

# LAW REVIEW 912-update

**Update:** (March 2009)

CATEGORY: 1.1.1.7—Application to state & local governments

1.2—Discrimination Prohibited

1.4—USERRA Enforcement

## **DOJ Sues NC to Enforce USERRA Regarding a Magistrate Who Is a Reservist**

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

In Law Review 0912 (February 2009), I reported on the lawsuit filed by the United States Department of Justice (DOJ) on Nov. 14, 2008, against the NC Administrative Office of Courts and NC Superior Court Judge Jerry Braswell. The lawsuit alleged that Judge Braswell violated the Uniformed Services Employment and Reemployment Rights Act (USERRA) when he decided not to reappoint Army National Guard member James Myles to a second term as a magistrate. On March 8, 2009, the *Goldsboro News-Argus* reported that the lawsuit was settled. Under the settlement, Mr. Myles received \$12,000 in back pay from the Administrative Office of Courts.

The Administrative Office of Courts did not admit that Judge Braswell's failure to reappoint Mr. Myles as a magistrate violated USERRA. Judge Braswell did not join in the settlement and refused to comment on it.

Mr. Myles missed many days of work at his civilian job because of his National Guard obligations, but each absence was protected by USERRA. When his initial term as a magistrate expired, the county clerk of court nominated him for a second term, but Judge Braswell refused to reappoint him. Mr. Myles complained to the Veterans' Employment and Training Service, United States Department of Labor (DOL-VETS), which investigated his claim and found it to have merit. After Judge Braswell and the Administrative Office of Courts refused to comply with the DOL-VETS demands that they come into compliance with USERRA, DOL-VETS referred the case to DOJ, which agreed that the case had merit and filed suit on behalf of Mr. Myles.

During the DOL-VETS investigation, Judge Braswell wrote to the agency, asserting that magistrate appointments and reappointments are completely within his discretion and that "USERRA has no application on this case." *Wrong*. As I explained in Law Reviews 0609 (Apr. 2006), 0616 (June 2006), 0621 (July-Aug. 2006), and 0701 (Jan. 2007), USERRA most definitely applies to persons holding temporary, probationary, and at-will jobs. You can find all previous Law Review articles at [www.roa.org/law\\_review](http://www.roa.org/law_review).

Under NC law, Judge Braswell has the discretion to consider such factors as he chooses to consider when deciding whether to reappoint a magistrate to a second term, but under section 4311(a) of USERRA it is unlawful for Judge Braswell to consider Mr. Myles' National Guard service, and the absences from work necessitated by his service, as a negative factor in the reappointment decision. Article VI, Clause 2 of the United States Constitution (the "Supremacy Clause") provides that federal law trumps conflicting state law.

On Nov. 2, 2006, Judge Braswell sent a letter to Mr. Myles, criticizing his absences from work caused by his National Guard service and telling him that "National Guard duty comes second to your job." *Wrong*. Under USERRA, the need of the nation to defend itself overrides the needs or convenience of any civilian employer--federal, state, local, or private sector. I invite the reader's attention to Law Review 0821 (May 2008) and Law Review 0909 (Feb. 2009).

When Congress enacted the reemployment statute in 1940, and when it substantially updated the law by enacting USERRA in 1994, and at all other relevant times, Congress was most certainly aware that this law can be burdensome on civilian employers, and sometimes on the civilian work colleagues of the employee who serves in the National Guard or Reserve. Congress decided that those burdens are justified by the nation's need to defend itself. The burdens imposed on civilian employers and co-workers pale to insignificance when compared to the burdens voluntarily undertaken by the fraction of 1% of our population who volunteer to serve in the Armed Forces.

Under section 4311(c) of USERRA, Mr. Myles and DOJ need not prove that Mr. Myles' National Guard obligations were *the reason* that Judge Braswell declined to reappoint him to a second term as magistrate. It is sufficient to prove that the National Guard obligations were *a motivating factor* in Judge Braswell's decision. I believe that Judge Braswell's Nov. 2, 2006 letter is sufficient, in and of itself, to prove that Mr. Myles' military obligations were considered by Judge Braswell when he decided not to reappoint Mr. Braswell.

In the settlement agreement, NC did not admit that it violated USERRA, but employers don't pay money to settle cases unless they believe that they can lose.