

LAW REVIEW 15016¹

February 2015

Carter v. Siemens Update

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

1.2—USERRA forbids discrimination

In Law Review 0952 (October 2009) we wrote the following:

“Q: I am a life member of ROA and a retired Army Reserve Captain (retired in 1996) with prior enlisted service.

I went to work for Siemens Business Services (SBS) in February 2005, in a team of about ten employees. I worked in Illinois, and the rest of the team worked in Ohio. On almost a daily basis, I spoke by telephone, on SBS business, with a female team member in Ohio. The manager of the team was promoted within SBS, and one of the team members became the acting manager. Along with some of the other team members, I made an internal company complaint against the acting manager. The female employee in Ohio refused to join in the complaint.

On Friday, Feb. 10, 2006, the female employee contacted the SBS personnel office and alleged that I threatened to kill the acting manager. She also sent the personnel department four old photographs of me in my Army uniform as “proof” that I am “an assassin.”

I had no inkling that anything was amiss until Monday, Feb. 13, when the SBS personnel director called me and asked, “Who are you going to kill?” Flabbergasted by the question, I responded “no one.” The personnel director gave me no opportunity to respond to the allegation that I had threatened to kill the acting manager. He fired me that very morning and also made a report to the Lake County Sheriff’s office. The Sheriff found the allegation to be without merit.

In an official SBS business record, the personnel director wrote, “Tom has a military background perceived to be in the type of unit that was involved in killing.” Ironically, I spent my Army and Army Reserve career in personnel and finance administration, but I did spend part of the time supporting Special Forces Soldiers.

¹ We invite the reader’s attention to www.servicemembers-lawcenter.org. You will find more than 1,300 “Law Review” 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. The Reserve Officers Association (ROA) initiated this column in 1997, and we add new articles each week.

² Captain Wright is the Director of ROA’s Service Members Law Center (SMLC). (ROA). He can be reached by telephone at (800) 809-9448, ext. 730. His e-mail is SWright@roa.org.

In June 2006, I complained to the Illinois Department of Human Rights (IDHR) and in November 2006 to the Office of Federal Compliance Programs of the United States Department of Labor (DOL-OFCCP).

DOL-OFCCP investigated my complaint and found it to have merit in May 2008. The IDHR also found my case to be meritorious. I have filed suit against SBS in the United States District Court for the Northern District of Illinois, and the case will be coming to trial soon. I have been unemployed for almost four years, except for a few short-term contract assignments. Prospective employers that contact SBS to inquire about me are told that I am a dangerous nut who threatened to kill his supervisor, and this has made me unemployable.

I have read your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). Does the SBS conduct I have described amount to a USERRA violation? Captain Thomas J. Carter, USAR (Ret.).

A: Yes. Assuming that the facts are as you have described them, SBS has egregiously violated section 4311 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." 38 U.S.C. 4311(a).

As I explained in Law Review 162 (Mar. 2005) and Law Review 0904 (Jan. 2009), section 4311(a) forbids discrimination based on past, present, or future membership in a uniformed service or performance of uniformed service. (You can find more than 600 past Law Review articles at www.roa.org/law_review.) The protection of section 4311(a) is not limited to persons currently serving in the National Guard or Reserve. Although you retired from the Army Reserve before you went to work for SBS in Feb. 2005, you are protected by section 4311(a).

Only 3/4 of 1% of the U.S. population is currently serving in the military, including the National Guard and Reserve. Because the draft was abolished more than a generation ago (in 1973), most of the folks we must deal with in business and government have never served in the military and have no relatives or close friends who have ever served in the military. They are generally clueless about military matters.

The SBS personnel director who credited the female employee's allegation, without conducting an investigation and despite the inherent incredibility of what she was alleging, violated section 4311(a) of USERRA. SBS denied you retention in employment because of your service in the uniformed services. If you had never served, the allegation against you likely would not have been made, and if it had been made it would not have been believed by SBS management. I do not doubt that employers need to be concerned about the possibility of workplace violence and sometimes need to be proactive in dealing with the threat or possibility of violence, but that in

no way justifies assuming the worst about an employee simply because he or she has served in the armed forces.

The discovery process in this case is ongoing. It is likely that the case will proceed to trial sometime in 2010. We will keep the readers informed of developments in this fascinating and important case. "

It has come to my attention that we have not kept the readers informed of developments in this case, as promised. Siemens tried hard to get the court to dismiss this case but failed. *See Carter v. Siemens Business Services LLC*, 2010 U.S. Dist. LEXIS 92354 (N.D. Ill. Sept. 2, 2010). After Carter's case survived the motion to dismiss, the judge pressed the parties to settle, as federal judges often do, because of crowded dockets in federal courts. Eventually, Siemens offered enough money to get Carter to accept the settlement. While the amount is confidential, and I do not know the amount, I think that the amount was substantial.

It should be emphasized that a settlement is not an admission of wrongdoing or liability, but companies do not pay money to settle cases unless they reasonably fear losing. I think that Captain Thomas J. Carter (ROA life member) had a good case, and I am glad that the case was resolved in his favor.

Captain Carter was represented by attorney Terrence J. Benshoof, also a life member of ROA. I congratulate Mr. Benshoof for his diligent and effective representation of Captain Carter. I recommended Mr. Benshoof to Captain Carter, and I think that the results show that my recommendation was warranted.

This case is interesting and unusual because it did not involve a currently serving Reserve Component member. Captain Carter retired from the Army Reserve in 1996, nine years before he was hired by Siemens. Carter's military service did not affect his civilian employer in any tangible way—he was not asking for time off for drill weekends and annual training and at his stage in 2005 he did not face any possibility of being called back to active duty. Siemens was not annoyed with Carter because his service inconvenienced the employer, but by assuming the worst about Carter *simply because he had served in the Army* Siemens violated section 4311 of USERRA.