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Time off from Work for Short Periods of National Guard Training

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1.1.1.7—USERRA applies to state and local governments
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***Ashman v. Winnebago County Sheriff's Department,* Case No. 11-C-50388, United States District Court for the Northern District of Illinois, Judge Frederick J. Kapala, Feb. 13, 2015.**

Matthew B. Ashman is a noncommissioned officer (NCO) in the Illinois Army National Guard (ARNG). He is not a member of the Reserve Officers Association (ROA), but he is certainly eligible to join, and we are working on recruiting him.

Ashman enlisted in the Illinois ARNG in 1996 and has been a member ever since. He was hired by the Winnebago County Sheriff's Department (WCSD) in January 1999 and was employed there until he was fired in July 2008. In this lawsuit, he claimed, and Judge Frederick J. Kapala[3] agreed, that the firing was unlawful because it was motivated at least in part by his ARNG service. Section 4311 of the Uniformed Services Employment and Reemployment Rights Act (USERRA)[4] provides as follows:

> § 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

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[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.

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[3] President George W. Bush appointed Kapala in 2007, and the Senate confirmed him. He served as a junior officer in the Army Reserve from 1970 to 1980.

[4] Congress enacted USERRA (Public Law 103-353) and President Bill Clinton signed it into law on October 13, 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA).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 STSA is the law that led to the drafting of millions of young men (including my late father) for World War II. USERRA is codified in title 38, United States Code, sections 4301-4335 (38 U.S.C. 4301-4335).

(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).

Ashman contends that the county denied him "retention in employment" when it fired him on July 16, 2008. To challenge the firing successfully, Ashman only needs to prove that his ARNG service was *a motivating factor* in the employer's decision to fire him. He need not prove that his military service was the sole reason for the firing. If he proves *motivating factor,* the *burden of proof* (not just the burden of going forward with the evidence) shifts to the employer, to prove that it *would have fired Ashman anyway* for a lawful reason unrelated to his military service.

As is explained in Law Review 104 and other articles, Congress enacted USERRA (Public Law 103-353) in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA's legislative history discusses in some detail the allocation of the burden of proof in section 4311 cases, as follows:

> Section 4311(b) [later renumbered 4311(c)] would reaffirm the standard of proof in a discrimination or retaliation case is the so-called "but for" test and that the burden of proof is on the employer, once a prima facie case is established. This provision is simply a reaffirmation of the original intent of Congress when it enacted current section 2021(b)(3) of title 38, in 1968. *See* Hearings on H.R. 11509 Before Subcommittee No. 3 of the House Committee on Armed Services, 89th Cong., 1st Sess. at 5320 (Feb. 23, 1966). In 1986, when Congress amended section 2021(b)(3) to prohibit initial hiring discrimination against Reserve and National Guard members, Congressman G.V. Montgomery (sponsor of the legislation and Chairman of the House Committee on Veterans Affairs) explained that, in accordance with the 1968 legislative intent cited above, the courts in these discrimination cases should use the burden of proof analysis adopted by the National Labor Relations Board and approved by the Supreme Court under the National Labor Relations Act. *See* 132 Cong. Rec. 29226 (Oct. 7, 1986) (statement of Cong. Montgomery) citing *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983).
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> This standard and burden of proof is applicable to all cases brought under this subsection regardless of the date of accrual of the cause of action. To the extent that the courts have relied on dicta from the Supreme Court's decision in *Monroe v. Standard Oil Co.,* 452 U.S. 549, 559 (1981) that a violation of this section can occur only if the military obligation is the sole factor (*see Sawyer v. Swift & Co.,* 836 F.2d 1257, 1261 (10th Cir. 1988), those decisions have misinterpreted the original legislative intent and history of 38 U.S.C. 2021(b)(3) and are rejected on that basis.

House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News (USCCAN)* 2449, 2457 (hereinafter "1994 *USCCAN).*

At the time he was fired, Ashman worked for the WCSD as a corrections officer at the Winnebago County Jail. He was assigned to the "D Team" which meant that he worked 12-hour shifts from 6 pm to 6 am. Ashman had a poor attendance record in his civilian job, even apart from shifts that he missed because of his ARNG responsibilities.

Under the collective bargaining agreement (CBA) between Ashman's union and the Sheriff, there was a specific graduated system of discipline for employee absences from work. An employee was given an "occurrence" for any unscheduled absence from work, being 15 or more minutes late for work, failure to timely report attendance, and any unscheduled departure from work lasting more than two hours. If an employee managed to work for 60 days without an occurrence, two accumulated occurrences would be removed from the employee's record.

In his opinion, Judge Kapala wrote: "It is undisputed that Ashman was not a model employee when it came to absenteeism. Prior to June 30, 2008, he had accumulated eight occurrences and was at risk of an automatic termination in the event he accumulated one more."

