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ROA Member Files Two USERRA Lawsuits

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

1.1.1.7—USERRA applies to state and local governments
1.2—USERRA forbids discrimination
1.4—USERRA enforcement
1.8—Relationship between USERRA and other laws/policies

On March 11, 2013, attorney Thomas Jarrard[1] filed two lawsuits, against two Virginia counties, on behalf of Navy Reserve Rear Admiral Mark Belton,[2] in the United States District Court for the Western District of Virginia (Harrisonburg). The defendants are Page County and Halifax County.

In these lawsuits, Admiral Belton is alleging that both counties violated section 4311 of the Uniformed Services Employment and Reemployment Rights Act (USERRA), which provides 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, 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."

Title 38, United States Code, section 4311 (38 U.S.C. 4311) (emphasis supplied).

As I explained in Law Review 89[3] (September 2003) and other articles, the 11th Amendment of the United States Constitution immensely complicates the process of suing a state government employer, but the United States Supreme Court has expressly held that political subdivisions (counties, cities, school districts, etc.) do not have 11th Amendment immunity. *See Hopkins v. Clemson College,* 221 U.S. 636, 645 (1911).

Section 4323 of USERRA (38 U.S.C. 4323) authorizes an individual claiming that a private employer or prospective employer violated USERRA to file suit against that private employer in the United States District Court for any district where the employer maintains a place of business. The final subsection of section 4323 provides: "In this section, the term 'private employer' includes a political subdivision of a State." 38 U.S.C. 4323(i). It is clear that a lawsuit of this nature can be brought and maintained in federal court, against a county, just as it can be brought and maintained against a private employer.

Admiral Belton contacted me,[4] and I referred him to attorney Thomas Jarrard. Admiral Belton did not contact the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), and he was not required to under section 4323. If an individual wants free legal representation from the United States Department of Justice (DOJ) he or she must first file a formal USERRA complaint with DOL-VETS, but an individual does not need to exhaust remedies through DOL-VETS or to obtain a "right to sue letter" from DOL-VETS before filing suit against a private employer in federal district court, with the individual's own attorney. An individual who files such a suit through private counsel and prevails can obtain a court order requiring the employer to pay the plaintiff's attorney fees. *See* 38 U.S.C. 4323(h)(2).

In most situations, I recommend that the individual claiming USERRA rights obtain private counsel and sue, and bypass DOL-VETS. The claimant needs an *advocate,* not a "neutral investigator." All too often, DOL-VETS simply takes the side of the employer and closes the case as "without merit" even when it does have merit.

For example, I invite the reader's attention to Law Review 758 (November 2007), concerning the USERRA case involving Gerald Delay and the Ace Heating Company of Seattle, Washington. Gerald Delay, a staff sergeant (SSGT) in the Air Force Reserve, was hired by Ace Heating in August 2000. He was called to active duty in February 2003 and served in Iraq, Afghanistan, and other countries, as an Air Force loadmaster

SSgt Delay came off active duty after two years and made a proper and timely application for reemployment at Ace Heating. He returned to work, but the company reduced his hours to only 30 per week, whereas he had been working a full 40-hour week before he was called to the colors. He requested advice and assistance from an Air Force legal assistance attorney at McChord Air Force Base in Washington, and the attorney sent a letter to Timothy Hayes, the owner of Ace Heating. The letter explained that Ace Heating had violated USERRA by denying SSgt Delay reinstatement into the full-time job he had before mobilization and almost certainly would have retained but for the mobilization.

Mr. Hayes fired SSgt Delay an hour after receiving the letter. SSgt Delay complained to DOL-VETS, which conducted an investigation. Mr. Hayes contended that he had fired SSgt Delay because of his substandard work performance and because he had rejected work assignments. Mr. Hayes submitted to DOL-VETS the Ace Heating

business records of problems with SSgt Delay leading up to the firing. Those records convinced DOL-VETS that SSgt Delay was properly fired for insubordination, and the agency closed its case without action.

After DOL-VETS turned him down, SSgt Delay hired a private attorney, James Beck with the firm of Gordon Thomas Honeywell Malanca Peterson & Daheim LLP of Tacoma, Washington. He discovered that Mr. Hayes created the records only after SSgt Delay complained to DOL-VETS, and then backdated them. A tip-off was that one record was dated February 29, 2005, and 2005 was not a leap year.

Mr. Hayes acknowledged creating the records after-the-fact and backdating them, but he insisted they accurately reflected problems with SSgt Delay's work performance after he returned from active duty.

The jury did not buy that argument and awarded SSgt Delay $146,000 in lost pay and economic damages, plus another $146,000 in liquidated damages, because the jury found the USERRA violation to have been willful. The jury also awarded SSgt Delay another $250,000 for the defamation of the fraudulent documents accusing him of insubordination and shoddy work.[5]

If you can find diligent, resourceful, and effective private counsel like Thomas Jarrard or James Beck, you are generally much better served than if you rely on DOL-VETS. Private counsel will approach the case as an advocate, not a neutral, and private counsel can consider other possible legal theories for relief, not just USERRA.

Admiral Belton was hired by Page County, as the county's chief administrator, in January 2005. He served in that capacity until July 2012, when the elected County Supervisors decided not to renew his contract, on a 5-1 vote. After he lost his job in Page County, he applied for a similar position in nearby Halifax County, but he was not hired.

In his lawsuit against Page County (challenging the non-renewal of his contract) and his lawsuit against Halifax County (concerning the county's decision not to hire him), Admiral Belton need not prove that the employer's decision in each case was motivated *solely* by his membership in the Navy Reserve and his absences from work for Navy training and service. It is sufficient for Admiral Belton to prove that his membership, service, and/or obligation to perform future service constituted *a motivating factor* in the Page County decision and/or the Halifax County decision. If he proves that, the *burden of proof* (not just the burden of going forward with the evidence) shifts to the employer to *prove* (not just say) that it would have made the same unfavorable personnel decision in the absence of the protected factor.

