

LAW REVIEW 13106
August 2013

How Not To Treat a National Guard Member who Is your Employee

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

1.2—USERRA forbids discrimination

1.4—USERRA enforcement

Weber v. Logan Valley Home for the Aged, 623 F. Supp. 711 (D.N.D. 1985), affirmed, 804 F.2d 1058 (8th Cir. 1986).

Rosie M. Weber worked for the Logan Valley Home for the Aged, as a licensed practical nurse, from 1977 until March 18, 1981, when she was fired. She was a noncommissioned officer in the North Dakota Army National Guard at the time of the firing. She claimed that the firing was motivated by her National Guard service. The United States District Court for the District of North Dakota (Judge Bruce M. Van Sickle) ruled in her favor, and the United States Court of Appeals for the 8th Circuit affirmed.

Weber was represented by the United States Department of Labor (DOL) and Department of Justice (DOJ) in both the District Court and the Court of Appeals. This case arose several years before Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) in 1994. This case was governed by the Veterans' Reemployment Rights Act (VRRA), which was enacted in 1940 and superseded by USERRA in 1994.

On Thursday, August 21, 1980, Weber completed her monthly National Guard training¹ and was driving home from Bismarck, North Dakota to Napoleon, North Dakota, with another female National Guard member (Kathy Brunner). Both Weber and Brunner were still in their Army uniforms (fatigues) when they went into the Korner Bar to buy cigarettes and a beer.

Don Kleppe (who admittedly was drunk) was at the bar with two male friends. One of Kleppe's friends teased Weber and Brunner about their apparel, and they explained that they were "in the military." Kleppe told Weber and Brunner that "no decent woman would be in the military" and that women in the military were "whores, sluts, prostitutes, and lesbians." Kleppe told Weber and Brunner that they were "not fit to live in Napoleon." The women told him that they were proud to be in the military and that one did not have to be a "loose woman" to serve in uniform. Kleppe's remarks then became even more objectionable and profane. When Kleppe

¹ Even in 1980, National Guard drills were not always held on weekends. I invite the reader's attention to Law Review 13099 (July 2013), titled "This is not your father's National Guard." Please see www.servicemembers-lawcenter.org. You will find 928 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.

bought beers for the two women, they shoved the beers back at him and left the bar. This would have been nothing more than an unpleasant memory for Weber, but six months later, on February 21, 1981, Kleppe was hired as the Acting Director of the Logan Valley Home for the Aged, where Weber worked as a licensed practical nurse and as the Acting Director of Nursing.

On March 17, 1981, Kleppe stopped by the nurse's station where Weber and another nurse were working. Kleppe asked Weber if she were still in the military, and Weber said "yes." Kleppe asked Weber, "When are you leaving?"² Weber answered "April 1." Kleppe said, "No, the longer period." Weber said, "That is in the summer." Kleppe then left the nurse's station.

The next morning (March 18, 1981), Kleppe called Weber into his office and told her to close the door. Kleppe told Weber that she was fired, effective immediately. Weber asked for an explanation. Kleppe responded, "I don't have to give any f.....g reason."

Weber contacted DOL, which investigated her claim and found it to have merit. DOL and DOJ represented Weber in filing suit against the Logan Valley Home for the Aged and in the discovery process and the trial. Judge Bruce M. Van Sickle³ ruled that the firing violated the VRRA because it was motivated by Weber's military service. In explaining his ruling, Judge Van Sickle wrote:

"From the facts recited above, this Court concludes: Weber's difficulties, once they had been investigated, could have been handled by adequate administrative leadership. Probably some discipline was in order. Possibly the problems could have justified discharge after less extreme remedies had been attempted. The Court finds, however, that Weber's misconduct was not a factor in the decision to discharge her. The Court finds the claim that Weber was fired because of her misconduct to be a mere pretext. This Court concludes that the actual cause for the discharge was not any misconduct on Weber's part but Kleppe's animosity toward her because of her service in the National Guard."

Under the law in effect at the time (at least in some circuits), the person challenging a firing under the VRRA had to prove that the firing was motivated *solely* by the person's obligations as a member of a Reserve Component of the armed forces. *See Sawyer v. Swift & Co.*, 836 F.2d 1257, 1261 (10th Cir. 1988). The employer's conduct in this case was so egregious that it met this more difficult standard.

Under section 4311 of USERRA (38 U.S.C. § 4311), a person in Weber's situation need only prove that his or her military service or obligations constituted "a motivating factor" for the discharge.⁴ If the person proves motivating factor, the *burden of proof* shifts to the employer to prove that it would have fired the person anyway.

² The question apparently referred to when Weber would next be away from work for her National Guard duty.

³ The case was tried without a jury because the VRRA made no provision for jury trials. Jury trials are available under the 1994 rewrite, USERRA.

⁴ Please see Law Review 13095 (July 2013).

Under section 4323(d)(1)(C) of USERRA, 38 U.S.C. § 4323(d)(1)(C), the court is to award liquidated damages (double damages) upon finding a *willful* violation. This would likely be an appropriate case for liquidated damages, but the law in effect at the time did not provide for extra remedies for willful violations.

Judge Van Sickle ordered the Logan Valley Home for the Aged to compensate Weber for the pay that she lost by reason of the unlawful firing, including prejudgment interest. For obvious reasons, Weber did not seek reinstatement at the nursing home. The Court of Appeals affirmed, holding:

“We conclude that there was ample evidence to support the District Court's findings. This included, *inter alia*, evidence that Home Administrator Donald Kleppe, the official who fired Weber, had, before becoming Administrator, expressed the view to Weber that women had no place in the military and that military women were promiscuous or homosexual; that he had questioned Weber about her National Guard affiliation and duties the day before her discharge; that he had refused to give Weber an explanation for her termination when he fired her; and that other explanations Kleppe offered to establish good cause for her firing were either pretextual or post hoc rationalizations of his action. Further, we find no substance in the prejudgment-interest and witness-fee issues raised by the Home; these awards clearly were not an abuse of the District Court's discretion. Accordingly, we affirm on the basis of the District Court opinion.” 804 F.2d at 1059.

		This is the first te	1	tccspec	_tscspec
selectedText.doc	Z-WU-A-U-A-Ms	opened	295	1	1
FULL	1	Weber v. Logan (1986 U.S. App. L	Weber v. Logan (3
0	0	3	0	0	0
0	0	0	0	ceb7eb30-fd35-1	client%a4%a3_h
%a3forever%a6	dGLzVzB-zSkAA	0c9ee0297aa949			