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Burden of Proof in Section 4311 Cases

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As I explained in Law Review 104, Congress first enacted legislation conferring the right to reemployment after military service in 1940, as part of the Selective Training and Service Act (STSA). The right to reemployment originally applied only to persons drafted under the STSA, but in 1941 Congress amended the law to confer the right to reemployment upon voluntary enlistees as well as draftees. The reemployment statute was part of the draft law until 1974, when Congress substantially amended the law and moved it to Chapter 43 of Title 38, U.S. Code, where it remains to this day. The reemployment statute had many formal names, but it was usually referred to as the Veterans' Reemployment Rights (VRR) law.

For the first 15 years of the VRR law's existence, the law only applied to active duty. In 1955, Congress amended the law to make it apply as well to initial active duty training performed by persons with no prior military experience who join the Reserves. In 1960, Congress amended the law to make it apply to National Guard members as well as Reservists, and to apply to active duty for training and inactive duty training (drills) performed by Reservists and National Guard members.

During the 1960s, Congress discovered that some employers would simply fire a Reservist or National Guard member in order to avoid the obligation to accommodate the person's repeated requests for military leave for National Guard or Reserve training. Accordingly, in 1968 Congress enacted what became section 2021(b)(3) of the VRR law, which provided that a Reserve or National Guard member "shall not be denied retention in employment or any promotion or incident or advantage of employment because of any obligation as a member of a Reserve Component of the Armed Forces." In 1986, Congress amended that law to prohibit discrimination *in initial hiring* as well.

In 1981, the Supreme Court wrote: "The legislative history thus indicates that section 2021(b)(3) was enacted for the significant but limited purpose of protecting the employee-Reservist against discriminations like discharge or demotion, motivated *solely* by Reserve status" (*Monroe v. Standard Oil Co.*, 452 U.S. 549, 559 (1981)) (emphasis supplied).

That statement by the Supreme Court can be characterized as *dictum* and therefore of little value as a precedent, because the *Monroe* case was not about a firing stemming from the plaintiff's absences from work for National Guard or Reserve training. Nonetheless, this statement in *Monroe* was regarded as a binding precedent by the U.S. Court of Appeals for the Tenth Circuit in *Sawyer v. Swift & Co.*, 836 F.2d 1257, 1261 (10th Cir. 1988).

Mr. Sawyer, a Navy Reservist who was fired by Swift and Co., alleged—and the U.S. District Court for the District of Kansas found—that his absences from work for Reserve training constituted *one of the reasons* for the firing, and that the firing was unlawful under section 2021(b)(3) of the VRR law. The employer appealed, and the Court of Appeals reversed, holding that Mr. Swift was required to prove that his Navy Reserve obligations were the *sole* reason for the discharge. As you can imagine, it is difficult to prove that anything that happens is *solely* due to something else.

As I explained in Law Review 104 and other articles, I developed an interest and expertise in the reemployment statute during the decade (1982-92) that I worked for the U.S. Department of Labor (DOL) as an attorney. Together with another DOL attorney, Susan M. Webman, I largely drafted the interagency task force work product that became the Uniformed Services Employment and Reemployment Rights Act (USERRA) when Congress enacted it, with only a few changes, in 1994. USERRA is a complete recodification of the VRR law, with major improvements,

but it is not a new law. You should think of the reemployment statute as 67 years old, not 13.

Ms. Webman and I, and the other members of the task force that studied the VRR law, were very much aware of the problems caused by cases like *Monroe and Sawyer*. We drafted section 4311 in such a way as to minimize the burden on the individual claiming that he or she had been denied initial employment, retention in employment, or any promotion or benefit of employment because of his or her past, present, or potential future service in a uniformed service. Section 4311 thus reads as follows:

"Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

(a) 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 on the basis of that membership, application for membership, performance of service, application for service, or obligation.

(b) An employer may not discriminate in employment against or take any adverse employment application against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter,

(3) has assisted or otherwise participated in an investigation under this chapter, or

(4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c) An employer shall be considered to have engaged in actions prohibited-

(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is *a motivating factor* in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

(2) under subsection (b), if the person's

(A) action to enforce a protection afforded any person under this chapter,

(B) testimony or making of a statement in or in connection with any proceeding under this chapter,

(C) assistance or other participation in an investigation under this chapter, or

(D) exercise of a right provided for in this chapter is *a motivating factor* in the employer's action, unless the employer can *prove* that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title" (38 U.S.C. 4311) (emphasis supplied).

The everyday business of courts in this country is to determine the meaning and intent of statutes enacted by Congress and the state legislatures—a process known as "statutory construction." In this process, a court looks first to the *text* of the statute (the actual words enacted by the legislative body) and then to the *legislative history*. The legislative history consists of committee reports, floor statements, and other contemporaneous materials that shed light on what the legislative body had in mind and was seeking to achieve when it considered and enacted the statute in question. As I have explained in numerous past Law Review articles, there is a large body of legislative history

accompanying the 1994 enactment of USERRA, and there is some legislative history for the USERRA amendments enacted by Congress in 1996, 1998, 2000, and 2004.

