite the fact that Defendants cited no authority for their assertion, and despite the plain language of USERRA covering FTNGD, the District Court bought Defendants' argument, despite the plain language of Section 112(b) which states:

**(b) Use of personnel performing full-time National Guard duty.--**(1) Under regulations *prescribed by the Secretary of Defense*, personnel of the National Guard of a State may, in accordance with the State drug interdiction and counter-drug activities plan referred to in subsection (c), be ordered to perform full-time National Guard duty under section 502(f) of this title for the purpose of carrying out drug interdiction and counter-drug activities.

32 U.S.C.A. § 112(b) (emphasis added). Section (b) reiterates what has already been said, in addition to the authority cited above, that the FTNGD-CD orders were "prescribed by the Secretary of Defense," and thus, under federal authority (which is distinguished from federal service). Again, if Sergeant Mueller's orders were pursuant to State authority, then his orders would have said "SAD" and not Title 32, 502(f). Sergeant Mueller's orders to the FTNGD-CD were pursuant to Title 32 and 502(f), and as such, Sergeant Mueller is protected by USERRA.

**CONCLUSION**

For the reasons stated above, Sergeant Mueller asks this Court to reverse the decision of the District Court on his USERRA claim, and to reinstate the supplemental state law claim under the IMLAA.

Respectfully Submitted,

*/s/John N. Maher*

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Attorney for Plaintiff-Appellant

John N. Maher (ARDC# 6237599)  
MAHER LEGAL SERVICES PC  
26 South 3<sup>rd</sup> Street, Number 68  
Geneva, Illinois 60134  
Tel: +1 (708) 468-8155  
Email: [johnmaher@maherlegalservices.com](mailto:johnmaher@maherlegalservices.com)  
[www.lawyersdefendingwarriors.com](http://www.lawyersdefendingwarriors.com)

Dated: June 21, 2019

**CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Cir. R. 32 because this brief contains 7,676 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 Palatino Linotype, 12-point font.

*s/John N. Maher*

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John N. Maher

Attorney for the Plaintiff-Appellant

Attorney for Plaintiff-Appellant  
John N. Maher (ARDC# 6237599)  
MAHER LEGAL SERVICES PC  
26 South 3<sup>rd</sup> Street, Number 68  
Geneva, Illinois 60134  
Tel: +1 (708) 468-8155  
Email: [johnmaher@maherlegalservices.com](mailto:johnmaher@maherlegalservices.com)  
[www.lawyersdefendingwarriors.com](http://www.lawyersdefendingwarriors.com)



**CIRCUIT RULE 31 (b) CERTIFICATION**

I, John N. Maher, hereby certify that fifteen paper copies of the Appellant's Brief and Required Short Appendix were sent within 7 days of filing via the Court's ECF system via commercial carrier to:

United States Court of Appeals  
Seventh Circuit  
219 S. Dearborn, Room 2722  
Chicago, IL 60604

*s/John N. Maher*

---

John N. Maher  
Attorney for the Plaintiff-Appellant

Attorney for Plaintiff-Appellant  
John N. Maher (ARDC# 6237599)  
MAHER LEGAL SERVICES PC  
26 South 3<sup>rd</sup> Street, Number 68  
Geneva, Illinois 60134  
Tel: +1 (708) 468-8155  
Email: [johnmaher@maherlegalservices.com](mailto:johnmaher@maherlegalservices.com)  
[www.lawyersdefendingwarriors.com](http://www.lawyersdefendingwarriors.com)

**CERTIFICATE OF SERVICE**

I hereby certify that on June 21, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Attorneys for Defendants-Appellees

James J. Powers IV Jpowers@cbslawyers.com  
Abigail C. Rogers arogers@cbslawyers.com

*s/John N. Maher*

---

John N. Maher  
Attorney for the Plaintiff-Appellant

Attorney for Plaintiff-Appellant  
John N. Maher (ARDC# 6237599)  
MAHER LEGAL SERVICES PC  
26 South 3<sup>rd</sup> Street, Number 68  
Geneva, Illinois 60134  
Tel: +1 (708) 468-8155  
Email: [johnmaher@maherlegalservices.com](mailto:johnmaher@maherlegalservices.com)  
[www.lawyersdefendingwarriors.com](http://www.lawyersdefendingwarriors.com)

