

## LAW REVIEW 11102

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### *Bunting v. Town of Ocean City Comes to a Conclusion*

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

1.2—USERRA-Discrimination Prohibited

1.4—USERRA Enforcement

In [Law Review 1112](#), published earlier this year, I wrote about *Bunting v. Town of Ocean City*, 2011 WL 288657 (4<sup>th</sup> Cir. Jan. 31, 2011). This is an unofficially published decision of the United States Court of Appeals for the Fourth Circuit. The 4<sup>th</sup> Circuit is the federal appellate court that sits in Richmond, Virginia and hears appeals from district courts in Maryland, Virginia, West Virginia, North Carolina, and South Carolina. The case was remanded to District Court for trial, and the trial is now over.

William Bunting is a Senior Chief Petty Officer (E-8) in the Coast Guard Reserve (now retired) and a Sergeant in the Police Department of Ocean City, Maryland. He left his civilian job when he was called to active duty from February 2003 to September 2004. Upon completion of his active duty, he met the eligibility criteria for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA), in that he left his job for service and gave the employer prior notice. His call to active duty was involuntary, so the 19-month active duty period did not count toward his five-year cumulative limit on the duration of the period or periods of uniformed service. He was released from the period of service without a disqualifying bad discharge, and he made a timely application for reemployment after he was released from service.

Bunting was a Sergeant in the Ocean City Police Department (OCPD) when he was called to the colors, and he was reinstated as a Sergeant 19 months later. During the active duty, there was an opportunity for OCPD Sergeants to apply for promotion to Lieutenant. Bunting had applied for earlier promotion opportunities, but he was not selected. He was not aware of the opportunity that arose during his active duty and did not apply. The OCPD sent him an e-mail, to his OCPD e-mail address, but at the time Bunting was on active duty and did not know that it was possible to access his OCPD e-mail remotely.

When Bunting returned to work, he learned about the missed promotion opportunity, and he complained to the Mayor, asserting that his USERRA rights had been violated. He later complained to the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). That agency found his claim to have merit and referred it to the Department of Justice (DOJ) after the OCPD refused to correct the alleged USERRA violation. DOJ declined to file suit on Bunting's behalf, and he later retained private counsel and sued the OCPD in the United States District Court for the District of Maryland.

In his lawsuit, Bunting complained about the missed promotion opportunity, during his 2003-04 active duty period. He also claimed that the OCPD had discriminated against him when it did not select him for promotion to Lieutenant when he applied again in 2005 and 2007. After discovery, the OCPD filed a motion for summary judgment with respect to each count of Bunting's complaint, and the District Court granted the motion for summary judgment in full.

To sustain a motion for summary judgment, the moving party (usually the defendant) must show that there is *no material issue of fact* and that the moving party is entitled to judgment as a matter of law. To grant the motion for summary judgment, the court must find that there is no evidence upon which a reasonable jury could find for the non-moving party. The court should consider the motion for summary judgment separately for each count of the plaintiff's complaint.

After the District Court granted the OCPD's motion for summary judgment, Bunting appealed to the 4<sup>th</sup> Circuit, which affirmed the District Court in part and reversed it in part. The appellate court affirmed the summary judgment with respect to the promotion opportunity missed during Bunting's 2003-04 active duty. The Court of Appeals agreed with the District Court, to the effect that the OCPD had no duty to ensure that Bunting was aware of the promotion opportunity.

The appellate court properly considered separately Bunting's allegations about the 2005 and 2007 promotion opportunities. The 4<sup>th</sup> Circuit held that there was evidence from which a jury could conclude that the OCPD had improperly considered Bunting's complaint about the first promotion opportunity when it considered him for promotion, but did not promote him, in 2005 and again in 2007.

Under section 4311(b) of USERRA [38 U.S.C. 4311(b)], it is unlawful for an employer to discriminate against or take an adverse action against an individual because that person "has taken an action to enforce a protection afforded any person under this chapter." The fact that Bunting's complaint about the first missed promotion was later found to be without merit did not justify the OCPD in discriminating against him or taking an adverse action against him based on his having taken that enforcement action.

Because the 4<sup>th</sup> Circuit reversed the District Court with respect to the 2005 and 2007 promotion opportunities, the case was remanded to the District Court for trial, and that trial was conducted recently. Bunting was given the opportunity to try to prove that the OCPD violated USERRA with respect to the 2005 and 2007 opportunities. Bunting did not have the opportunity to try to prove his case about the first promotion opportunity, because the 4<sup>th</sup> Circuit had upheld the summary judgment for the employer with respect to that count of Bunting's complaint.

In accordance with section 4311(c) of USERRA [38 U.S.C. 4311(c)], the District Judge properly instructed the jury, after the parties had put on their respective cases. The judge asked the jury, in writing, to answer two questions:

- a. Did Bunting prove that his complaint about the first missed promotion opportunity was *a motivating factor* in the OCPD's decision to deny him promotion to Lieutenant in 2005 and 2007?
- b. If so, did the OCPD prove that it *would not have promoted Bunting anyway* even if he had not taken the protected enforcement action?

The jury answered both questions affirmatively, which means that the OCPD won. An article in the local Ocean City newspaper made it sound like this was some kind of an anomalous "split verdict" and that the jury's findings were self-contradictory. In fact, the judge properly instructed the jury, and the jury's verdict makes sense and is supported by the evidence.

Under section 4311(c), Bunting wins if he can prove that his protected enforcement activity was *a motivating factor* in the employer's decision to deny him the promotion in 2005 and/or 2007, but the OCPD can avoid liability if it can prove that it would not have promoted Bunting anyway. The jury apparently concluded that the OCPD had proved that Bunting was not among the best qualified OCPD Sergeants being considered for promotion to Lieutenant, and that Bunting would not have been promoted in any case. The jury's verdict is in no way illogical or self-contradictory. This case was conducted exactly as Congress intended when it enacted section 4311(c).

This case is now almost certainly over. I cannot conceive of any non-frivolous ground for Bunting to appeal the adverse jury verdict.