



## COMMITTEE COMMENTARY

Federal law—the Uniformed Services Employment and Reemployment Rights Act (USERRA)—mandates that employers must reinstate U.S. reservists and National Guard members into the same or comparable positions upon their return from military duty. *5280* (Denver's city magazine) writer Maximillian Potter reveals, however, that many citizen-soldiers encounter severe difficulties in returning to their civilian jobs after service to their country. In "Nobody's Hero," he tells the story of two Denver-area Marine reservists, Jim Vigil and Steve Duarte, as a way to highlight the evident lack of USERRA enforcement and the at-best inadequate role played by federal agencies charged with compliance. He focuses especially on the U.S. Department of Defense organization Employer Support of the Guard and Reserve (ESGR). "Nobody's Hero" vividly illustrates how the efficacy of laws depends on enforcement and if and how this responsibility is met. Potter describes the Colorado ESGR, which relies upon volunteer mediators, as seriously mismanaged, widely regarded as ineffective in representing citizen-soldiers, and rife with apparent, if not actual, conflicts of interest. *5280* doggedly pursues its investigation by filing a Freedom of Information Act (FOIA) request seeking documents related to USERRA-based claims mediated by Colorado ESGR. Not only do they fail to comply, but Potter learns of an email sent to all state ESGR offices advising them to "immediately delete or destroy any old files." To prevent destruction of these documents in Colorado, *5280* files a motion for a temporary restraining order in federal court. The story behind "Nobody's Hero" was featured on the *NBC Nightly News* and other outlets, generating national debate and serving as a catalyst for reform in Colorado and across the country. Potter and *5280* deserve our special recognition for their remarkable efforts in committing substantial resources to pursue this investigation and for educating the public about this important matter of law and justice.

# Nobody's Hero

5280: Denver's City Magazine

Denver, Colorado

Maximillian Potter, *Writer*

Daniel Brogan, *Editor and Publisher*



Daniel Brogan



## INTERVIEW WITH MAXIMILLIAN POTTER

A Philadelphia native, Maximillian Potter is executive editor of *5280*, the city magazine of Denver. He "self assigned" and wrote "Nobody's Hero."

**Where did the initial idea for "Nobody's Hero" come from?**

In 2005, my dear friend since childhood, Tim McMenamin, a Marine reservist, was deployed to Iraq. We began exchanging emails and he told me about Jim Vigil, a Marine reservist from Denver in his unit. I decided it would be worthwhile to go to Iraq to write about him. In August 2005 I embedded with their Marine Civil Affairs Group in Iraq's Al Anbar Province. One of my goals was to profile Chief Warrant Officer Vigil as representative of the thousands of reservists and National Guard members who have been called up since 9/11. My plan was to be with him while he served over there and then when he returned. I expected that he would be welcomed by his employer, a Denver public high school, as something of a hero. I never expected he would be fired. When he was, I shifted gears and began researching the story that, unfortunately, had then presented itself. Jimmy came to personify all those thousands of reservists and National Guard members who return home from duty to find they've been demoted or fired by their employers.

**What resources were required to write this article?**

*5280*—more specifically, the magazine's owner, editor, and publisher Dan Brogan—shouldered most of the substantial expenses to send me to Iraq. A journalist could not ask for a more supportive boss than Dan. When I wanted to go to Iraq, he said yes, even though doing so would take me out of the magazine's day-to-day operations for weeks. When I asked for the time and considerable financial support to file our FOIA-legal case against Employer Support of the Guard and Reserve (ESGR) and the Department of Defense, Dan again said yes, without hesitation. I could not have produced this story with Dan's unwavering support. Whatever good there is in "Nobody's Hero" is in no small part because of him.

**How do you think "Nobody's Hero" treats or offers insights or perspectives on legal issues and legal institutions?**

The United States has mobilized over a half million reservists and National Guard members since September 11, 2001. Yet not much is known about USERRA, the federal law that exists to protect their civilian jobs when these "part-timers" return from duty. Not much is known by the civilian public or even by the troops themselves. I'd like to think that "Nobody's Hero" is the very piece that actually drilled through the government's "PR" sheen and the bureaucracy, and touched the truth of how effectively, or rather, ineffectively, Uncle Sam's federal agencies are at actually enforcing USERRA and protecting the rights of those who are willing to make the ultimate sacrifice.

**What do you see as the public impact of "Nobody's Hero"?**

I think the piece got the issue into the public discourse. Relying on the initial *5280* story, the *NBC Nightly News* with Brian Williams, the Colorado NPR affiliate, blogs and newspapers around the country all continued to cover/uncover the issues first exposed in "Nobody's Hero." In the wake of the story, the Denver Public School system apologized to Vigil and promised him his job back. They have instituted USERRA training for their HR employees. ESGR's top two leaders announced plans to resign. They have hired additional staff and instituted new policies to improve case management. I hope that these changes will help the tens of thousands of citizen-soldiers and their families achieve justice now—and for years to come.

You get a sense of how honorably 53-year-old Steve Duarte served his country when you see the walls of his home office: They are covered with dozens of photographs and commendations commemorating his 29 years in the U.S. Marine Corps—beginning with his graduation from Officer Candidate School in 1977, and including his last overseas deployment, to Iraq in 2003. And you get a sense of how dishonorably his country served him after he returned from Iraq when you see the stacks of legal documents neatly piled on the office floor. “When you’re over there in Iraq,” Duarte says on his late-summer afternoon, “you think about your family and keeping yourself safe. You don’t think about your job. You’re assuming, well, our government and country will take care of us. I still don’t believe it.”

