

# Law Review 12119

December 2012

## **USERRA Forbids Discrimination in Employment Based on Uniformed Service—Not Limited to Reserve Component Service**

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

1.2—USERRA forbids discrimination

1.4—USERRA enforcement

***Angiuoni v. Town of Billerica*, 2012 U.S. Dist. LEXIS 139058 (D. Mass. July 16, 2012); affirmed, 2012 U.S. Dist. LEXIS 139474 (D. Mass. Sept. 27, 2012).**

Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRRA), which dates back to 1940. Section 2021(b)(3) of the VRRRA made it unlawful for an employer to deny a person hiring, retention in employment, or a promotion or incident or advantage of employment based on "obligations as a member of a reserve component of the armed forces." When Congress enacted USERRA in 1994, it significantly broadened the protection against employer discrimination. 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."<sup>[1]</sup>

Plaintiff Joseph Angiuoni became a probationary (rookie) police officer for the Town of Billerica, Massachusetts, in April 2009, after he graduated from the Massachusetts Police Academy. Rookie police officers are considered probationary for the first year of service. Angiuoni would have become a tenured police officer after a year of service, but he was fired in November 2009, after just eight months on the force.

In September 2011, Angiuoni filed suit against the Town in the United States District Court for the District of Massachusetts, alleging that the firing violated section 4311 of USERRA, and also alleging Police Chief Daniel Rosa had interfered with Angiuoni's opportunity to obtain law enforcement employment elsewhere in Massachusetts by giving false negative reviews of Angiuoni to prospective employers. Angiuoni amended his complaint in November 2011. In December of 2011, a year ago, the Town filed a motion to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure (FRCP).

To get a case dismissed under Rule 12(b)(6), the defendant must show that the plaintiff is not entitled to any relief that the court can award *even if all the factual allegations in the plaintiff's complaint are true*. Thus, the facts set forth in this article and in the court's decision are *as alleged by the plaintiff*, since there has as yet been no judicial determination of the truthfulness of the plaintiff's claims.

With respect to the question as to whether Angiuoni's complaint should be dismissed under Rule 12(b)(6), the court referred that issue to Magistrate Judge Jennifer C. Boal.<sup>[2]</sup> Judge

Boal recommended that the *Angiuoni* case not be dismissed, and Judge Nathaniel M. Gorton adopted the recommendation.

Under Massachusetts law, a tenured police officer who is a service-connected disabled veteran (as Angiuoni is) receives preference in the event of layoffs over all other non-veteran police officers, regardless of seniority. Angiuoni's contention is that the police chief and other leaders of the department conspired to fire Angiuoni before he could serve a year in the department and obtain tenured status, because they opposed the state's veteran-preference law.

The Town argued that this allegation, even if true, would not constitute a violation of section 4311(a). The Town argued that section 4311(a) only protects *current members* of the National Guard or Reserve, but the Court found (correctly in my view) that section 4311 protects all those who are serving, apply to serve, have served, or have an obligation to serve in the uniformed services. When Congress broadened the anti-discrimination provision in 1994, Congress clearly intended to cover cases like this.

I believe that 99% of *meritorious* 4311(a) cases deal with current National Guard and Reserve members. It is not hard to believe that a civilian employer would be tempted to discriminate against a serving National Guard or Reserve member, who will need to be away from work periodically for military training and service. If the individual is not currently serving, is not subject to recall, and has no recurring military training requirements, why would the employer want to discriminate against such an individual? Unlike most veterans, Angiuoni has a plausible answer to that question.

Angiuoni served on active duty in the United States Army from 2002 to 2007, when he was honorably discharged with a service-connected back injury. After he left active duty, Angiuoni did not affiliate with the Army Reserve or Army National Guard. During the eight months that he worked for the Town, he had no weekend drill or annual training requirements and he was not subject to mobilization. Nonetheless, he has made a cognizable claim that the Town fired him because of his 2002-07 active duty and his service-connected disability.

According to Angiuoni, Police Chief Rosa pressed him to resign in November 2009. Rosa told Angiuoni that if he did not resign, he (Rosa) would ensure that Angiuoni "never works in law enforcement again." Nonetheless, Angiuoni refused to resign, and the Town fired him. Angiuoni claims that Rosa has carried out his threat by providing untrue negative information about Angiuoni to other Massachusetts police departments that were considering hiring Angiuoni.

This conduct, if proved, could constitute the tort of "tortious interference with advantageous relations" under the common law of Massachusetts. Under 28 U.S.C. 1658(a) ("supplemental jurisdiction"), Angiuoni can make this state law claim in federal court, along with his federal USERRA claim, because the state law claim is closely related to his federal law claim. The Town tried to get this claim dismissed, but the Court refused to dismiss it.

The next step in this case is the discovery process, wherein Angiuoni gets to obtain information, documents, and testimony from the Town and the Town gets those things from Angiuoni. At the end of the discovery process, the Town can make a motion for summary judgment. If the Town can show that, after discovery, there is *no remaining material issue of fact* then the Court will grant summary judgment and avoid a trial. If Angiuoni survives such a motion for summary judgment, the next step will be a trial, potentially before a jury.

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

**UPDATE:**

The defendant filed an answer to the complaint almost a year after the motion to dismiss was denied, claiming they "inadvertantly forgot" to file the answer. The plaintiff did not make a strong objection to the late complaint and the court rejected the plaintiff's motion to dismiss the affirmative defenses. The case will continue and we will keep our readers informed. See *Angiuoni v. Town of Billerica*, 2013 U.S. Dist. LEXIS 165643 (D. Mass. Sept. 20, 2013) (recommendation made by magistrate), accepted and adopted by *Angiuoni v. Town of Billerica*, 2013 U.S. Dist. LEXIS 167164 (D. Mass. Nov. 19, 2013).

**UPDATE - AUGUST 2015:** Please see [Law Review 15062](#) (July 2015) for an update on developments in this case.

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[1] 38 U.S.C. 4311(a) (emphasis supplied). This refers to section 4311(a) of title 38, United States Code.

[2] Under Article III, Section 1 of the United States Constitution, federal "Article III" judges are appointed by the President with Senate confirmation and serve for life, unless they resign or are impeached by the House of Representatives and removed by the United States Senate. A Magistrate Judge is not so appointed and does not have lifetime tenure, so Magistrate Judges cannot make binding decisions, unless the parties have consented to trial by Magistrate Judge. Magistrate Judge Boal conducted hearings and heard arguments and then made recommendations. District Judge Nathaniel M. Gordon (who was appointed by the President and confirmed by the Senate with life tenure) adopted Magistrate Judge Boal's recommendations on September 27, 2012.