

# LAW REVIEW 1112

## Fourth Circuit Reverses Summary Judgment for Employer

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**1.2—USERRA Discrimination**

**1.4—USERRA Enforcement**

***Bunting v. Town of Ocean City*, 2011 WL 288657 (4<sup>th</sup> Cir. Jan. 31, 2011).**

### The pertinent section of USERRA:

(a) 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.

(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person

(1) has taken an action to enforce a protection afforded any person under this chapter,

(2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter,

(3) has assisted or otherwise participated in an investigation under this chapter, or

(4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c) An employer shall be considered to have engaged in actions prohibited—

(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

(2) under subsection (b), if the person's

(A) action to enforce a protection afforded any person under this chapter,

(B) testimony or making of a statement in or in connection with any proceeding under this chapter,

(C) assistance or other participation in an investigation under this chapter, or

(D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section [4312 \(d\)\(1\)\(C\)](#) of this title.

Title 38, United States Code, section 4311 (38 U.S.C. 4311).

## **FACTUAL BACKGROUND**

William Bunting is a Senior Chief Petty Officer (E-8) in the Coast Guard Reserve (now retired) and a Sergeant in the Ocean City Police Department (OCPD). He was called to active duty from February 2003 to September 2004. He met the eligibility criteria for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and was reemployed promptly in September 2004.

From time to time, on no particular schedule, the OCPD gives Sergeants the opportunity to apply for and be considered for promotion to Lieutenant, and such an opportunity arose in 2004, while Bunting was on active duty. In its decision, the United States Court of Appeals for the 4<sup>th</sup> Circuit wrote: "Though Bunting apparently did not find out about the promotion [opportunity] until after the position had been filled, there is no evidence in the record that OCPD took any steps to prevent him from learning of the opportunity. Indeed, notice of the opening was sent to his OCPD e-mail, though he apparently did not know that he could access his e-mail account remotely."

When he learned of the closed promotion opportunity, Bunting sent a letter to the Ocean City Mayor, complaining and asserting that his USERRA rights had been violated. When the Mayor did not respond, he made a formal USERRA complaint to the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), which conducted an investigation and at least initially concluded that Bunting's complaint had merit. The DOL-VETS investigation did not result in the Department of Justice filing suit on his behalf against Ocean City. Bunting later retained private counsel and sued Ocean City in the United States District Court for the District of Maryland.

When she learned of Sergeant Bunting's letter to the Mayor and complaint to DOL-VETS, the OCPD Chief directed the OCPD's Internal Affairs Division to investigate Bunting for possibly violating OCPD policy by making such a complaint. The Chief's action at least arguably violated section 4311(b), which makes it unlawful for an employer to reprise against an employee for exercising USERRA rights or making a USERRA complaint.

The OCPD had new promotion opportunities, from Sergeant to Lieutenant, in 2005 and 2007, after Bunting returned from active duty. Bunting applied for both opportunities but was not selected. In separate counts of his complaint, he claimed that Ocean City violated USERRA in denying him the promotion on each of these three occasions.

As with any civil case, there was a period of discovery during which the plaintiff (Bunting) and the defendant (Ocean City) had the opportunity to depose witnesses and to propound and answer interrogatories and document production requests. After the discovery process had been completed, Ocean City filed a motion for summary judgment, in accordance with Rule 56 of the Federal Rules of Civil Procedure. Under Rule 56, the court is to grant a summary judgment motion if it finds, based on the evidence produced during the discovery stage, that there is "no material issue of fact" and that no reasonable jury could find for the non-moving party on that count of the complaint.

The District Court granted the summary judgment motion with respect to each count of Bunting's complaint, and this appeal followed, to the United States Court of Appeals for the 4<sup>th</sup> Circuit. The 4<sup>th</sup> Circuit is the federal appellate court that is located in Richmond, Virginia and that hears appeals from district courts in Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

The Court of Appeals reviewed the District Court's summary judgment separately with respect to each count of Bunting's complaint, affirming the summary judgment with respect to the missed promotion opportunity while he was on active duty but reversing the summary judgment with respect to the 2005 and 2007 promotion opportunities. There now must be a trial on those counts, unless Bunting and Ocean City come to a settlement.