I invite the reader's attention to these two paragraphs of Judge Kapala's decision:

> On June 30, 2008, the National Guard ordered Ashman to report for duty each day from June 30, 2008 until July 11, 2008 beginning at 8 a.m. Ashman provided the memorandum which memorialized that activation to WCSD. WCSD marked Ashman as on "Military Leave" during each shift he was scheduled to work for that time period, including July 7, 2008. On July 3, 2008, Ashman was informed by his National Guard unit commander that the unit would be granted leave from their military duties for the period of July 4 through July 7, 2008, in celebration of the July 4th holiday. However, Ashman was informed that the unit anticipated that certain transports may arrive during that time frame carrying equipment which would necessitate recalling the unit to provide service. The unit was not ultimately called in while on leave, and Ashman reported back to his unit at 8 a.m. on July 8, 2008. Ashman completed his service requirement and returned to work on July12, 2008.
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> On July 9, 2008, the Department of Military Affairs in Springfield, Illinois, issued Orders 191-008 and 191-016. Those orders, apparently cut in an effort to avoid paying the guardsmen who were on leave over the July 4th weekend, represented that Ashman had only been ordered to training by the National Guard from June 30, 2008 through July 3, 2008 and from July 8, 2008 through July 11, 2008. Chief Deputy Kurt Ditzler received the new orders and, to him, Ashman appeared to have no longer been under orders on July 7, 2008, when he missed a regularly-scheduled work shift (July 7, 2008 was the only shift he was scheduled to work between July 4, 2008 and July 7, 2008). Ditzler received those orders through an email from a staff sergeant at Ashman's unit. In that email, the staff sergeant explained to Ditzler that the unit was given a "pass" and thus the new orders were cut, but that the unit remained responsible to return if needed during that time period. The email also noted that the unit was not ultimately utilized during that time period. In any event, Ditzler determined that Ashman's absence on July 7, 2008 was unexcused, since he was not under military obligation according to the more recent orders. Accordingly, after Ashman worked his regularly scheduled shifts on July 12 and 13, he was terminated pursuant to his accumulation of a ninth occurrence.

Judge Kapala pointed out that Chief Deputy Ditzler made both a mistake of fact and a mistake of law in determining that Ashman was absent without authorization from his civilian job for the shift that started at 6 pm on July 7 and ended at 6 am on July 8. The mistake of fact related to Ditzler's undue reliance on the *after the fact* changed ARNG orders. The orders that Ashman had received told him that he was on title 32 ARNG training duty for an uninterrupted period that began on June 30 and ran until July 11. Ashman reasonably believed that he was on an

uninterrupted period of duty for that entire period and that he had been granted a "pass" for the period of July 4 (Independence Day) through July 7, and that he was expected by the National Guard to remain available to come back during that period if certain equipment were to arrive and if his services were needed by the National Guard during that period. As it happened, the equipment did not arrive, and Ashman and his National Guard colleagues were not called back during the July 4-7 time period, and *after the fact* the Illinois National Guard changed the orders to exclude the July 4-7 period from the orders, as a money-saving measure. But Ashman had no way of anticipating that he would not be called back during that period and no way of anticipating that the orders would be retroactively changed after the fact.

Chief Deputy Ditzler also made a mistake of law about the lawfulness of requiring Ashman to work at his civilian job from 6 pm on July 7 until 6 am on July 8, when Ashman (even under the retroactively revised orders) was expected to perform military duty starting just two hours later, at 8 am on July 8. The military duty was close by, so Ashman could have arrived by 8 am at the place of military duty, but he would not have been *fit for duty* with no sleep.

Section 4331 of USERRA (38 U.S.C. 4331) gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. The Secretary utilized that authority and published the final USERRA Regulations in the *Federal Register* on Dec. 19, 2005. The Regulations are now published in title 20 of the Code of Federal Regulations (C.F.R.), Part 1002 (20 C.F.R. Part 1002). The pertinent section is as follows:

§ 1002.74 **Must the employee begin service in the uniformed services immediately after leaving his or her employment position in order to have USERRA reemployment rights?**

No. At a minimum, an employee must have enough time after leaving the employment position to travel safely to the uniformed service site and *arrive fit to perform the service*. Depending on the specific circumstances, including the duration of service, the amount of notice received, and the location of the service, additional time to rest, or to arrange affairs and report to duty, may be necessitated by reason of service in the uniformed services. The following examples help to explain the issue of the period of time between leaving civilian employment and beginning of service in the uniformed services:

(a) *If the employee performs a full overnight shift for the civilian employer and travels directly from the work site to perform a full day of uniformed service, the employee would not be considered fit to perform the uniformed service. An absence from that work shift is necessitated so that the employee can report for uniformed service fit for duty.*

(b) If the employee is ordered to perform an extended period of service in the uniformed services, he or she may require a reasonable period of time off from the civilian job to put his or her personal affairs in order, before beginning the service. Taking such time off is also necessitated by the uniformed service.

(c) If the employee leaves a position of employment in order to enlist or otherwise perform service in the uniformed services and, through no fault of his or her own, the beginning date of the service is delayed, this delay does not terminate any reemployment rights.