**CIRCUIT RULE 30(d) STATEMENT**

The undersigned, counsel of record for Plaintiffs-Appellants, in compliance with Circuit Rule 30(d) states:

1. The appendix at the end of this brief contains all materials required by Circuit Rule 30(a) and (b).

*s/John N. Maher*

---

John N. Maher

Attorney for the Plaintiff-Appellant

Attorney for Plaintiff-Appellant  
John N. Maher (ARDC# 6237599)  
MAHER LEGAL SERVICES PC  
26 South 3<sup>rd</sup> Street, Number 68  
Geneva, Illinois 60134  
Tel: +1 (708) 468-8155  
Email: [johnmaher@maherlegalservices.com](mailto:johnmaher@maherlegalservices.com)  
[www.lawyersdefendingwarriors.com](http://www.lawyersdefendingwarriors.com)

No. 18-3609

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**UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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**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.**

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**Appeal from the United States District Court  
For the Northern District of Illinois.**

**Case No. 17-CV-007938**

**The Honorable Judge Harry D. Leinenweber**

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**REQUIRED SHORT APPENDIX**

**APPELLENT'S REQUIRED SHORT APPENDIX TABLE OF CONTENTS**

11/16/2018 District Court Opinion and Order on Plaintiff's Motion to Reconsider (Dkt. #55) .....	App.1-App.4
11/16/2018 District Court Judgment (Dkt. #56) .....	App.5
5/2/18 Memorandum Opinion and Order re: Defendants' Motion to Dismiss (Dkt. #32) .....	App.6-App.14

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

DAVID MUELLER,

Plaintiff,

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.

Case No. 17 C 7938

Judge Harry D. Leinenweber

**ORDER**

Plaintiff's Motion to Reconsider (Dkt. No. 33) is denied. Defendants' Motion to Dismiss Count I of the First Amended Complaint (Dkt. No. 37) is granted. The Court declines to exercise jurisdiction to determine the applicability of the IMLAA to Plaintiff's case or to determine the applicability of the State Mandates Act, 30 ILCS 805/1 *et seq.*, to the IMLAA. Defendants' Motion to Strike (Dkt. No. 48) is denied.

**STATEMENT**

Plaintiff, an employee of the Joliet Police Department, has sued the City and its Chief and Deputy Chief of Police for allegedly violating the Uniformed Service Members Employment and Reemployment Act, 38 U.S.C. § 4311 ("USERRA") (Count I), and the Illinois Military Leave of Absence Act, 5 ILCS 325/1 ("IMLAA") (Count II). The Court dismissed Count I of the original Complaint on the basis that Plaintiff did not come under the coverage of the USERRA and declined to exercise supplemental jurisdiction on Count

II, the state law IMLAA claim. Plaintiff filed a Motion to Reconsider the dismissal of the USERRA claim or, in the alternative, to file a First Amended Complaint. The Court granted leave to file the First Amended Complaint, and Defendants responded by objecting to reconsideration and with a Motion to Dismiss Count I of the First Amended Complaint. The facts are not really disputed so that the real questions before the Court are ones of law.

The undisputed facts have been clearly laid out in the parties' filings and in the Court's previous Memorandum Opinion. *Mueller v. City of Joliet*, No. 17 C 7938, 2018 WL 2045451, at \*1-2 (N.D. Ill. May 2, 2018). Briefly, the Plaintiff, a member of the National Guard, received deployment orders requiring him to report for active full-time duty to the Illinois National Guard Counter Drug Task Force. The orders were executed by Richard J. Hayes, Jr., the State Adjutant General, on behalf of the Governor of Illinois. Plaintiff was informed by his superiors at the Police Department that he only qualified for "unpaid leave of absence" during his deployment, which reduced his compensation during his leave because his National Guard pay was less than his municipal pay. Plaintiff contends that this decision violates the USERRA and/or the IMLAA. Defendants' position, with which the Court agreed, was that the USERRA did not apply because Plaintiff was on in-state service while on duty with the National Guard.

