LAW REVIEW[1] 11022

Supreme Court Reserves 7th Circuit USERRA Case

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1.2—USERRA Discrimination
10.1—Supreme Court Cases on Reemployment

***Staub v. Proctor Hospital,* 562 U.S. 411 (2011).**

In an 8-0 decision[3] the United States Supreme Court reversed the unfavorable decision of the United States Court of Appeals for the Seventh Circuit: *Staub v. Proctor Hospital,* 560 F.3d 647 (7th Cir. 2009). The Court of Appeals decision is discussed in detail in Law Review 0922 (June 2009).

Staub is the 17th United States Supreme Court decision[4] applying the veterans' reemployment statute, which was originally enacted in 1940 and substantially rewritten in 1994, as the

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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.

[3]Justice Elena Kagan recused herself from participation in this case, because when she was the Solicitor General of the United States (prior to her nomination to the Supreme Court) she filed a brief suggesting that the Supreme Court should grant *certiorari* (discretionary review), which the Court did.

[4]Please see Category 10.1 in the Law Review Subject Index for a case note about each of the 16 Supreme Court decisions.

Uniformed Services Employment and Reemployment Rights Act (USERRA). The most recent case was in December 1991[5], almost 20 years ago, so this really is a big deal.[6]

Vincent Staub was a member of the United States Army Reserve until his recent retirement. As a civilian, he worked for Proctor Hospital (Peoria, Illinois) until he was fired in 2004.

As originally conceived in 1940, the reemployment statute was for a once-in-a-lifetime experience. An individual holding a civilian job[7] was drafted or voluntarily enlisted and served "for the duration." When the war was over and the individual honorably discharged, he or she returned to the civilian job and was treated, for seniority and pension purposes, as if he or she had remained continuously employed in the civilian job during the time that he or she was away from work for military service. The employer might be annoyed with the inconvenience and expense of accommodating the returning veteran, perhaps at the expense of a replacement employee, but the employer had no incentive to discriminate against the veteran, because it was unlikely that the veteran would again leave the civilian job for military service.

In 1955 and 1960, Congress expanded the reemployment statute to include initial active duty training, active duty for training, and inactive duty training performed by Reserve and National Guard personnel. Thus, the absences from work for military service were transformed from a once-in-a-lifetime experience to a recurring experience. Employers were tempted to rid themselves of the inconvenience by firing or discriminating against the Guard or Reserve member. Accordingly, in 1968 Congress made it unlawful for an employer to fire an individual or to discriminate in promotions and benefits because of obligations as a member of a Reserve Component of the armed forces. In 1986, Congress expanded the provision to outlaw initial hiring discrimination as well.

The anti-discrimination provision of the reemployment statute is an important concomitant to the reemployment provision. Without the anti-discrimination provision, an employer could avoid the reemployment obligation, and its attendant burdens, by the simple expedient of firing Reserve Component members or refusing to hire them in the first place.

When Congress enacted USERRA in 1994, it substantially expanded and strengthened the anti-discrimination provision, which now reads as follows:

> (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,

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[5]*King v. St. Vincent's Hospital,* 502 U.S. 215 (1991). Please see Law Review 0929 for a discussion of the *King* case.
[6]ROA filed an *amicus curiae* (friend of the court) brief in the Supreme Court, urging the Court to reverse the 7th Circuit, which the Court has now done.
[7]The reemployment statute has applied to the Federal Government and to private employers since 1940. In 1974, Congress expanded the law to cover state and local governments as well.

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.

38 U.S.C. 4311.

While employed by Proctor Hospital, Vincent Staub was required to attend one drill weekend per month and two or three weeks of full-time training per year. Because the angiography department of the hospital required weekend staffing, Staub's military obligations imposed some burden on the hospital.

Both Janice Mulally, Staub's immediate supervisor, and Michael Korenchuk, Mulally's supervisor, were hostile to Staub's military obligations. Mulally scheduled Staub for additional shifts without notice so that he would have to "pay back the department for everyone else having to bend over backward to cover his schedule for the Reserves." She also informed Staub's co-worker (Leslie Swedeborg) that Staub's "military duty has been a strain on the department" and she asked Swedeborg to help her "get rid of" Staub. Korenchuk referred to Staub's military obligations as "a bunch of smoking and joking and a waste of the taxpayers' money" and he stated that he was aware that Mulally was "out to get" Staub.[8]

In January 2004, Proctor Hospital issued Staub a "corrective action" disciplinary warning for purportedly violating a company rule requiring him to stay in his work area whenever he was not working with a patient. In April 2004, Proctor Hospital fired Staub for allegedly violating the corrective action. Staub contended that both the corrective action and the allegation that he had violated it were invented by Mulally and Korenchuk based on their animus against him because of his Army Reserve service.