20 C.F.R. 1002.74 (bold question in original) (emphasis by italics supplied).

In his opinion Judge Kapala wrote: "Accordingly, because Ashman was legally under military obligation because of 20 C.F.R. 1002.74 regardless of the ultimate impact of the July 9 orders, and because Ditzler's ignorance of the regulation does not serve to insulate WCSD from liability, Ashman has established the necessary prima face case for discrimination."

This case is one of those rare cases that we call a "pure question of law" case. The facts were not really in dispute—the dispute was about the application of the law (USERRA) to these agreed upon facts. Accordingly, Judge Kapala denied the county's motion for summary judgment and granted Ashman's partial motion for summary judgment. Judge Kapala held that the July 2008 firing of Ashman was unlawful.

What remains to be determined is the remedy and the measure of damages. USERRA provides as follows concerning the remedies that a federal court may order against a state or local government or private employer in a USERRA case:

> (d) Remedies.
> (1) In any action under this section, the court may award relief as follows:
> (A) The court may require the employer to comply with the provisions of this chapter.
> (B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.
> (C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.
> (2) (A) Any compensation awarded under subparagraph (B) or (C) of paragraph (1) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter.
> (B) In the case of an action commenced in the name of the United States for which the relief includes compensation awarded under subparagraph (B) or (C) of paragraph (1), such compensation shall be held in a special deposit account and shall be paid, on order of the Attorney General, directly to the person. If the compensation is not paid to the person because of inability to do so within a period of 3 years, the compensation shall be covered into the Treasury of the United States as miscellaneous receipts.
> (3) A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section.
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> (e) Equity powers. The court shall use, in any case in which the court determines it is

> appropriate, its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter.

38 U.S.C. 4323(d) and (e).

Since the judge has found that the July 2008 firing was unlawful, the judge will order the county to reinstate Ashman to the job from which he was unlawfully fired. The judge can and will enforce the court order through his contempt powers. That means literally that if the Sheriff and Chief Deputy Sheriff do not reinstate Ashman as ordered, they can be jailed for contempt of a federal court order.

Under section 4323(d)(1)(B), Ashman is entitled to be compensated for the pay and benefits that he has lost during the entire period between July 2008, when he was unlawfully fired, and when the county reinstates him to his job. Under USERRA or any employment discrimination law, the plaintiff has a *duty to mitigate damages.* I am informed that Ashman has held other civilian jobs (including employment as an Illinois ARNG technician) during the last seven years since he was fired.

Please see Law Review 206 (December 2005) for a detailed discussion of the computation of damages in a USERRA case. For each pay period[5] a computation must be made. How much would Ashman have earned in the county job but for the unlawful firing? Call that Figure A. How much did Ashman earn from his mitigating employment? Call that Figure B. Subtract Figure B from Figure A, and that is the back pay to which Ashman is entitled for that specific pay period.

The computation must be for *comparable hours.* If Ashman worked overtime in his mitigating job, the lawbreaking employer (WCSD) should not benefit from Ashman's extra effort.

If Ashman earned more in the mitigating employment for a particular pay period, no back pay is owed for that specific period. The excess should not be applied to earlier or later pay periods.

Perhaps Ashman had health insurance, for himself and his family, while he was employed by the WCSD. While unemployed, he had to purchase health insurance on the market (at considerable expense). These expenses need to be computed and included in the back pay that the county will be required to pay.

Under section 4318 of USERRA, Ashman is entitled to be treated *as if he had been continuously employed in the civilian job* during the times that he was away from work for uniformed service. Since the court has found the firing to be unlawful, Ashman is entitled to be treated *as if he had been continuously employed in the civilian job* for the entire period from the date of the unlawful firing until he is reinstated. If under a settlement Ashman is not to return to work, the

[5] A pay period may be two weeks or one-half of a month.

cash settlement must include money to cover the very valuable pension benefits that he has lost.

What about front pay? If under a settlement Ashman will not be returning to work for the county, the settlement amount needs to compensate him for the continuing loss of pay and pension benefits. Will the court order front pay? Probably not—the court will not likely assume that the Sheriff will contumaciously violate a federal court order.

Under section 4323(d)(1)(C), Ashman is entitled to doubled damages, called "liquidated damages," if the court concludes that the county violated USERRA willfully. I think that this is a case where liquidated damages are at least in play. We will keep the readers informed of developments in this interesting and important case.

The Illinois National Guard is at least partially responsible for the unfortunate circumstances of this case.

I have written to Major General Daniel M. Krumrei, the Adjutant General of Illinois and head of the Army National Guard and Air National Guard of the state. I have asked him to treat this case and its underlying circumstances as lessons to be learned for the future. I think that the National Guard was wrong to change Ashman's orders after the fact, just to save a few bucks. And did the Illinois National Guard headquarters not realize that July 4 is Independence Day when they wrote Ashman's orders and the orders of his colleagues?

In fairness to General Krumrei, it should be noted that he did not become the Adjutant General of Illinois until 2012, four years after the circumstances that gave rise to this case.