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CATEGORY: 1.17-Discrimination Prohibited

How NOT To Prove a Discrimination Case Under USERRA

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***Hart v. Township of Hillside,* 228 Fed. Appx. 159, 2007 WL 1063105 (3rd Cir. 2007).**

Section 4311(a) of the Uniformed Services Employment and Reemployment Rights Act (USERRA) outlaws discrimination *in hiring* (as well as discrimination against those already employed) because of membership in a uniformed service, application to join a uniformed service, performance of uniformed service, or application or obligation to perform uniformed service. Section 4311(c) of USERRA [38 U.S.C. 4311(c)] provides that if one of these protected factors were *a motivating factor* in the employer's adverse decision, the *burden of proof*—not just the burden of going forward with the evidence—shifts to the employer. In such a situation, the employer must prove (not just assert) that it would have made the same decision in the absence of the protected factor, for a lawful reason unrelated to the plaintiff's military status.

In November 2001, the Township of Hillside, N.J., sought to hire two new firefighters. The township accepted applications and conducted interviews. Timothy Hart, the plaintiff, was one of six applicants; he was rated sixth and was not hired. The top two candidates were hired immediately, and the candidate rated third was hired later.

At his interview, Mr. Hart mentioned that he was a member of the National Guard. The interviewers then asked him at least 13 questions about his military obligation, according to the Court of Appeals decision. By asking these questions, the interviewers helped Mr. Hart establish his *prima facie* case that his National Guard membership was *a motivating factor* in the employer's decision to rank him so low that he would not be selected.

On Dec. 5, 2003, Mr. Hart filed suit against the Township of Hillside in the U.S. District Court for the District of New Jersey. The township asserted five non-discriminatory reasons for rating Mr. Hart at the bottom of the list of six applicants: Mr. Hart seemed to take the interview too casually, he was inappropriately dressed for the interview, he had a criminal history, he had a poor driving record (including three moving violations and four accidents), and his psychological evaluation suggested that he was immature. During the discovery process in district court, Mr. Hart put forth no evidence to dispute any of the township's contentions. The district court granted summary judgment for the employer, and Mr. Hart appealed to the U.S. Court of Appeals for the Third Circuit.

The district court applied the burden-shifting analysis enunciated by the Supreme Court in *McDonnell Douglas v. Green,* 411 U.S. 792 (1973), a case arising under Title VII of the Civil Rights Act of 1964. The court of appeals held that applying the *McDonnell Douglas* standard was in error and that the district court should instead have applied the burden-shifting analysis enunciated by the U.S. Court of Appeals for the Federal Circuit in *Sheehan v. Department of the Navy,* 240 F.3d 1009, 1013 (Fed. Cir. 2001). (*Sheehan* is a USERRA case.) The appellate court further held that applying the wrong analysis was "harmless error" because the township was still entitled to summary judgment under the correct *Sheehan* analysis.

My distinct impression is that this case was a monumental waste of everyone's time, including the court's. In retrospect, the township's interviewers should have been instructed to ignore Mr. Hart's mention of his National Guard membership. By asking him 13 or more questions about his military obligations, the interviewers helped Mr. Hart to prove his *prima facie* case and to shift the burden of proof to the employer. Even after that mistake, the township might have avoided this lengthy litigation by informing Mr. Hart of the legitimate, non-discriminatory reasons for ranking him last among the six applicants.

Section 4311 outlaws *discrimination—it does not guarantee that you will be hired no matter how poor your qualifications*.