

LAW REVIEW 1240

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DOJ Sues Home Depot for Violating USERRA

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1.2—USERRA Forbids Discrimination

1.4—USERRA Enforcement

On April 5, 2012, the United States Department of Justice (DOJ) filed suit against Home Depot in the United States District Court for the District of Arizona, on behalf of Brian Bailey, a member of the California Army National Guard. Home Depot fired Bailey on May 25, 2010. DOJ alleged that the firing violated section 4311 of the Uniformed Services Employment and Reemployment Rights Act (USERRA), in that the firing was motivated by Bailey's Army National Guard service (DOJ claimed).

Section 4311(a) of USERRA provides:

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.

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

Section 4311(c)(1) provides:

An employer shall be considered to have engaged in actions prohibited--- ... 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.

38 U.S.C. 4311(c)(1) (emphasis supplied).

To prevail in this case, DOJ does not need to prove that firing Bailey was motivated *solely* by Bailey's Army National Guard service. It is sufficient to prove that Bailey's service was a *motivating factor* in the employer's decision to terminate his employment. If DOJ proves that, Bailey wins, unless Home Depot can *prove* (not just say) that it would have fired Bailey anyway, for lawful reasons unrelated to his military service.

On April 5, [Air Force Times posted an article](#) by reporter Karen Jowers about this lawsuit. Ms. Jowers offered the company the opportunity to respond to the lawsuit. The article quotes a Home Depot spokesman Steve Holmes as follows:

In fact, the store manager who terminated this associate [Bailey] is the wife of a veteran and her daughter was also honorably discharged from active duty just last year. This store manager was a 17-year associate who personally valued the importance The Home Depot places on treating our military associates with respect, and she probably would be the last person to fire someone for anything even remotely connected to their military obligations.

I say that although Mr. Holmes' statement may be true, it is a *non sequitur* (i.e. it does not follow). Mr. Holmes wants us to infer that because the store manager is married to a veteran and is the mother of another veteran she would never discriminate against an employee because of the employee's military obligations. In my experience, such discrimination happens every day, and supervisors who are veterans or who are related to veterans are by no means exempt.

In [Law Review 1122](#), I discuss the Supreme Court case of *Staub v. Proctor Hospital*, 562 U.S. ____ (2011). Army Reserve Master Sergeant Vincent Staub proved that his 2004 firing was motivated by his Army Reserve service. He proved that over a period of years his two direct supervisors had egregiously harassed him (even to the point of trying to recruit other employees to lie about Staub in order to get him fired) because of his Army Reserve service and the burden that his service put on the angiography department of the hospital. One of the two direct supervisors was the mother of an active duty Navy sailor.

Almost 850,000 National Guard and Reserve personnel have been called to the colors since the terrorist attacks of September 11, 2001. Some have been called as many as four or five times and may be called again. Employers are increasingly annoyed by and impatient with this service. A large company like Home Depot may be very supportive of National Guard and Reserve service at the corporate headquarters level, but that does not mean that the company is supportive at the store manager level.

We will keep the readers informed of developments in this important case.