LAW REVIEW 1004

Generous Employer Not Required To Remain Generous

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

Crews v. City of Mt. Vernon, 567 F.3d 860 (7th Cir. 2009).

1.2—Discrimination Prohibited
1.3.2.10—Furlough or Leave of Absence Clause
1.8—Relationship Between USERRA and other Laws/Policies

Ryan P. Crews is a Corporal in the Police Department of the city of Mt. Vernon, Illinois. He is also a member of the Illinois Army National Guard. His regular police department schedule is Wednesday through Sunday, with Mondays and Tuesdays off. Frequently, his National Guard drill weekend conflicts with his police department schedule. This recent published Court of Appeals decision relates to the financial impact of that conflict.

Section 4312 (38 U.S.C. 4312) of the Uniformed Services Employment and Reemployment Rights Act (USERRA) gives an employee the right to leave a position of civilian employment in order to perform "service in the uniformed services" of however short or long the duration and then to return to the civilian employment after completing the period of service. USERRA's definition of "service in the uniformed services" [38 U.S.C. 4303(13)] specifically includes inactive duty training (drills), as well as active duty, active duty for training, initial active duty training, and other forms of service. When Mr. Crews is scheduled to work for the police department on the same weekend as his National Guard drills, USERRA requires that the police department permit him to miss work on the Saturday and Sunday, in order to report to his National Guard training.

USERRA does not require an employer to pay an employee for time the employee is away from work for uniformed service—the employer is only required to grant unpaid military leave. Section 4302(a) [38 U.S.C. 4302(a)] provides that USERRA does not supersede, nullify, or diminish any other federal or state law, local ordinance, contract, collective bargaining agreement, or employer policy or practice that provides greater or additional rights to employees who are away from work for uniformed service.

Mt. Vernon chose to provide greater or additional benefits in two ways. First, the city paid differential pay, so that Crews or a similarly situated police officer would not lose net pay when missing a day of civilian work for National Guard drills. Second, the city permitted Crews and others similarly situated to make up the missed work days by working on days that the police officer would otherwise have off. At the time the city adopted these policies, Crews was the only police officer who was a member of a Reserve Component of the Armed Forces.

After the terrorist attacks of September 11, additional police officers joined National Guard and Reserve components. Including additional police officers and Crews' promotion to corporal in the department caused the cost of these benefits to increase, and the city rescinded the policy of permitting police officers to work on days off to make up for work days missed because of drill requirements. The city retained the differential pay policy. Crews protested the elimination of the rescheduling policy and filed suit in the United States District Court for the Southern District of Illinois after the city refused to reinstate the policy.

After discovery, the District Court granted the employer's motion for summary judgment. Crews appealed to the United States Court of Appeals for the 7th Circuit, the federal appellate court that sits in Chicago and hears federal cases appealed from federal district courts in Illinois, Indiana, and Wisconsin. The 7th Circuit affirmed the grant of summary judgment.

Not surprisingly, the 7th Circuit decision cites *Monroe v. Standard Oil Co*., 452 U.S. 549 (1981). *Monroe* is the 15th of 16 Supreme Court cases under the reemployment statute, which dates back to 1940. I discuss *Monroe* and its implications in detail in Law Review 0923 (June 2009). All previous Law Review articles are available on ROA's website,www.roa.org/law_review. You will find more than 600 articles, mostly about USERRA and related laws.

In *Monroe*, the Supreme Court decided that USERRA's predecessor did not require an employer to rearrange an employee's work schedule in order to enable to employee to maximize his or her earnings, by rescheduling the civilian work schedule around the military training requirement. Nothing in the text or legislative history of USERRA shows any intent by Congress to overrule *Monroe* on this holding.

