LAW REVIEW 14002
January 2014

Ethan Allen Is still Rolling over in his Grave[1]

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

1.1.1.7—USERRA applies to state and local governments
1.1.2.1—USERRA applies to part-time, temporary, probationary, and at-will employees
1.1.3.3—USERRA applies to National Guard service
1.2—USERRA forbids discrimination
1.4—USERRA enforcement
1.7—USERRA regulations
1.8—Relationship between USERRA and other laws/policies

***Brown v. State of Vermont,* 2013 VT 112 (Vermont Supreme Court Dec. 13, 2013).**

Facts of the *Brown* case

On December 13, 2013, the Vermont Supreme Court affirmed the summary judgment for the State of Vermont (defendant) in a case arising under the Uniformed Services Employment and Reemployment Rights Act (USERRA). That's the bad news. The good news is that the right of the plaintiff to sue the State of Vermont, as employer, was not questioned.

The Vermont Department of Corrections (VDOC) hired Daniel Brown (a Sergeant in the Vermont Army National Guard) in December 2008, as a Temporary Corrections Officer (TCO).[2] In early 2009, Brown began formal training at the Vermont Corrections Academy in Rutland. After completing his training in late February, he reported to the Southern State Correctional Facility (SSCF) in Springfield to continue on-the-job training.

In late February 2009, shortly after Brown completed his Academy training, SSCF supervisors learned that Brown and several other Vermont Army National Guard Soldiers who were correctional officers were scheduled for mobilization and deployment to Afghanistan in late 2009. In early March 2009, Brown received an e-mail notifying him that he had been selected to

[1] Please see Law Review 0936 (August 2009) for the first part of this story. Ethan Allen is rolling over in his grave when he learns how Vermont is treating service members today. Ethan Allen and his "Green Mountain Boys" from Vermont (not one of the original 13 states, but the first state to be admitted after the ratification of the Constitution by the original 13) played an important part in winning the American Revolution, and young men and women from Vermont have played an important part in defending our country in each generation, down to our own time. I invite your attention to www.servicemembers-lawcenter.org. You will find 993 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 and another 169 in 2013.

[2] All of these facts come from the Vermont Supreme Court decision.

be interviewed for three available permanent correctional officer positions. Eight TCOs were selected for the interview, and three of them (including Brown) were National Guard members scheduled for mobilization. Three of the eight TCOs were selected for permanent status, and the three who were selected had never served in the armed forces.

Although not promoted to permanent status, Brown continued working as a TCO. Over the next few months, he was the subject of a number of critical reports about his job performance. On May 5, 2009, Brown received a letter from his supervisor, informing him that he had been discharged from his employment.

Several months later, Brown filed suit against the State of Vermont in the Civil Division of the Vermont Superior Court, Rutland Division. Brown alleged that the State violated section 4311 of USERRA, first by denying him promotion to permanent status and then by firing him.

Section 4311 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."*

38 U.S.C. 4311 (emphasis supplied).

Brown's "temporary" status is irrelevant.

Vermont TCOs are at-will, non-union employees utilized to fill schedule gaps and reduce overtime for regular VDOC employees. By statute, TCOs are not entitled to benefits or to work more than 1520 hours per year,[3] whereas permanent employees are entitled to the benefits and protections due full-time state employees.

As I explained in Law Review 0936, the temporary, at-will, non-union, and part-time status of the TCO position in no way makes it lawful for the employer to discriminate against those holding or seeking such positions with respect to initial employment, retention in employment, or promotions on the basis of obligation to perform service in a uniformed service (like the Vermont Army National Guard). Section 4331 of USERRA gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to employers. DOL published in the *Federal Register* proposed rules, for notice and comment, in September 2004, and final rules in December 2005. The final rules are now published in title 20 of the Code of Federal Regulations (C.F.R.), Part 1002. The DOL USERRA regulations provide as follows:

"Does an employee have rights under USERRA even though he or she holds a temporary, part-time, probationary, or seasonal employment position?

USERRA rights are not diminished because an employee holds a temporary, part-time, probationary, or seasonal employment position. However, an employer is not required to reemploy an employee if the employment he or she left to serve in the uniformed services was for a brief, nonrecurrent period and there is no reasonable expectation that the employment would have continued indefinitely or for a significant period. The employer bears the burden of proving this affirmative defense." 20 C.F.R. 1002.41 (bold question in original).

Vermont's motion for summary judgment

We never reached the question of whether Brown would have the right to reemployment after completing the period of service (mobilization and deployment to Afghanistan) that began in late 2009 because VDOC fired him before the mobilization occurred. To prove that denying him promotion to "permanent" status and firing him violated section 4311 of USERRA, Brown need not prove that he was an ideal correctional officer or that the denial of promotion and firing were motivated *solely* by his obligation to perform service (the impending mobilization). It

[3] 3 Vermont Statutes Annotated, section 331.

would be sufficient for Brown to prove that his obligation to perform service was *a motivating factor* in VDOC's decisions. If he proves that, the burden of proof shifts to the employer to *prove* (not just say) that Brown would have been denied promotion and fired even if he had not been a member of the National Guard.