With regard to the meaning of section 4311, and particularly section 4311(c), I offer a long quotation from a 1993 report of the House Committee on Veterans' Affairs:

"Section 4311(b) [later renumbered 4311(c)] would reaffirm that the standard of proof in a discrimination or retaliation case is the so-called 'but for' test and that the burden of proof is on the employer, once a *prima facie* case is established. This provision is simply a reaffirmation of the original intent of Congress when it enacted current section 2021(b)(3), in 1968. See Hearings on H.R. 11509 before Subcommittee No. 3 of the House Committee on Armed Services, 89th Cong., 1st Sess. at 5320 (Feb. 23, 1966). In 1986, when Congress amended section 2021(b)(3) to prohibit initial hiring discrimination against Reserve and National Guard members, Congressman G.V. Montgomery (sponsor of the legislation and chairman of the House Committee on Veterans Affairs) explained that, in accordance with the 1968 legislative intent cited above, the courts in these discrimination cases should use the burden of proof analysis adopted by the National Labor Relations Board and approved by the Supreme Court under the National Labor Relations Act. See 132 Cong. Rec. 29226 (Oct. 7, 1986) (statement of Cong. Montgomery) citing *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

"This standard and burden of proof is applicable to all cases brought under this section regardless of the date of accrual of the cause of action. To the extent that the courts have relied on *dicta* from the Supreme Court's decision in *Monroe v. Standard Oil Co.*, 452 U.S. 549, 559 (1981), that a violation of this section can occur only if the military obligation is the sole factor (see *Sawyer v. Swift & Co.*, 836 F.2d 1257, 1261 (10th Cir. 1988)), those decisions have misinterpreted the original legislative intent and history of 38 U.S.C. 2021(b)(3) and are rejected on that basis" (House Report No. 103-353, 1994 *United States Code Congressional & Administrative News* 2449, 2457).

The appellate courts that have addressed the burden of proof issue under section 4311 since Congress enacted USERRA in 1994 have been unanimous in putting the burden of proof on the employer (defendant) to show lack of pretext, rather than putting the burden of proof on the employee (plaintiff) to show that the employer's proffered reason for taking an employment action was a pretext for unlawful discrimination. See *Velasquez-Garcia v. Horizon Lines of Puerto Rico, Inc.*, 2007 U.S. App. LEXIS 114, at page 3 (1st Cir. 2007); *Coffman v. Chugach Support Services Inc.*, 411 F.3d 1231, 1238-39 (11th Cir. 2005); *Gagnon v. Sprint Corp.*, 284 F.3d 839, 853-54 (8th Cir. 2002); *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898-99 (9th Cir. 2002); *Hill v. Michelin North America Inc.*, 252 F.3d 307, 312 (4th Cir. 2001); *Sheehan v. Department of the Nav*y, 240 F.3d 1009, 1014 (Fed. Cir. 2001); *Gummo v. Village of Depew, New York*, 75 F.3d 98, 106 (2nd Cir. 1996).

The two-pronged burden-shifting analysis under USERRA and the National Labor Relations Act [*National Labor Relations Board v. Transportation Management Corp.*, 462 U.S. 393 (1983)] is markedly different from and much more pro-employee than the three-pronged analysis under Title VII of the Civil Rights Act of 1964. (Title VII makes it unlawful for an employer to discriminate in employment on the basis of race, color, sex, religion, or national origin.) In Title VII cases, the employee (plaintiff) must first prove that one of the Title VII factors (race, sex, etc.) was the reason, or at least a reason, for the employer's action, then the burden of going forward with the evidence (but not the burden of proof) shifts to the employer, to offer a legitimate, non-discriminatory reason for the action. The burden of proof then shifts back to the plaintiff, to show that the employer's proffered reason for the action is a pretext for discrimination. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

In Law Reviews 61, 0642, 0701, and 0707, I explained the distinction between section 4311 cases (discrimination) and section 4312 cases (reemployment). Section 4312 cases are much easier to prove, because in such a case you don't need to get inside the head of the employer-defendant. In a reemployment case under section 4312, you only need to prove that you meet five objective eligibility criteria, as discussed in Law Review 77 (left job for service, gave employer prior notice, have not exceeded the cumulative five-year limit, released from the period of service without a punitive or other-than-honorable discharge, and made a timely application for reemployment). If you meet these criteria, you are entitled to reemployment, regardless of the reason the employer does not want you back, and

even if reemploying you means laying off the person who was hired to take your place when you left the job for service.

Section 4311 cases are more difficult, because in a section 4311 case you must prove that one of the protected factors mentioned in section 4311 (membership in a uniformed service, obligation to perform service, etc.) was *a motivating factor* in the employer's decision. The degree of difficulty of section 4311 cases should not be overstated, however. You are not required to prove that your military service was *the* reason you were fired-it is sufficient to prove that your service was *a motivating factor* in the employer's decision. There need not be a "smoking gun" or employer admission, and the "motivating factor" can be proved by circumstantial as well as direct evidence. The courts often look to the *proximity in time* between the protected activity and the adverse employment action. I invite your attention to Law Review 0707 (employee fired immediately after returning from two-week National Guard training) and Law Review 35 (employee fired immediately after giving the employer notice of impending mobilization).