As I explained in Law Review 104 and other articles, Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA).[6] USERRA's 1994 legislative history provides as follows about the shifting burden of proof under section 4311:

"Section 4311(b) [later renumbered 4311(c)] would reaffirm that the standard of proof in a discrimination or retaliation case is the so-called 'but for' test and that the burden of proof is on the employer, once a *prima facie* case is established. This provision is simply a reaffirmation of the original intent of Congress when it enacted current section 2021(b)(3) of title 38, in 1968. *See* Hearings on H.R. 11509 Before Subcommittee No. 3 of the House Committee on Armed Services, 89th Cong., 1st Sess. at 5320 (Feb. 23, 1966). In 1986, when Congress amended section 2021(b)(3) to prohibit initial hiring discrimination against Reserve and National Guard members, Congressman G.V. Montgomery (sponsor of the legislation and Chairman of the House Committee on Veterans Affairs) explained that, in accordance with the 1968 legislative intent cited above, the courts in these discrimination cases should use the burden of proof analysis adopted by the National Labor Relations Board and approved by the Supreme Court under the National Labor Relations Act. *See* 132 Cong. Rec. 29226 (Oct. 7, 1986) (statement of Cong. Montgomery), *citing NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

This standard and burden of proof is applicable to all cases brought under this section regardless of the date of accrual of the cause of action. To the extent that courts have relied on dicta from the Supreme Court's decision in *Monroe v. Standard Oil Co.*, 452 U.S. 549, 559 (1981) that a violation of this section can occur only if the military

obligation is the sole factor (*see Sawyer v. Swift & Co.,* 836 F.2d 1257, 1261 (10th Cir. 1988)), those decisions have misinterpreted the original legislative intent and history of 38 U.S.C. 2021(b)(3) and are rejected on that basis."

House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2457.

In a very recent case, the opinion of the United States Court of Appeals for the Sixth Circuit[7] includes a most useful paragraph about how to establish a violation of section 4311:

"Discriminatory motivation may be inferred from a variety of considerations, including proximity in time between the employee's military activity and the adverse employment action, inconsistencies between the employer's conduct and the proffered reason for its actions, the employer's expressed hostility toward military members together with knowledge of the employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses. If Bobo carries the initial burden to show by a preponderance [of the evidence] that his protected status was a motivating factor in his discharge from employment, the burden shifts to UPS to prove affirmatively that it would have taken the same employment action in the absence of Bobo's protected status." *Bobo v. United Parcel Service, Inc.,* 665 F.3d 741, 754 (6th Cir. 2012).[8]

Attorney Jarrard only very recently been filed suit against these two Virginia counties, but it appears that Admiral Belton has ample evidence to establish that the elected County Commissioners unlawfully considered his Navy Reserve service in deciding not to renew his contract (Page County) and in deciding not to hire him (Halifax County). On July 21, 2011, Page County Supervisor Robert Griffith sent a letter to a third party identified only as "Phillip." In the letter, he wrote: "Mark Belton is gone to some kind of Navy school right now. In my opinion, he can stay there for all I care. I think between Regina [Regina Miller, the county's executive secretary], Amity [Amity Moler, the county's finance director], and myself we can run this county better than he has done since he has been here (or hasn't been here)."

Admiral Belton's case against Halifax County is perhaps even stronger. Departing Halifax County Administrator George Nester sent Admiral Belton an e-mail to inform him that the county had chosen another candidate. In the e-mail, Mr. Nester informed Admiral Belton that there were two reasons for his non-selection. He wrote: "The second [reason] was a concern that your essential military skills could result in your being pulled away in the event of a national crisis." This sentence is what we call a "smoking gun" proof of a violation. You don't need a smoking gun to prove a section 4311 case, but it sure is nice to have.

Section 4323(d)(1) of USERRA provides the remedies that a court may award upon finding a USERRA violation:

"In any action under this section, the court may award relief as follows:

(A) The court may require the employer to comply with the provisions of this chapter.

(B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.

(C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful."

38 U.S.C. 4323(d)(1).

Both of these cases sound like appropriate candidates for the award of liquidated (double) damages for willful violations. We will keep the readers informed of developments in these important cases.

[1] Thomas Jarrard is a Marine Corps Reserve officer and a life member of ROA. He is an attorney in Spokane, Washington with a nationwide practice for veterans and Reserve Component members.

[2] Admiral Belton is also a member of ROA.

[3] I invite the reader's attention to www.servicemembers-lawcenter.org. You will 864 articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012.

[4] As the Director of ROA's Service Members Law Center, I receive and respond to more than 700 inquiries per month from service members, military family members, attorneys, employers, congressional staffers, reporters, and others, concerning military-legal topics, especially USERRA.

[5] When you bring a civil case in federal court based on a federal statute (like USERRA), you can bring a closely related state law claim in the same federal lawsuit, under the "supplemental jurisdiction" of the federal court. *See* 28 U.S.C. 1367(a). I invite the reader's attention to Law Review 909 (February 2009) for another example of appending a state law claim, for additional relief, to a USERRA claim.

[6] The STSA is the law that led to the drafting of millions of young men, including my late father, for World War II.

[7] The 6th Circuit is the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee.

[8] This citation means that you can find the *Bobo* case in Volume 665 of *Federal Reporter, Third Series*, starting on page 741, and the particular language quoted can be found on page 754. I discuss the *Bobo* case in detail in Law Review 13036 (March 2013).