

The Military Extraterritorial Jurisdiction Act and the Uniformed Services Employment and Reemployment Rights Act

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1.2—USERRA forbids discrimination

1.8—Relationship between USERRA and other laws/policies

12.0—Military criminal justice

Nazario v. City of Riverside, 2013 U.S. App. LEXIS 16254 (9th Cir. Aug. 6, 2013).

This is a very interesting case involving the unlikely correlation between the Military Extraterritorial Jurisdiction Act (MEJA) and the Uniformed Services Employment and Reemployment Rights Act (USERRA).

The plaintiff (Jose Luis Nazario, Jr.) enlisted in the Marine Corps in September 1997 and was honorably discharged in October 2005. Like everyone joining the armed forces since the early 1980s, he had an eight-year obligation. Because he spent the whole time on active duty, he had no remaining reserve obligation after he left active duty. Unlike most young men and women leaving active duty, he was not a member of the Individual Ready Reserve (IRR) after he left active duty.

After his honorable discharge, Nazario joined the Police Department of the City of Riverside, California as a rookie police officer in April 2006. The Naval Criminal Investigative Service (NCIS) investigated allegations that Nazario and a squad that he led had unlawfully killed two detainees in Fallujah, Iraq on November 9, 2004. NCIS turned over its investigative findings to the United States Attorney for the Central District of California because Nazario was living in that district.

Congress enacted the Uniform Code of Military Justice (UCMJ) in 1950, replacing different laws that applied to the Army (including the Air Force as part of the Army until 1947) and to the Navy and Marine Corps and to the Coast Guard. As enacted in 1950, Article 3(a) of the UCMJ permitted trial by court martial of discharged veterans, for offenses allegedly committed while on active duty. In a case involving a former Air Force airman who had been honorably discharged five months before his arrest for alleged crimes committed in Korea on active duty, the Supreme Court held that Article 3(a) of the UCMJ was unconstitutional and that a

discharged veteran cannot constitutionally be subjected to trial by court martial. *Toth v. Quarles*, 350 U.S. 11 (1955).¹

Reservists not on active duty (including IRR members) can be and sometimes are recalled to active duty for court martial for serious offenses allegedly committed while on active duty. 10 U.S.C. 802(d). *See also Lawrence v. Makysm*, 58 M.J. 808 (2003). But Nazario was not a reservist and could not be recalled to active duty. But for the 2000 enactment of MEJA, there would have been no way to hold Nazario criminally accountable for the crimes he allegedly committed while on active duty in Iraq in 2004.

MEJA provides: “Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States—(1) while employed by or accompanying the Armed Forces outside the United States; or (2) while a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice), shall be punished as provided for that offense.” 18 U.S.C. 3261(a).²

In accordance with MEJA, the United States Attorney for the Central District of California obtained a grand jury indictment against Nazario and then arrested him and tried him for manslaughter in that court. The jury found him not guilty of the charges. *United States v. Jose L. Nazario, Jr.*, Case No. EDCR 07-00127-SGL.

The City of Riverside fired Nazario immediately upon his arrest. After he was acquitted, Nazario sought reinstatement to his police officer position, but the City refused. Nazario then retained an attorney and sued the City of Riverside in the United States District Court for the Central District of California.

Nazario claimed that the City’s decision to fire him upon his arrest and to deny him reinstatement upon his acquittal violated section 4311(a) of USERRA, which provides: “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.”³

¹ The citation means that you can find this Supreme Court decision in Volume 350 of *United States Reports* starting on page 11.

² MEJA is most useful not only in prosecuting honorably discharged veterans like Nazario but also military spouses and family members, Department of Defense and Department of State civilian employees and contractors, and other U.S. citizens who commit serious crimes while accompanying U.S. military forces outside our country. Prior to the enactment of MEJA, there were several publicized cases involving serious crimes committed by U.S. citizens overseas who were effectively immune from prosecution.

³ 38 U.S.C. 4311(a).

After discovery, the City of Riverside filed a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. District Judge Virginia A. Phillips found that there was *no material issue of fact* and that the defendant was entitled to judgment as a matter of law, and she granted the defendant's summary judgment motion. Nazario appealed to the United States Court of Appeals for the Ninth Circuit,⁴ which affirmed the summary judgment.

It should be emphasized that this is not a case involving a credible claim to reemployment rights under USERRA. Nazario did not work for the City of Riverside before he enlisted in the Marine Corps in 1997, and Nazario did not leave his civilian job for the purpose of performing uniformed service. This would have been a different case, but not necessarily a different result, if Nazario had left his civilian job when recalled to active duty (from a reserve status) for court martial. Nazario had no reserve status and could not be recalled, because he completed his entire eight-year enlistment and did not reenlist, and because he had been honorably discharged from the Marine Corps.

In affirming the summary judgment, the 9th Circuit panel held: "RPD's [Riverside Police Department's] evidence establishes that Nazario's employment was terminated, as any officer's employment would have been, because he was arrested and charged with a felony, regardless of the alleged conduct underlying those charges. Nazario did not present any evidence to cast doubt on RPD's assertion that it would terminate any probationary police officer arrested on a felony charge, regardless of the validity or content of that charge. Therefore, RPD has demonstrated that Nazario would have been terminated regardless of the asserted protected conduct. 38 U.S.C. 4311(c)(1)."

Nazario did not apply to the 9th Circuit for rehearing *en banc* and did not apply to the Supreme Court for *certiorari*. The deadline for doing so has passed. This case is over.

⁴ The 9th Circuit is the federal appellate court that sits in San Francisco and hears appeals from district courts in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Marianas Islands, Oregon, and Washington.