The legal dispute between the parties therefore involves the interpretation of the words "federal authority" and "state authority." This legal issue goes back to the twin purposes of the National Guard. When operating under federal authority, the member is under the direction of the President of the United States and performs a federal function such as suppression of an

insurrection or assisting in the case of national emergencies such as national disasters. On the other hand, when the member is under state authority he is under the direction of the Governor or his designee and performs a state function, such as riot control or enforcement of state criminal law. Here, Plaintiff, as a member of a state drug interdiction task force, was attempting to enforce a state criminal law. This limitation is clearly delineated in 32 U.S.C. § 112, under which, for a state to qualify for federal funding for drug interdiction, a state must certify (1) that the counter drug operations are to be conducted while the personnel are not involved in federal service, (2) the use of the National Guard is authorized by and is consistent with State law, and (3) the Governor of the State has determined that plan activities serve a state law enforcement purpose. The obvious reason for the certification requirement is to comply with the Posse Comitatus Act ("PCA"), 18 U.S.C. § 1385, which prohibits the use of the Army or Air Force in enforcing state criminal laws. When a National Guard is under federal service, it is considered a part of the Army. The cases are legion in which guardsmen are utilized as members of anti-drug task forces and provide evidence in subsequent drug prosecutions. In such cases, defendants routinely endeavor to have testimony and evidence suppressed as obtained in violation of the PCA. In all cases where the Guard has been called into duty by the State, such defenses have failed because the members of the National Guard were under state service rather than federal service. See *Gilbert v. United States*, 165 F.3d 470, 474 (6th Cir. 1999); accord *United States v. Hutchings*, 127 F.3d 1255, 1258 (10th Cir. 1997); *United States v. Benish*, 5 F.3d 20, 26 (3rd Cir. 1993).



Plaintiff argues that the guardsmen's annual training activities and homeland security activities are under federal authority. This is true, but the purpose of such activities is to ensure that the National Guard is ready if needed for federal services, and such training is required by the Act of the President of the United States. Thus, members who are undergoing annual or periodic training may be in federal service and thus qualify for the protection of the USSERA. This is not the case here.



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Harry D. Leinenweber, Judge  
United States District Court

Dated: 11/16/2018

IN THE UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF ILLINOIS

David Mueller ,

Plaintiff(s),

v.

City of Joliet et al ,

Defendant(s).

Case No. 17 C 7938

Judge Harry D. Leinenweber

**JUDGMENT IN A CIVIL CASE**

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)  
and against defendant(s)  
in the amount of \$ ,

which ☐ includes pre-judgment interest.  
☐ does not include pre-judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☒ in favor of defendant(s) City of Joliet et al  
and against plaintiff(s) David Mueller

Defendant(s) shall recover costs from plaintiff(s).

☐ other:

This action was (*check one*):

- ☐ tried by a jury with Judge Harry D. Leinenweber presiding, and the jury has rendered a verdict.  
☐ tried by Judge Harry D. Leinenweber without a jury and the above decision was reached.  
☒ decided by Judge Harry D. Leinenweber on a motion.

Date: 11/16/2018

Thomas G. Bruton, Clerk of Court

Melanie A. Foster, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

DAVID MUELLER,

Plaintiff,

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.

Case No. 17 C 7938

Judge Harry D. Leinenweber

MEMORANDUM OPINION AND ORDER

I. BACKGROUND

The Plaintiff, employed as Sergeant of Operations for the City of Joliet Police Department, is a member of the Illinois National Guard. On March 23, 2016, Plaintiff received deployment orders from the National Guard that required him to report for active full-time duty to the Illinois National Guard Counter Drug Task Force. The orders were executed by Richard J. Hayes, Jr., the State Adjutant General on behalf of the Governor of Illinois. (Although the full-time duty period was designated as from May 9, 2016 to September, 30, 2016, Plaintiff only served until August, 1, 2016, when he resigned and returned to full-time status with the Police Department.) Plaintiff duly

informed his superiors at the Police Department of his orders, but was advised that he only qualified for "unpaid leave of absence" and he would have to use benefit time for his military service and would "not continue to accrue leave time, such as vacation or personal days." The effect of this "unpaid leave" decision was to reduce Plaintiff's compensation during the leave to his pay as a member of the National Guard which was less than his pay as Sergeant of Operations.

