

### **Political Subdivisions of States Do Not Have 11<sup>th</sup> Amendment Immunity**

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

1.1.1.1—Hiring halls and joint employers

1.1.1.7—State and local governments as employers

1.1.3.3—National Guard service

1.2—USERRA forbids discrimination

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

***Snyder v. Johnson, 2013 U.S. Dist. LEXIS 22854 (District of Kansas Feb. 20, 2013).***

In this case, the defendants filed a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, shortly after plaintiff filed the case. There has been no trial, and there has not even been discovery, wherein the parties get to demand information, documents, admissions, depositions, etc. from each other. To prevail on a motion to dismiss, the defendant must establish that *even assuming that everything alleged by the plaintiff is true* the plaintiff is not entitled to any relief that the court can award. Accordingly, the facts contained in this article and in the February 20 court decision are based solely on the facts as alleged by the plaintiff in his complaint. Kenneth Snyder, the plaintiff, is apparently an enlisted member of the Air National Guard. On September 21, 2009, he submitted an employment application to the Board of Public Utilities (BPU) of the Unified Government of Wyandotte County and the City of Kansas City, Kansas. He was deployed overseas for two months by the Air National Guard, which prevented him from starting his BPU job on time. After he was released from duty, he began work for the BPU on January 21, 2010. He had several more Air National Guard periods, causing him to miss work during his first five months of BPU employment. The BPU fired him in early July 2010.

Snyder filed suit in the United States District Court for the District of Kansas, alleging that the firing violated section 4311 of the Uniformed Services Employment and Reemployment Rights Act (USERRA), which reads 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).

To prevail under section 4311, Snyder only needs to prove that his performance of uniformed service or his obligation to perform service was a *motivating factor* in the employer's decision to terminate his employment. Snyder need not prove that his service amounted to the *sole reason* for the firing. If Snyder proves motivating factor, the burden of proof shifts to the employer to prove that it would have fired Snyder anyway, even in the absence of his USERRA-protected activities, for lawful reasons unrelated to his service.

Snyder sued the BPU and he also sued William Johnson and Eric Clark, two BPU supervisors who allegedly harassed him about his military service and who made the firing decision. The defendants moved to dismiss the suit under Rule 12(b)(6). In a well-written six-page decision, Federal District Judge Julie A. Robinson denied the motion to dismiss.

The defendants claim that the 11<sup>th</sup> Amendment of the United States Constitution bars this lawsuit against the BPU, citing *Townsend v. University of Alaska*, 543 F.3d 478 (9<sup>th</sup> Cir. 2008). Judge Robinson held that *Townsend* is inapposite because the University of Alaska is clearly an administrative arm of the State of Alaska, while BPU is a *political subdivision* of the State of Kansas. She held that political subdivisions do not have 11<sup>th</sup> Amendment immunity, citing *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 280 (1977).<sup>1</sup>

In addition to suing the BPU, his employer, Snyder also sued William Johnson and Eric Clark, two BPU supervisors who allegedly harassed Snyder about his military service and who made the decision to fire Snyder. The defendants moved to dismiss Johnson and Clark as defendants, but Judge Robinson denied that motion as well. Section 4303 of USERRA defines 16 terms used in this statute, including the term "employer." The definition of "employer" includes "a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities." 38 U.S.C. 4303(4)(A)(i) (emphasis supplied). Because BPU delegated to Johnson and Clark certain employment-related responsibilities, including decision-making on firing Snyder, Johnson and Clark are "employers" of Snyder within the USERRA definition and are subject to his suit. Snyder has survived the motion to dismiss, but this case is far from over. Snyder is ably represented by attorney Luanne C. Leeds of Leeds Law LLC in Topeka, Kansas. We will keep the readers informed of developments in this case.

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<sup>1</sup> This is a 1977 decision of the United States Supreme Court. The citation means that you can find this case in Volume 429 of *United States Reports*, starting on page 274. The particular language cited can be found on page 280.