Brown had several pieces of evidence to support his claim that his National Guard service and his impending mobilization were motivating factors in the employer's decisions to deny him promotion to permanent status and to terminate his employment. First, of the eight TCOs considered for promotion in the spring of 2009, three (including Brown) were National Guard members slated for mobilization. Three of the eight were promoted, and those promoted were all non-military.

After Brown learned that he had not been selected for promotion to permanent status, he had a conversation with Kyle Beckwith, the SSCF supervisor for training and recruitment. In explaining why Brown was not promoted, Beckwith stated: "They're not going to give me a full-time benefit slot if I'm leaving in eight months."

Later, following an investigation into complaints of employment discrimination, the SSCF superintendent issued a report finding that Beckwith had "overstepped both his authority and his expertise" in making statements about hiring decisions, that his statements led to "confusing and erroneous information, impressions and implications" and that "classified hires are based first on competence and expertise."

Stanley Woods, another SSCF supervisor, had a conversation with one of the other two National Guard members who were considered for promotion along with Brown but not selected. Woods stated that it was "common knowledge" that "the reason you are not getting promoted is because you are getting deployed." The majority decision of the Vermont Supreme Court downplayed the significance of the Beckwith and Woods statements on the grounds that both of those supervisors were not members of the panel who considered eight TCOs and promoted three to permanent status.

SSCF supervisor Mark Potanas was in charge of scheduling and also was a member of the interview panel. In a conversation with Beckwith, the recruiting officer, Potanas said, "You're bringing me more military?" Later, Potanas derided as "stupid" the participation by several military-affiliated correctional officers in the 2009 Memorial Day parade.

In downplaying the significance of Potanas' statements, the majority opinion stated: "Potanas explained that the remark was meant as a joke about scheduling problems sometimes presented by guards who were in the military; he denied that it reflected hostility toward military members and asserted that, in fact, military membership was generally looked upon favorably in hiring by the Department."

The majority decision also points out that Brown was ranked eighth among the eight TCOs considered for promotion and that Brown had received some reprimands for performance

issues in the weeks leading up to his termination. The majority decision does not consider the possibility that these incidents were manufactured or exaggerated and that the number eight ranking was affected by Brown's impending mobilization.

Rule 56 of the Vermont Rules of Civil Procedure is almost identical to Rule 56 of the Federal Rules of Civil Procedure. After discovery in a case has been completed, a party (usually the defendant) can file a motion for summary judgment. To obtain a summary judgment, and to sustain it on appeal, the moving party must show that there is *no material issue of fact* and that the moving party is entitled to judgment as a matter of law. In ruling on a motion for summary judgment, a judge should not *weigh the evidence.* The court should not grant summary judgment unless the court finds that there is *no evidence* that would support a finding for the non-moving party by the finder-of-fact (usually a jury).

Associate Justice Beth Robinson wrote an eloquent dissent, arguing that there was evidence to support a verdict for Brown and that the Supreme Court should have overturned the summary judgment. I agree with Justice Robinson.

Enforcing USERRA against the State of Vermont

As is explained in Law Reviews 89 (Sept. 2003), 0848 (Oct. 2008), 1011 (Jan 2010), 1140 (June 2011), 1144 (June 2011), 1148 (July 2011), 1158 (Aug. 2011), 1195 (Dec. 2011), 1224 (Feb. 2012), 1232 (Mar. 2012), 12115 (Nov. 2012), 12120 (Dec. 2012), 13027 (Feb. 2013), 13028 (Feb. 2013), 13066 (May 2013), 13073 (May 2013), and 13156 (Nov. 2013), the 11th Amendment of the United States Constitution presents enormous complications to the enforcement of USERRA against state government employers.

The 11th Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State."[4] Although the 11th Amendment speaks to a suit against a state by a citizen of another state, or a foreign state, the Supreme Court has held that 11th Amendment immunity also precludes a suit against a state by a citizen of that same state. *Hans v. Louisiana*, 134 U.S. 1 (1890).[5]

Because of the 11th Amendment, Brown could not bring his suit against the State of Vermont in federal court, so he brought the case in state court. Although Brown was not successful in his lawsuit against the State of Vermont, he did succeed in pointing the way for others to enforce their USERRA rights against state government agencies, as employers. The State of Vermont defended Brown's suit on the merits. The State did not claim sovereign immunity either in the trial court or the Vermont Supreme Court. This is the good news of the *Brown* case.

[4] Yes, it is capitalized just that way, in the style of the late 18th Century.
[5] The citation means that you can find the *Hans* case in Volume 134 of *United States Reports,* starting on page 1.