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Another USERRA Case Headed for Supreme Court

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Landolfi v. City of Melbourne, Florida,* 2013 U.S. App. LEXIS 6859, 195 L.R.R.M. 2599 (11th Cir. April 5, 2013), *petition for certiorari filed July 3, 2013.

1.2—USERRA forbids discrimination
1.4—USERRA enforcement
1.8—Relationship between USERRA and other laws/policies

Dominick Landolfi is an enlisted member of the Air Force Reserve and a firefighter for the City of Melbourne, Florida. Landolfi claimed that the Fire Department violated section 4311 of the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4311, by failing to promote him to the grade of Battalion Chief in 2006, 2008, and 2010 and by failing to promote him to the position of Assistant Chief of Administration in 2010.

Section 4311 of USERRA 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).

As is explained in Law Review 104[1] 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).[2]

In the 78 years since Congress enacted the National Labor Relations Act (NLRA) in 1935, Congress has passed several laws that forbid firing or discriminating against an employee or potential employee based on certain protected activities or immutable characteristics of the employee or applicant. Two of the most important laws are the NLRA and Title VII of the Civil Rights Act of 1964. Different standards and procedures apply under different employment laws.

The NLRA makes it unlawful for a private sector employer to discharge or discriminate against an employee or applicant based on the individual's union or concerted activities that are protected by the NLRA. For example, let us assume that the XYZ Corporation (a non-union shop) becomes aware that employee Joe Smith has been importuning his fellow employees, urging them to invite a union to come in and attempt to organize the workforce. XYZ fires Smith in an attempt to nip unionism in the bud.

Title VII of the Civil Rights Act of 1964 outlaws discrimination in employment based on race, color, sex, religion, or national origin. For example, let us assume that the ABC Corporation fires Mary Jones, and Jones claims that the firing was based on her race (African American) and her sex (female).

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[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 917 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform. You will also find 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 and another 95 so far in 2013.

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

Let us assume that Smith filed a complaint with the General Counsel of the National Labor Relations Board (NLRB), asserting that his firing was motivated by his protected union activities and by the employer's desire to nip unionism in the bud. The General Counsel found Smith's complaint to be meritorious and has initiated an enforcement action in the NLRB against XYZ Corporation, alleging that the firing of Smith violated the NLRA because it was motivated by Smith's protected union activities.

To prevail, the General Counsel must prove by a preponderance of the evidence that Smith's protected union activities were *a motivating factor* (not necessarily the sole reason) for the employer's decision to fire Smith. If the General Counsel 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* (not just could have) fired Smith for lawful reasons unrelated to his protected union activities. If the General Counsel proves the *prima facie* case and the employer fails to prove the affirmative defense, the General Counsel wins. *See National Labor Relations Board v. Transportation Management Corp.,* 462 U.S. 393 (1983).[3]

Now let us turn to Mary Jones' claim that she was fired on the basis of her race and/or her sex. To prevail, Jones must first prove her *prima facie* case by a preponderance of the evidence—she must prove that the employer considered her race and/or her sex in deciding to fire her. Let us assume that Jones proves her *prima facie* case. The *burden of going forward with the evidence* (not the burden of proof) shifts to the employer to *articulate a lawful non-discriminatory reason for the firing.* The *burden of proof* then shifts back to Jones to prove that ABC's explanation of the firing is a *pretext. See McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973).

You can see that the NLRA rules (*Transportation Management*) are much more favorable to the plaintiff than the Title VII rules (*McDonnell Douglas*). Under the NLRA rule, the burden of proof shifts to the employer after the plaintiff proves his or her *prima facie* case. Under the Title VII rule, only the burden of going forward with the evidence shifts to the employer and the plaintiff retains the burden of proof.

USERRA's legislative history clearly shows that Congress intended that *Transportation Management* and not *McDonnell Douglas* would apply in cases arising under section 4311 of USERRA. The comprehensive report of the House Veterans' Affairs Committee includes the following most instructive paragraph:

"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 the VRRA] of title 38, in 1968. *See* Hearings on H.R. 11509 Before Subcommittee No. 3 of the House Committee

[3] The citation means that you can find this case in Volume 462 of *United States Reports,* starting on page 393.

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)."

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

After extensive discovery, the City of Melbourne made a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Rule 56 is an important tool used by federal courts in dealing with crowded dockets. To grant summary judgment, the court must conclude that there is *no material issue of fact* and that the moving party (usually but not always the defendant) is entitled to judgment as a matter of law. The court must find that there is *no evidence* (beyond a "mere scintilla") upon which a reasonable jury could find for the non-moving party (usually but not always the plaintiff). On August 1, 2012, Judge Anne C. Conway of the United States District Court for the Middle District of Florida granted the City of Melbourne's summary judgment motion.[4]

In her decision, Judge Conway acknowledged that there was evidence from which a reasonable jury could find (if a trial were held) that the City of Melbourne had unlawfully considered Landolfi's Air Force Reserve service in deciding not to promote him. She granted summary judgment because she found that there was no evidence in the record (after discovery) to prove that the City's explanation for not promoting Landolfi was pretextual. The 11th Circuit[5] affirmed on this same basis.