In November 2002, Duarte, a Marine reserve officer employed by Denver’s Agilent Technologies Inc., was called up for a nine-month deployment to Kuwait and Iraq. The war was in its first phase, and Duarte was just behind the front lines, supporting a group of Navy Seabees. The Seabees are engineers; their job was to rebuild, or replace entirely, bridges, roads, and runways destroyed during the initial battles. While the Seabees knew their way around a blueprint, they needed a refresher on combat tactics, and Duarte and his group handled that training. It became clear to Officer Duarte that he was very much in the shit on the second day of the war, when an Iraqi missile hit only 200 meters from his HQ.

Duarte returned to Colorado and to his job at Agilent in July 2003. By then, he’d worked for the company for more than 19 years. He had helped design the payment structure for the company’s worldwide sales force. But upon his return from Iraq he was assigned a “special project”—to investigate how other companies pay their sales forces. Duarte suspected he’d intentionally been sent on a Mission Impossible. The fact of the matter was, companies consider their payment structures proprietary information and rarely share such information. His suspicions were confirmed on Monday, November 10, when his boss fired him over the phone. Only four months after returning from a war zone to a job he’d had for almost two decades he was instructed to have his office cleared out by the end of the week.

The severance package of \$54,821 didn’t ease Duarte’s anxieties. What would he, his wife, and his youngest of their three children do about health insurance? And then there was the more frightening uncertainty: During his may years at the company Duarte had reached an annual salary of \$88,800. Where now would a middle-aged man find a job—that is, if he found a job—that would pay him comparably?

Adhering to the recommended military protocol, the Monday he was fired Duarte called his commanding officer. Marine Corps Reserve Col. George Aucoin tried to reassure Duarte that all would work out; after all, Aucoin said, there’s USERRA and ESGR. He advised Duarte to immediately do two things: First, e-mail a copy of USERRA to his bosses and gently inform them that they were breaking the law—that after his return they were required to keep him employed for one year; and second, Aucoin instructed him to call ESGR.

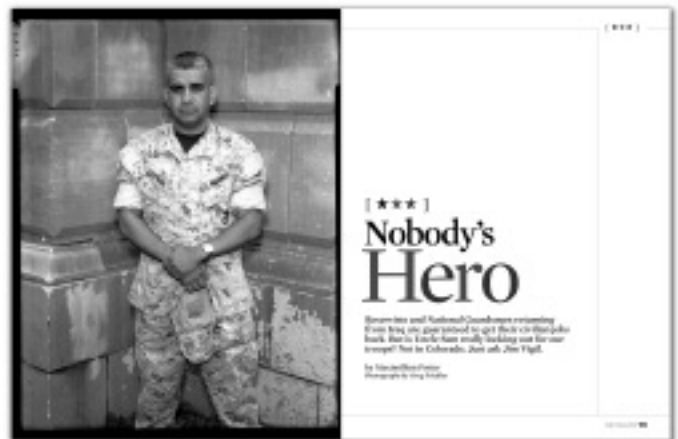
Within 24 hours of sending the e-mail to his Agilent superiors Duarte receive one in response that, as he puts it, was, “We’re going to do this and we can do it.” The Tuesday morning after he was fired, Duarte called the Colorado ESGR; a representative said the organization’s chairman would contact him shortly, and that meanwhile he ought to contact the Department of Labor. “They’re the ones,” he was informed, “charged with helping you out.” Duarte spoke with two Labor Department

representatives; both told him that unless he heard somebody say they were firing him for military service he didn’t have a case.

Weeks and then months passed without Duarte hearing again from ESGR. “When I made the call to ESGR,” Duarte says, “I thought, well, their name—Employer Support of the Guard and Reserve—they are there to support us. In the Marines, you rely on one another. It’s you’ve got my back, I’ve got yours, and I thought that’s what ESGR was about. It didn’t take me long to figure out they’re not even close. I was desperate.”

In his civilian life, Duarte’s commanding officer, Aucoin, is an attorney. He was no labor lawyer, but he became so outraged by what he heard from his Marine that he began to research USERRA law. He was stunned to discover that there was not much legal precedent for it in the United States courts and that not a single USERRA-based suit had come to a verdict in Colorado. Aucoin was convinced Duarte had a case strong enough to be the first, and Duarte agreed. In February 2004, two months after he’d been fired, Duarte filed suit in the Colorado U.S. District Court. Agilent hired one of Denver’s largest and most respected law firms, Holland & Hart. The trial would be nothing short of an unprecedented court battle between a corporate Goliath and the civilian-troop David, with more than just Duarte’s rights at stake.

One way or the other, the case would establish legal precedent for all USERRA civil claims that would follow; perhaps it would even discourage any further claimants. The trial began March 7, 2005, under Chief Judge Lewis T. Babcock. Agilent argued that Duarte was fired “for cause.” Under USERRA, termination for cause is permitted, provided the employer can demonstrate the cause. Agilent claimed it had been downsizing for months because of hard financial times—both accurate claims—and that Duarte’s performance was underwhelming and thus sufficient cause. The trial ended a mere three days later with the judge finding in favor of Duarte.



The article is available online at [www.5280.com/issues/2006/0610/feature.php?pageID=662](http://www.5280.com/issues/2006/0610/feature.php?pageID=662).