

Law Review 1168

USERRA Protects the Co-Worker Who Testifies or Provides Information in a USERRA Case

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1.2—USERRA Forbids Discrimination

1.4—USERRA Enforcement

Amendola v. Mayo Foundation, 633 F.3d 712 (8th Cir. 2011).

This case is the companion case to *Lisdahl v. Mayo Foundation*, 633 F.3d 712 (8th Cir. 2011). This is a separate but related case, and the 8th Circuit consolidated the cases for argument and decision. I discuss *Lisdahl* in detail in Law Review 1167, and you might read that article as a predicate to this one.

Mike Amendola and Roger Swor were co-workers of Chad Leroy Lisdahl at Gold Cross Ambulance Service, a division of the Mayo Foundation in Minnesota. Neither Amendola nor Swor has ever served in the military.

Section 4311(b) of the Uniformed Services Employment and Reemployment Rights Act (USERRA) provides:

- (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.*

38 U.S.C. 4311(b) (emphasis supplied).

I first developed an interest and expertise in the reemployment statute 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 interagency task force work product that President George H.W. Bush presented to Congress, as his proposal, in February 1991. This was our proposed rewrite of the Veterans' Reemployment Rights Act (VRRRA), which dates back to 1940.

Different versions of USERRA passed the House and the Senate during the 102nd Congress (1991-92), but those differences were not resolved during that Congress. At the end of the 103rd Congress (1993-94), the differences were resolved and identical language passed the

Senate and the House of Representatives. On October 13, 1994, President William J. Clinton signed Public Law 103-353 (USERRA).

During the 1980s and early 1990s, I recall several cases at DOL involving co-workers of the VRRRA claimant. For example, let us say that employer Joe Smith strenuously objects to the drill weekends of employee and National Guard member Mary Jones. "Jones, you cannot have one weekend off per month to play soldier, because I need you here at the store. The weekend is our busiest time."

In August, when Jones told Smith that she would be away from work for her weekend National Guard drills, Smith said, "Jones, if you go play soldier one more time you are fired." Bob Williams and Alice Adams, co-workers of Jones, were present and heard this statement by Jones, their boss.

In September, when Jones told Smith of her September drill weekend, Smith summarily fired her, without comment. Jones contacted Employer Support of the Guard and Reserve (ESGR) and later DOL, to complain about the firing. When contacted by ESGR and DOL, Smith claimed that Jones was fired for insubordination and substandard performance. He claimed that Jones' National Guard service had nothing to do with the firing. When asked about the August "go play soldier" statement, Smith denied ever having said any such thing.

As part of its investigation, DOL contacts Williams and Adams and asks them if they recall hearing Smith threatening to fire Jones because of her National Guard duty. Williams and Adams tell the DOL investigator, "We would love to cooperate with your investigation, but if we do Smith will fire us too. What legal protection do we have if we get fired for cooperating with the DOL investigation?"

DOL had to tell Williams and Adams that under the law as then written there was no legal protection for them. During the decade that I worked for DOL as an attorney, I recall at least five cases involving this scenario. When Susan Webman and I drafted the work product that became USERRA, our intent in drafting section 4311(b) was to protect folks like Williams and Adams.

Section 4311(b) is an important and well-written part of USERRA, but you still have to prove your case. Amendola and Swor supported Lisdahl's claim that he was mistreated and constructively discharged by Gold Cross (the employer) and David Johnson (the supervisor of Lisdahl, Amendola, and Swor).

Amendola and Swor sued Gold Cross, claiming that Johnson had retaliated against them for supporting Lisdahl's USERRA claim. As the discovery process was completed, Gold Cross filed a motion for summary judgment, which the District Court granted. The District Court held that summary judgment was appropriate because Amendola and Swor had not presented any evidence of a "materially adverse" personnel action against them because of their support for Lisdahl's USERRA claim.

Amendola and Swor appealed to the 8th Circuit, which upheld the summary judgment against them. The concluding paragraph of the 8th Circuit decision is as follows: "Applying the material adversity standard to the claims of Amendola and Swor, the actions of which Amendola and Swor complain do not rise to the level of actionable retaliation. These are the garden-variety complaints about minor slights and disagreements with supervisors that are not protected by USERRA. A federal court does not sit as a super-personnel department

that oversees a company's general employment practices and guarantees to each employee a genial boss. See, e.g., *Gilbert v. Des Moines Area Community College*, 495 F.3d 906, 916 (8th Cir. 2007); *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 973 (8th Cir. 1994). Because the 'retaliations' claimed by Amendola and Swor were not materially adverse employment actions, the district court did not err in granting Gold Cross and Johnson's motion for summary judgment."

Let this be a lesson. Please do not try to "make a federal case" about every perceived slight and every disagreement with your employer. If you are having difficulties with your employer concerning your National Guard or Reserve service, I suggest that you contact ESGR at 800-336-4590. An ESGR *ombudsman* will work with you and your supervisor to mediate small problems before they become big problems and result in litigation. I invite your attention to Law Review 1166 for a detailed description of the services that ESGR provides.^[1]

^[1] I invite your attention to www.servicemembers-lawcenter.org. You will find more than 800 articles about USERRA and other laws that are particularly pertinent to those who serve our nation in the National Guard and Reserve, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.