As I explained in Law Review 103, and other articles, Congress enacted USERRA in 1994, as a complete rewrite of the Veterans' Reemployment Rights Act (VRRA), which was enacted in 1940 and frequently amended. USERRA's legislative history includes the following statement: "The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protection against employment-related discrimination, and the protection of certain other rights and benefits have been eminently successful for over fifty years. Therefore, the Committee [House Committee on Veterans' Affairs] wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act, remains in full force and effect in interpreting these provisions. This is particularly true of the basic principle established by the Supreme Court that the Act is to be 'liberally construed.' See *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); *Alabama Power Co. v. Davis*, 431 U.S. 581 (1977)." House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2452.

As I explained in Law Review 0923, USERRA's legislative history criticizes *Monroe* on an unrelated issue of whether it is necessary to prove that anti-military animus was the sole reason for an unfavorable personnel action, or whether it is sufficient to prove that anti-military animus was *one of the reasons* for the employer's decision. With regard to the central holding of *Monroe*, concerning the employer's duty (or lack of duty) to make scheduling accommodations, the enactment of USERRA in 1994 did not overrule *Monroe*, and *Monroe* is still good law on its central holding. See *Rogers v. City of San Antonio*, 392 F.3d 758 (5th Cir. 2004).

Section 4316(b)(1) of USERRA provides: "Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be … deemed to be on furlough or leave of absence while performing such service … and entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service." 38 U.S.C. 4316(b)(1). This is referred to as the "furlough or leave of absence clause" and was included in the VRRA before the 1994 enactment of USERRA. I invite the reader's attention to category 1.3.2.10 in the Law Review Subject Index for six

articles about this provision.

During the nine years that Mt. Vernon's rescheduling policy was in effect, that policy applied only to employees (like Crews) who needed to miss a day of work for uniformed service. The policy did not apply to a police officer who wanted to be off work on Saturday to attend a child's soccer game or for any reason other than military service. Accordingly, section 4316(b)(1) did not require the city to continue the rescheduling policy.

Crews argued that Mt. Vernon's rescheduling policy was a "benefit of employment" as broadly defined by section 4303(2) of USERRA, 38 U.S.C. 4303(2), and that section 4311 (38 U.S.C. 4311) forbade the city to deny this benefit. Crews argued that once the city had established the benefit, even voluntarily, it was precluded from ever discontinuing the benefit. Both the District Court and the 7th Circuit firmly rejected this argument. The appellate court held that section 4311 makes it unlawful for the city to deny Crews (or Reserve Component members generally) a benefit to which he is otherwise entitled as an employee. Since the rescinded rescheduling policy only benefited police officers who were Reserve Component members, section 4311 did not preclude the city from ending the policy, the 7th Circuit held.

Section 4302 of USERRA (38 U.S.C. 4302) makes it clear that USERRA is a floor and not a ceiling on the rights of individuals who serve or have served in our nation's uniformed services, including the Reserve and National Guard. Section 4302(a) provides that USERRA does not supersede, nullify, or diminish another federal or state law, local ordinance, contract, collective bargaining agreement, or voluntary employer policy or practice that provides greater or additional rights or benefits. Section 4302(b) provides that USERRA overrides and supersedes state laws, local ordinances, contracts, collective bargaining agreements, and employer policies and practices that purport to limit USERRA rights and benefits or that impose additional prerequisites upon the exercise or enjoyment of USERRA rights and benefits.

A Department of Defense organization called the National Committee for Employer Support of the Guard and Reserve (ESGR) accords recognition and awards (up to and including the prestigious Freedom Award) to employers that go above and beyond the requirements of USERRA in supporting employees who are members of Reserve Components of our nation's Armed Forces. I believe that the 7th Circuit got it right here—that an employer is not required to maintain in perpetuity a voluntary supportive policy. I am concerned that no employer would ever establish a voluntary policy above and beyond USERRA if establishing such a policy were held to require the employer to maintain the policy forever. No employer can go below USERRA's floor, but an employer that is above the floor can lawfully return to the floor by discontinuing an "over and above" policy.

If you have questions, suggestions, or comments, please contact Captain Samuel F. Wright, JAGC, USN (Ret.) (Director of the Servicemembers' Law Center) at swright@roa.org or 800-809-9448, ext. 730.