As a result of the forgoing denial of paid leave, Plaintiff filed a charge of discrimination with the Illinois Department of Human Rights. His charge was subsequently dismissed and he received a notice of right to sue. He thereafter filed this two-count Complaint alleging violations of the Uniformed Service Members Employment and Reemployment Act (the "USERRA"), 38 U.S.C.A. § 4311 (Count I), and the Illinois Military Leave of Absence Act (the "IMLAA"), 5 ILCS 325/1 (Count II). He has named as Defendants, the City of Joliet (the "City"), Brian Benton, Chief of Police in his official and individual capacity, and Edgar Gregory, Deputy Chief of Police in his individual capacity. Federal jurisdiction is based on Count I, while jurisdiction of Count II is based on supplemental jurisdiction.

Defendants have filed a Motion to Dismiss contending that neither of these statutory provisions apply to Plaintiff's claim

because his service in the Illinois National Guard's Counter Drug Task Force was purely a function of state law. They also contend that, should the Court find that the City is obligated for the differential pay as claimed under IMLAA, the City is excused from complying because the increased costs resulting from IMLAA's required paid leave would run afoul of the Illinois State Mandates Act, 30 ILCS 805/8(a). This act prohibits the imposition of unfunded mandates such as alleged to be the case here because the legislature had not provided funding for IMLAA claims. In response, Plaintiff argues that these two statutes apply to individuals who are called to "full-time national guard duty" and, accordingly, Plaintiff is entitled to their protection. For the reasons stated herein, the Court finds that USERRA does not apply to Plaintiff due to the fact that he was in state service while on active duty and that the Court will not exercise supplemental jurisdiction with respect to Count II, IMLAA.

## **II. THE NATIONAL GUARD**

The Army National Guard, originally referred to as the militia, predates the founding of the nation and has been a standing national military for almost 150 years. Following its key role during the Revolutionary War, the militia was enshrined in the Constitution as a fundamental component of our national

defense. Since the enactment of the Constitution, a variety of statutes have been enacted that define the Militia's (or Guard's) role in our nation's affairs. While federal regulations dictate much of the Guard's organization and function, the control of Guard personnel and units is divided between the federal government and the states. Most of the provisions governing the Guard's federal mission are contained in Title 10 U.S.C.A. which authorizes the President to federalize the National Guard. The purposes for federalization include augmenting the active armed forces in time of war, assisting in the handling of national emergencies such as hurricane relief, suppressing insurrections, and elimination of unlawful obstructions which seek to prevent the enforcement of federal law in any state or territory. *National Guard Fact Sheet Army National Guard (FY2005)* [https://web.archive.org/web/20120812205138/http://www.arng.army.mil/SiteCollectionDocuments/Publications/News%20Media%20Factsheets/ARNG\\_Factsheet\\_May\\_06%20ARNG%20fact%20Sheet.pdf](https://web.archive.org/web/20120812205138/http://www.arng.army.mil/SiteCollectionDocuments/Publications/News%20Media%20Factsheets/ARNG_Factsheet_May_06%20ARNG%20fact%20Sheet.pdf), at 3. (Last visited April 30, 2018).

An important limitation on the federal use of the National Guard is the Posse Comitatus Act, 18 U.S.C.A. § 1385 ("PCA"). This Act prohibits the use of the Army or Air Force in the execution of criminal laws of the United States. The PCA only

applies to the National Guard when it is placed in federal service as part of the Army or Air Force, and does not apply to the National Guard when it is in its militia status, *i.e.*, under state control. *Memorandum Opinion of Douglas W. Kmiec, Assistant Attorney General Office of Legal Counsel, April 4, 1989.*

When the National Guard units are not under federal control, the Governor is the commander-in-chief of the respective state units and may act through his designee, such as the State Adjutant General in Illinois. The Governor can mobilize National Guard personnel to state active duty for training orders, and for non-combat purposes such as humanitarian missions in response to disasters, counterdrug operations, peacekeeping or peace enforcement missions, maintenance of vital public services, and participation in engineering projects. *National Guard Fact Sheet Army National Guard (FY2005)*, at 4.

