

LAW REVIEW 14046
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Marine Corps Reservist Sues Village of Skokie for Violating USERRA¹

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

1.1.1.7—USERRA applies to state and local governments

1.2—USERRA forbids discrimination

1.3.2.12—Vacations, holidays, and days off

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

Baldo Bello is a Staff Sergeant (SSGT) in the Marine Corps Reserve and a new member of ROA.² He is also employed by the Village of Skokie (a suburb of Chicago) as a police officer. On March 12, 2014, SSGT Bello sued the Village of Skokie in the United States District Court for the Northern District of Illinois.

SSGT Bello is ably represented by attorney Dana L. Kurtz of Hinsdale, Illinois. Some months ago, I heard from SSGT Bello and referred him to an ROA member who is an attorney in Chicago and a Lieutenant Colonel in the Army Reserve. That ROA member referred SSGT Bello to Ms. Kurtz when he (the initial attorney) was mobilized and deployed to Afghanistan.

As the Director of the Service Members Law Center (SMLC), I am here at ROA headquarters during regular business hours Monday-Friday and also until 10 pm Eastern on Mondays and Thursdays.³ The point of the evening availability is to encourage Reserve Component (RC) personnel to call me or e-mail me from the privacy of their own homes, not from their civilian jobs.

As you can appreciate, you have no reasonable expectation of privacy when you use the employer's telephone, computer, or time to complain about the employer and to seek advice and assistance in dealing with the employer. Moreover, if the employer is annoyed with you because you have been called to the colors five times since September 11, 2001 and expect to

¹ As I explained in Law Review 104 and other articles, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA), the law that led to the drafting of millions of young men (including my late father) for World War II. I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 1,038 articles about USERRA and other laws that are especially pertinent to those

² In August 2013, ROA members amended the ROA Constitution and made noncommissioned officers eligible for ROA membership.

³ In 2013, I received and responded to 9,193 inquiries (766 per month on average) from service members, military family members, attorneys, employers, congressional staffers, reporters, and others.

be called again, and if the employer is looking for an excuse to fire you, the last thing that you should do is to give the employer the excuse that he or she is seeking.

In the lawsuit, SSGT Bello claims that the Village of Skokie violated USERRA by forcing Bello to work on his scheduled days off (days he would not otherwise be required to work) to “make up for” other days when he has been away from his civilian job for military training or service in the Marine Corps Reserve. I agree with the assertion that this employer action violated section 4311(a) of USERRA, 38 U.S.C. 4311(a).⁴ The Village of Skokie deprived Bello of a benefit of employment (the days off) on the basis of his Marine Corps Reserve service.

The lawsuit further alleges that the Village of Skokie violated section 4311(b) of USERRA by reprising against Bello (suspending him without pay for a time and trying to fire him) because he had asserted his own USERRA rights and the USERRA rights of other Skokie police officers who are members of Reserve Components of the armed forces. The seven Reserve Components are the Army Reserve, Army National Guard, Air Force Reserve, Air National Guard, Navy Reserve, Coast Guard Reserve, and Marine Corps Reserve.

Other counts of the complaint allege that the Village of Skokie violated the Illinois Military Leave of Absence Act and the Illinois Whistleblower Protection Act. When you file a suit in federal court based on a federal law like USERRA, you can bring closely related state law claims in the same federal court action under 28 U.S.C. 1367. This sort of jurisdiction is called “supplemental jurisdiction.” The idea is that it would be wasteful of judicial resources to force a party to bring separate state court and federal court cases to assert closely related claims.

Bello could have filed a complaint with the Veterans’ Employment and Training Service of the United States Department of Labor (DOL-VETS), but he chose not to do so. If Bello had filed such a claim, DOL-VETS would have investigated the claim. If the DOL-VETS investigation did not result in a resolution satisfactory to Bello, he could have requested that DOL-VETS refer the matter to the United States Department of Justice (DOJ), and DOJ could have sued the Village of Skokie, on behalf of Bello.

If DOJ had brought this suit, it would have been limited to alleging that the Village of Skokie violated USERRA. By proceeding with private counsel, instead of DOL-VETS and DOJ, Bello preserved his right to seek relief under other legal theories, over and above USERRA. In a case of this kind, the individual is often better served by private counsel (like Ms. Kurtz) than by DOL-VETS and DOJ. The Bello situation is a good example of the kinds of considerations that go into the determination of whether it is better to obtain private counsel or to rely on DOL-VETS and DOJ.

Section 4323(b)(3) of USERRA provides: “In the case of an action [to enforce USERRA] against a private employer by a person [like Bello], the district courts of the United States [including the

⁴ The citation means that you can find this provision in section 4311(a) of title 38 of the United States Code. USERRA can be found at sections 4301 through 4335 of title 38.

District Court for the Northern District of Illinois] shall have jurisdiction of the action.” 38 U.S.C. 4323(b)(3). Section 4323(i) provides: “*In this section* [pertaining to USERRA enforcement in court], the term ‘private employer’ *includes a political subdivision of a State.*” 38 U.S.C. 4323(i) (emphasis supplied).

This means that Bello can sue the Village of Skokie (a political subdivision of the State of Illinois) in federal court, in his own name and with his own lawyer, and that is exactly what he has done, through his attorney Dana Kurtz. As I have explained in Law Review 14037 and other articles, political subdivisions of states do not have immunity under the 11th Amendment of the United States Constitution. Some courts have gotten this question wrong, but fortunately the United States Court of Appeals for the Seventh Circuit got it right.⁵

This is an important case, and we will keep the readers informed of developments.

⁵ See *Sandoval v. City of Chicago*, 560 F.3d 703, 704 (7th Cir.), cert. denied, 558 U.S. 874 (2009). The 7th Circuit is the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin. The citation means that you can find the *Sandoval* case in Volume 560 of *Federal Reporter Third Series*, starting on page 703, and the particular language cited is on page 704. The “cert. denied” means that the United States Supreme Court denied *certiorari* (discretionary review). The denial of *certiorari* can be found in Volume 558 of *United States Reports*, on page 874. Because the Northern District of Illinois is in the 7th Circuit, the court in this case will follow the *Sandoval* precedent. What is good for the City of Chicago is also good for the Village of Skokie.