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15th Supreme Court Case Relating to Reemployment Statute *Monroe v. Standard Oil Co.* 452 U.S. 549 (1981)

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1.2—USERRA-Discrimination Prohibited
10.1—Supreme Court Cases on Reemployment

Roger D. Monroe worked for the Standard Oil Co. at its refinery in Lima, Ohio. The refinery was a "continuous process" and operated 24 hours per day, 365 days per year. Mr. Monroe and his colleagues worked five consecutive eight-hour days per week, but in a different five-day sequence each week. In this way, the burden of working weekends was equitably distributed among the employees.

Mr. Monroe was also a member of the Ohio Army National Guard, and he participated in inactive duty training one weekend each month. His drill weekends frequently conflicted with scheduled work in the refinery. When this occurred, Mr. Monroe attempted to rearrange his refinery schedule around his drill requirement by trading shifts with other employees. When he

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[1]I invite the reader's attention to https://www.roa.org/page/LawCenter. You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

[2]BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

was unable to arrange a shift swap, the employer granted him an unpaid leave of absence from his refinery job on those Saturdays and Sundays when he was scheduled to drill with the National Guard. Section 2024(d) of the reemployment statute [then codified at 38 U.S.C. 2024(d)] clearly required the employer to grant this leave of absence.

Mr. Monroe was a junior enlisted member of the National Guard. When he was forced to miss eight hours or 16 hours of his 40-hour workweek, because of his National Guard drill requirement, he lost money, since his drill pay was substantially less on a daily basis than his refinery pay. That pay loss was the genesis of his complaint.

Mr. Monroe's National Guard drill weekend was generally on the same weekend each month, and he had informed his employer months in advance of the weekends when he would be unable to work because of his military training obligation. He requested that the employer rearrange his work schedule around his drill weekends, so that he would not lose money because of his National Guard training.

At the time this case went to the Supreme Court, section 2021(b)(3) of the reemployment statute [then codified at 38 U.S.C. 2021(b)(3)] provided as follows: "Any person who holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied 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." Mr. Monroe asserted that the opportunity to work and be paid for a 40-hour week was an "incident or advantage of employment" protected by section 2021(b)(3), and he argued that the quoted language imposed upon the employer the obligation to rearrange his schedule around his drill weekends.

Mr. Monroe sued, with the assistance of the Department of Labor and the Department of Justice. He prevailed in the District Court, which awarded him $1,086 for those days when, the court found, the employer should have made scheduling accommodations but did not. *Monroe v. Standard Oil Co.,* 446 F. Supp. 616 (N.D. Ohio 1978). The employer appealed, and the Court of Appeals reversed. *Monroe v. Standard Oil Co.,* 613 F.2d 641 (6th Cir. 1980). The Supreme Court granted *certiorari* because of the apparent intercircuit conflict, referring to *West v. Safeway Stores, Inc.,* 609 F.2d 147 (5th Cir. 1980).

In a 5-4 decision written by Justice Potter Stewart, the Supreme Court affirmed the 6th Circuit's dismissal of Mr. Monroe's complaint. The Court cited the legislative history of section 2021(b)(3) and held, "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 and demotion, motivated *solely* by Reserve status." *Monroe v. Standard Oil Co.,* 452 U.S. 549, 559 (1981) (emphasis supplied).

This quoted language had unfavorable consequences that the Supreme Court probably did not intend or anticipate. In *Sawyer v. Swift & Co.,* 836 F.2d 1257, 1261 (10th Cir. 1988), the U.S. Court of Appeals for the 10th Circuit cited

the quoted language and held that a Reservist claiming to have been fired because of his Reserve obligations must prove that the discharge was motivated *solely* by the Reserve obligations. As you can imagine, it is most difficult to prove that anything that happens can be attributed *solely* to something else—human life is seldom that simple.

In 1994, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA), a complete rewrite of the reemployment statute construed by the Supreme Court in *Monroe.* Section 4311 of USERRA (38 U.S.C. 4311) is a much broader and stronger anti-discrimination provision than section 2021(b)(3). Section 4311(c) of USERRA provides that an individual challenging a discharge or other alleged discrimination is only required to prove that the protected factor (like performance of uniformed service) was *a motivating factor* (not necessarily the sole reason) for the employer's unfavorable action. USERRA's legislative history clearly indicates that the intent of section 4311(c) was to overrule *Monroe* and *Sawyer* on this "motivated solely" issue. I invite the reader's attention to Law Review 0739 for a detailed discussion of *Monroe, Sawyer,* and the USERRA legislative history on this point.

While USERRA clearly superseded *Monroe* on the "solely motivated" issue, I believe that *Monroe* is still good law on the basic issue decided by the Court. When a Reserve Component member's military training schedule conflicts with the civilian job schedule, the employer is clearly required to grant the employee time off (at least time off without pay) so that the employee can attend the military training without risk of losing the civilian job. But the employer is not required to rearrange the employee's work schedule in order to protect the employee from loss of pay in cases where the hourly civilian pay exceeds the hourly military pay. *See Rogers v. City of San Antonio,* 392 F.2d 758 (5th Cir. 2004).

As a result of the Law Review column, I hear from Reserve and National Guard members every day, with USERRA questions and problems. I occasionally hear complaints like Mr. Monroe's: I lose money when I drill, and I want the employer to rearrange my civilian work schedule so that I can work and be paid for the same number of hours, and also perform my military training. Much more commonly, I hear the exact mirror-image of Mr. Monroe's question.

For example, I recently heard from a nurse—a nurse as a Reservist and a nurse in her civilian job. Like the oil refinery at issue in *Monroe,* a hospital must operate on weekends and overnight. She used to work at the civilian hospital every other weekend. As recommended by the National Committee for Employer Support of the Guard and Reserve (ESGR), she notified the civilian hospital's chief nurse of her Reserve drill schedule for the entire fiscal year. The chief nurse then rearranged her civilian weekend work schedule around her drill weekends. As a result, this nurse either drills or works at the civilian hospital almost every weekend. Unlike Mr. Monroe, her priority is on having some weekends off, not on maximizing her income.

I believe that requiring an employee to work on a day that he or she otherwise would have had off, in order to "make up for" the employee's absence for uniformed service on another day, is a violation of USERRA. I invite the reader's attention to Law Review 103 ("Do I Have To Work on My Day Off?") and Law Review 140 ("Do I Have To Work on My Day Off?—Part 2").

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