### **III. DISCUSSION**

#### **A. Count I - USERRA**

Now, turning to Plaintiff's Complaint, no where does he allege that his National Guard unit had been federalized at the time of his call up. To the contrary, his call to duty came from the State Adjutant General who is the state official given

the authority to mobilize the state national guard in its militia form. The order came from the Department of Military Affairs State of Illinois and was signed by Richard J. Hayes, Jr., Major General, The Adjutant General. The authorization was for "full-time National Guard Duty for Counterdrug (FTNG-CD)" (the latter acronym meaning "Full Time National Guard-Counter Drug"). (See, Exhibit A to Defendants' Motion to Dismiss.) There is no indication that the President of the United States had anything to do with the issuance of this order and Plaintiff has suggested none. Instead, Plaintiff argues that he was called to "full time status" and the federal government is paying for at least some of the costs associated with this order.

However, if, in fact, Plaintiff had been called in to federal service for enforcement of drug laws, such call up would appear to be in violation of the Posse Comitatus Act and also in violation of the federal funding law, 32 U.S.C.A. § 112 (A)(1), which allow the National Guards to participate in drug interdiction programs only "while not in federal service." See, *United States v. Hutchings*, 127 F.3d 1255, 1258 (10th Cir. 1997). Accord, *United States v. Benish*, 5 F.3d 20, 26 (3rd Cir. 1993). Plaintiff criticizes the citation of these cases as being just "federal criminal law." However, these cases each



involve evidence obtained by the National Guard while on drug interdiction duty to which motions to suppress were filed by defendants based on the contention that the evidence was seized in violation of the PCA. In each case, the motion to suppress was denied because of the lack of federal involvement, *i.e.*, the drugs were seized by Guard members while in state service. Surely the federal government would not involve itself in a criminal drug investigation in possible violation of the PCA, and risk suppression of any evidence seized.

Next we have to determine whether the provisions of 38 U.S.C.A. § 4311 ("USERRA"), under which Plaintiff's Count I relies, apply to him even though he was not in federal service. This statute, entitled "Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited," makes it illegal for an employer to discriminate against an employee who performs services in a "uniformed service." Plaintiff argues that by refusing him paid leave Defendants have violated this federal statute. Defendants argue that this statute does not apply to Plaintiff because he was not in a "uniformed service" as the same is defined in federal law. Uniformed Service is defined as excluding a tour of duty while under state control and not under federal control. Defendants

are correct: 20 C.F.R. § 1002.57(b) issued by the United States Department of Labor states as follows:

National Guard service under authority of State law is not protected by USERRA. However many states have laws protecting the civilian job rights of National Guard members who serve under State orders. Enforcement of those State laws is not covered by USEERRA or these regulations.

Because Plaintiff's tour of duty was clearly under the authority of the State of Illinois, USERRA has no applicability to his case.

Plaintiff objects to the use of a Rule 12(b)(6) motion to decide this case on its merits. However, this type of motion is a proper vehicle to dispose of a case that is not plausible on its face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). While Plaintiff need not plead facts in his Complaint to support his claim, he must plead sufficient factual content to draw a reasonable inference that Defendants are liable for the alleged misconduct. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). He has failed to do so here.

Since Count I relies solely on USERRA, the Motion to Dismiss Count I is granted.

#### **B. Count II - IMLAA**

Since federal jurisdiction was based on USERRA in Count I, jurisdiction over Count II, IMLAA, is based on supplemental

jurisdiction. The Court declines to exercise jurisdiction, neither to determine the applicability of the IMLAA to Plaintiff's case nor to determine the applicability of the State Mandates Act to IMLAA. Count II is therefore dismissed for lack of federal jurisdiction.

**IV. CONCLUSION**

For the reasons stated here herein, Defendants' Motion to Dismiss Count I is granted. Count II dismissed for lack of federal jurisdiction.

**IT IS SO ORDERED.**



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Harry D. Leinenweber, Judge  
United States District Court

Dated: 5/2/2018