Proctor Hospital contended that the decision to fire Staub was made by Linda Buck, the hospital's human relations director, and that Buck was not infected by any of the anti-military animus that Korenchuk and Mulally had exhibited. But Korenchuk and Mulally clearly initiated the process that led to the firing of Staub, and Buck must have relied primarily on adverse reports about Staub's work performance that she received from Korenchuk and Mulally.

Staub sued the hospital in the United States District Court for the Central District of Illinois, claiming that the firing violated section 4311 of USERRA, 38 U.S.C. 4311. The case was tried before a jury, and Staub prevailed. After hearing the evidence in multi-day trial, and after hearing the District Judge's instructions, the jury found that Staub had proved, by a preponderance of the evidence, that his Army Reserve service was a motivating factor in Proctor Hospital's decision to terminate his employment, and that the hospital had not proved that it would have fired him anyway, for lawful reasons, in the absence of his membership in the Army Reserve, his performance of uniformed service, and his obligation to perform future service.

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[8]These facts come directly from the Court's decision, written by Justice Antonin Scalia. At the outset, Justice Scalia wrote: "Staub and Proctor hotly dispute the facts surrounding the firing, but because a jury found for Staub in his claim of employment discrimination against Proctor, we describe the facts view in the light most favorable to him."

The District Judge denied Proctor's motion for new trial and motion for judgment notwithstanding the verdict. Proctor then appealed to the United States Court of Appeals for the 7th Circuit.[9] A three-judge panel of the 7th Circuit reversed the District Court verdict for Staub, holding that under the "cat's paw doctrine"[10] Proctor Hospital could not be held liable for discrimination by Korenchuk and Mulally unless Staub proved that Buck was "singularly influenced" by the two direct supervisors.

Staub applied to the 7th Circuit for rehearing *en banc,*[11] but that motion was denied. Staub applied to the Supreme Court for *certiorari* (discretionary review), which was granted.[12] Briefs for the parties and friends of the court (including ROA) were filed in July and August 2010. The oral argument was held on November 2, 2010, and the decision came down March 1, 2011.

Justice Antonin Scalia wrote the majority decision, and his opinion was joined by Chief Justice John Roberts, Justice Anthony Kennedy, Justice Ruth Bader Ginsburg, Justice Stephen Breyer, and Justice Sonia Sotomayor. The majority decision relied on principles of agency law and tort law and found that the employer (Proctor Hospital) was liable for the discriminatory actions of supervisory employees Korenchuk and Mulally and that requiring Staub to prove that Buck was "singularly influenced" by the two immediate supervisors was inconsistent with those principles.

Justice Samuel Alito, joined by Justice Clarence Thomas, wrote a concurring decision, agreeing with the result (reversal of the 7th Circuit) but relying on the text of USERRA rather than general principles of agency law and tort law. Justice Elena Kagan did not participate.

This case is not necessarily over. Justice Scalia wrote: "The jury instruction did not hew precisely to the rule we adopt today; it required only that the jury find that 'military status was a motivating factor in [Proctor's] decision to discharge him.' App. 68a. Whether the variance between the instruction and our rule was harmless error or should mandate a new trial is a matter the Seventh Circuit may consider in the first instance." We will keep the readers informed of any further developments in this most important case.

Update – May 2022

After the Supreme Court reversed and remanded the case, the Seventh Circuit, pursuant to Circuit Rule 54, invited the parties to present their positions as to whether it should mandate a

[9]The 7th Circuit is the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.

[10]The "cat's paw" reference is to a fable written by Aesop about 25 centuries ago and put into verse by LaFontaine in 1679. In the fable, a clever monkey induces a cat by flattery to extract roasting chestnuts from the fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing. Please see footnote 1 of the majority decision.

[11]If the motion for rehearing *en banc* had been granted, the case would have been reargued and decided by all the active judges of the 7th Circuit.

[12]Granting *certiorari* requires the affirmative vote of four of the nine justices. This discretionary review is denied in the vast majority of cases, and denial of *certiorari* makes the Court of Appeals decision final.

new trial or reinstate the verdict.[13] The Seventh Circuit determined that the jury instruction did not "hew precisely" to the rule it adopted.[14] Thus, the Seventh Circuit granted a new trial.[15]

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1 Constitution Ave. NE
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[13]Staub v. Proctor Hosp., 421 Fed.Appx. 647, 647—48 (7th Cir. 2011).
[14]*Id.* at 648.
[15]*Id.* at 649.