## **OCEAN CITY DID NOT VIOLATE USERRA WITH RESPECT TO THE 2004 PROMOTION OPPORTUNITY**

It would have been unlawful for the OCPD to discriminate against Bunting with respect to the 2004 promotion opportunity, based on his Coast Guard Reserve service, but the OCPD did not have an “affirmative action” obligation to ensure that Bunting was aware of the opportunity and had the opportunity to apply.<sup>[1]</sup> After reviewing all the evidence, with an eye most favorable to the non-moving party (Bunting), the 4<sup>th</sup> Circuit found that there was no evidence from which a reasonable jury could infer that Ocean City had violated USERRA with respect to the 2004 promotion opportunity, and the 4<sup>th</sup> Circuit affirmed the summary judgment with respect to that count of the complaint.

### **AVOID PUTTING YOURSELF IN BUNTING’S DILEMMA**

Senior Chief Bunting was fully engaged with his Coast Guard duties during the entire time of his active duty. The point of USERRA, as well as the Servicemembers Civil Relief Act, is to ensure that the service member can devote his or her full attention to military duties, without undue distractions related to the civilian job and other legal issues back home, and without losing out on valuable opportunities and benefits because of the military service.

I strongly recommend that a person in this situation should draft and sign a *limited power of attorney* to a trusted colleague at work, authorizing that individual to have access to the absent service member’s personnel record and to apply, on the service member’s behalf, for promotions, transfers, benefits, etc. The agent to whom the limited power of attorney is granted should be someone who is familiar with the service member’s interests and qualifications and who can readily become aware of opportunities as they arise. The agent should be someone who is not likely to be in competition with the service member for the same promotion opportunities.

The limited power of attorney for the trusted colleague at work is separate from the *general power of attorney* that the service member grants to his or her spouse or other close relative, empowering that person to act on the member’s behalf in business matters generally. Unless the spouse works for the same employer, he or she likely will not have the information necessary to act for the member with respect to the employer.

### **OCEAN CITY AT LEAST ARGUABLY VIOLATED USERRA WITH RESPECT TO THE 2005 AND 2007 OPPORTUNITIES**

Bunting’s claims about denial of the 2005 and 2007 promotions were different, the 4<sup>th</sup> Circuit found: “We have reviewed the record, and we conclude that Bunting has adduced evidence rising to the level of a disputed issue of material fact. When [OCPD Chief] DiPino was notified of Bunting’s complaints to the mayor, she informed Ocean City’s attorney that she was referring the matter to the OCPD’s internal affairs bureau. In addition, Ocean City responded to DOL-VETS’s communication by implying that Bunting would face discipline for failing to comply with OCPD policies. In light of the fact that these threats of discipline were made in response to protected USERRA activities, the statements clearly raise the specter of retaliation. Finally, in evaluating Bunting for a promotion in 2007, one senior officer commented that Bunting was unfit for promotion because he filed actions against the OCPD. We conclude that these facts could lead a reasonable jury to find that Bunting may have received promotions in 2005 and 2007 if he had not engaged in protected activities, i.e., complaining to the mayor and filing a USERRA complaint with DOL-VETS.”

There are many published court decisions about section 4311(a) of USERRA—employer discrimination based on an individual’s membership in a uniformed service, performance of uniformed service, or obligation to perform future service. There are only a handful of published court decisions about section 4311(b)—employer retaliation for having exercised or sought to enforce USERRA rights. This case is important.

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<sup>[1]</sup> The Office of Personnel Management (OPM) USERRA regulations provide: “[Federal] Agency promotion plans must provide a mechanism by which employees who are absent because of ... uniformed service can be considered for promotion.” 5 C.F.R. 353.106(c). The OPM regulations apply to federal agencies, as employers, and not to state and local governments and private employers. The DOL-VETS regulations applying USERRA to non-federal employers contain no similar provision. Please see Law Review 0855, available at [www.roa.org/law\\_review](http://www.roa.org/law_review).