It seems clear that both Judge Conway and the 11th Circuit panel[6] made a critical error in applying the Title VII rules (*McDonnell Douglas*) rather than the NLRA rules (*Transportation Management*). It was not incumbent upon Landolfi to prove that the City's explanation for not promoting Landolfi was pretextual. Rather, the burden of proof was on the City to prove that it would not have promoted Landolfi anyway, for legitimate non-discriminatory reasons unrelated to his Air Force Reserve service protected by USERRA. This was a question for a jury, and this was not an appropriate case for summary judgment.

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[4] Judge Conway's decision is apparently not published anywhere, not even in LEXIS.

[5] The 11th Circuit is the federal appellate court that sits in Atlanta and hears appeals from federal district courts in Alabama, Florida, and Georgia.

[6] As in every appellate case in our federal system, the appeal was heard by a panel of three judges. They were Stanley Marcus and Charles R. Wilson (sitting judges of the 11th Circuit) and Senior Judge Robert Lanier Anderson III of the 11th Circuit.

I invite the reader's attention to *Sheehan v. Department of the Navy,* 240 F.3d 1009 (Fed. Cir. 2001).[7] The lengthy and scholarly decision written by Judge Pauline Newman[8] (for a unanimous panel[9]) concludes that the MSPB had erred in applying the *McDonnell Douglas* rules and that the *Transportation Management* rules should have been applied.

Sheehan has been cited with approval and followed by decisions in the 1st Circuit[10], the 3rd Circuit[11], the 4th Circuit[12], and the 6th Circuit.[13] *See Vega-Colon v. Wyeth Pharmaceuticals,* 625 F.3d 22 (1st Cir. 2010); *Hart v. Township of Hillside,* 228 Fed. Appx. 159, 2007 U.S. App. LEXIS 8515 (3rd Cir. 2007); *Bunting v. Town of Ocean City,* 409 Fed. Appx. 693, 2011 U.S. App. LEXIS 1935 (4th Cir. 2011); and *Bobo v. United Parcel Service,* 665 F.3d 741 (6th Cir. 2012). There have also been numerous District Court cases in other circuits that have followed *Sheehan.*

In the final step available to him, Landolfi applied to the United States Supreme Court for a writ of *certiorari.* He filed his petition on July 3, 2013. If four or more of the nine Justices vote for *certiorari,* there will be briefs on the merits and oral argument in the Supreme Court and a decision likely toward the end of the 2013-14 term.[14] If three or fewer of the Justices vote for *certiorari* it is denied and the decision of the Court of Appeals becomes final.

I have recruited some excellent help[15] and I am drafting (for ROA) an *amicus curiae* (friend of the court) brief, urging the Supreme Court to grant *certiorari* in this important case. *Certiorari* is denied more than 95% of the time, but I believe that *Landolfi* is one of those rare cases that merit the attention of our nation's highest Court.

USERRA is important and relevant, now more than ever, because 878,407 National Guard and Reserve personnel have been called to the colors since the terrorist attacks of September 11,

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[7] The citation means that you can find this case in Volume 240 of *Federal Reporter Third Series,* starting on page 1009. The Federal Circuit is the specialized federal appellate court that sits here in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including review of decisions of the Merit Systems Protection Board (MSPB). The MSPB had applied the *McDonnell Douglas* rules. The Federal Circuit held that this was an error and that the *Transportation Management* rules should have been applied.

[8] Judge Newman was the first judge appointed directly to the Federal Circuit after the court was created in 1982. She is 85 but still an active serving judge of the Federal Circuit.

[9] Judge Paul Redmond Michel and Judge Arthur J. Gajarsa were also on the panel. Both were active judges of the Federal Circuit when the case was decided in 2001. Judge Michel has since taken senior status and Judge Gajarsa has since retired.

[10] The 1st Circuit sits in Boston and hears appeals from district courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.

[11] The 3rd Circuit sits in Philadelphia and hears appeals from district courts in Delaware, New Jersey, Pennsylvania, and the United States Virgin Islands.

[12] The 4th Circuit sits in Richmond and hears appeals from district courts in Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

[13] The 6th Circuit sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee.

[14] The term will begin on October 7, 2013 and end on or about June 30, 2014.

[15] Brice Biggins is a third-year law student at George Mason University Law School in Arlington, Virginia and editor of the *George Mason Journal of National Security Law.*

2001.[16] Moreover, the 11th Circuit decision in *Landolfi* conflicts with decisions in the 1st Circuit, the 3rd Circuit, the 4th Circuit, the 6th Circuit, and the Federal Circuit. An important federal statute like USERRA should have the same meaning all over the country, and the only way to make that happen is for the Supreme Court to grant *certiorari* and create a clear nationwide standard.

[16] We receive a weekly report from the Office of the Assistant Secretary of Defense for Reserve Affairs, and this figure is from the report dated July 9, 2013.