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How to Prove a USERRA Discrimination Case—Continued

By CAPT Samuel F. Wright, JAGC, USN (Ret.)

***Sheehan v. Department of the Navy,* 240 F.3d 1009 (Fed. Cir. 2001).**

Patrick J. Sheehan served a long and distinguished career in the Judge Advocate General's Corps of the Regular Navy. He retired from the Navy as a captain in the mid-1990s. In 1996, he applied for the newly created civilian position of attorney advisor and counsel to the commander of the Naval Training Center at Great Lakes, Ill. After he was not selected, he appealed to the Merit Systems Protection Board (MSPB), alleging that his non-selection was motivated by his Navy service, in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA).

Section 4311(a) of USERRA provides: "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 supplied).

As I explained in Law Review 104 and other articles, Congress enacted USERRA in 1994 as a recodification of the Veterans' Reemployment Rights Act (VRRA), which can be traced back to 1940. Section 2021(b)(3) of the VRRA provided: "Any person who seeks or holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve Component of the Armed Forces." 38 U.S.C. 2021(b)(3) (1988 edition of the United States Code).

Under the VRRA, the protection against discrimination only applied to members of the Reserve Components. Under USERRA, the protection was broadened to include anyone who has ever served in or applied to join any one of the uniformed services, whether the Active Component or a Reserve Component. CAPT Sheehan states a facially valid claim when he asserts that the Navy (as a civilian employer) adversely considered CAPT Sheehan's Navy uniformed service when deciding upon his application for the civilian position in question. Of course, unless CAPT Sheehan has evidence that the Navy adversely considered his Navy service, he is wasting everyone's time by making this claim.

Under section 4311(c) of USERRA [38 U.S.C. 4311(c)], CAPT Sheehan is not required to prove that his Navy service was *the* reason for his non-selection. He only needs to prove that his service (or one of the protected factors under section 4311(a)) was *a motivating factor* in the employer's decision to hire someone other than CAPT Sheehan for the position. If CAPT Sheehan proves that, the burden of proof shifts to the employer to prove that it would not have selected CAPT Sheehan even if he had never served in a uniformed service.

Especially after the terrorist attacks of Sept. 11, 2001, it is often not difficult to convince a judge, jury, or the MSPB that an employer unlawfully considered the military obligations of a *current* National Guard or Reserve member when making a decision about hiring, promotion, or firing. An employer may object to the burden and inconvenience often imposed on the civilian employer of a National Guard or Reserve member, who may frequently demand the right to be away from the civilian job for military training or service. Thus, the employer may be tempted to avoid or rid itself of the burden by firing the Reserve Component member or not hiring the member in

the first place.

For a veteran or military retiree, it is much more difficult to show a nexus between an employment decision and the claimant's military service in the past, often distant past. The military retiree or veteran will not be asking for time off from work for periodic military training. It is unlikely (but not wholly out of the realm of possibility) that the retiree or veteran will volunteer for or be called to additional military service. There may be some civilian employers who have ideological objections to military service, even service four decades ago in Vietnam. If the employer uses an individual's military service (even service decades ago) as a negative factor in making a decision about hiring, promotion, or firing, then the employer has violated section 4311(a) of USERRA.

It seems unlikely that the Department of the Navy, in making a civilian hiring decision, would adversely consider an applicant's uniformed service in the Navy. Not surprisingly, CAPT Sheehan lost his case at the MSPB. The Board held, after a hearing, that CAPT Sheehan had not presented *evidence* that would lead the MSPB to conclude that his uniformed service was *a motivating factor* in his non-selection for the civilian job.

CAPT Sheehan appealed to the U.S. Court of Appeals for the Federal Circuit, which affirmed the MSPB denial. Interestingly, the court took this case as an opportunity to establish definitively the legal standards that apply to section 4311 cases. In a well-written scholarly opinion by Judge Pauline Newman of the Federal Circuit, and joined by her two colleagues on the panel that decided the case, the court wrote:

"The procedures established by precedent require an employee making a USERRA claim of discrimination to bear the initial burden of showing by a preponderance of the evidence that the employee's military service or obligation was 'a substantial or motivating factor' in the adverse employment action. *See Transportation Management,* 462 U.S., at 400-01. If this requirement is met, the employer then has the opportunity to come forward with evidence to show, by a preponderance of the evidence, that the employer would have taken the adverse action anyway, for a valid reason. *See id.; Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 287 (1977); *Holo-Krome Co. v. Nat'l Labor Relations Bd.,* 954 F.2d 108, 110-12 (2d Cir. 1992); *see also Matson Terminals Inc. v. Nat'l Labor Relations Bd.,* 114 F.3d 300, 303 (D.C. Cir. 1997); *FPC Holdings Inc. v. Nat'l Labor Relations Bd.,* 64 F.3d 935, 942 (4th Cir. 1995); *Mississippi Transport Inc. v. Nat'l Labor Relations Bd.*, 33 F.3d 972, 979 (8th Cir. 1994); *Union-Tribune Pub. Co. v. Nat'l Labor Relations Bd.,* 1 F.3d 486, 490 (7th Cir. 1993).

"The factual question of discriminatory motivation or intent may be proven by either direct or circumstantial evidence. *See FPC Holdings, Inc.,* 64 F.3d at 942 ('Motive may be demonstrated by circumstantial as well as direct evidence and is a factual issue which the Board [NLRB] is peculiarly suited to determine.'); *Matson Terminals,* 114 F.3d at 303-04; *see also Kumferman v. Dep't of the Navy,* 785 F.2d 286, 290 (Fed. Cir. 1986) (intent is a question of fact to be determined by the MSPB). Circumstantial evidence will often be a factor in these cases, for discrimination is seldom open or notorious. Discriminatory motivation under USERRA may be reasonably inferred from a variety of factors, including proximity in time between the employee's military activity and the adverse employment action, inconsistencies between the proffered reason and other actions of the employer, an employer's expressed hostility toward members protected by the statute together with knowledge of the employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses. *Cf. W.F. Bolin Co. v. Nat'l Labor Relations Bd.,* 70 F.3d 863, 871 (6th Cir. 1995). In determining whether the employee has proven that his protected status was part of the motivation for the agency's conduct, all record evidence may be considered, including the agency's explanation for the actions taken.

"When the employee has met this burden, the burden shifts to the employer to prove the affirmative defense that legitimate reasons, standing alone, would have induced the employer to take the same adverse action. *Transportation Management,* 462 U.S. at 400; *Mt. Healthy,* 429 U.S. at 285-86. This applies to both so-called 'dual motive' cases (in which the agency defends on the ground that, even if an invalid reason played a part in the adverse action, the same action would have been taken in the absence of the invalid reason) and so-called 'pretext' cases (in which the agency defends on the ground that it acted only for a valid reason). *See Holo-Krome,* 954 F.2d at 110-11." *Sheehan,* 240 F.3d at 1013-14. This language has been quoted and cited with approval in many subsequent cases, including cases in the non-federal sector as well as the federal sector. USERRA applies essentially to all employers in this country, including federal, state, local, and private sector employers.