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Does USERRA Provide for Disparate Impact Liability?

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

1.2—USERRA forbids discrimination
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Q: I am a Captain in the Army Reserve Judge Advocate General's Corps and a member of the Reserve Officers Association (ROA). I work as an associate (employee) at a major law firm—let's call it Dewey Cheatham & Howe (DCH). Associates at this firm are expected to achieve X number of billable hours in each calendar year. Those associate attorneys who fail to achieve X number of billable hours in two consecutive years are terminated. No exceptions are made for illness or other exigencies.

In 2014, I was away from my DCH job for military service for fully one third of the year—four months. Nonetheless, I worked very hard during the other eight months and I even did some billable hours while on military duty. I made a great effort to achieve X number of billable hours but fell ten hours short. The managing partner has told me that if I fall short of X again in 2015 I will be terminated.

Does the "disparate impact" theory of discrimination[3] apply under the Uniformed Services Employment and Reemployment Rights Act (USERRA)? Is it lawful for the law firm to expect

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[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1,350 "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.

[2] Captain Wright was the Director of ROA's Service Members Law Center (SMLC), as a full-time employee of ROA, from June 2009 through May 2015. During that six-year period, he received and responded to more than 35,000 e-mail and telephone inquiries. He is no longer employed by ROA, but he is continuing the SMLC as a part-time volunteer effort, as a member of ROA. He is available on Wednesday and Thursday evenings to respond to e-mails and telephone calls. The telephone number is (800) 809-9448, extension 730, and the e-mail is SWright@roa.org. Please understand that Captain Wright is a volunteer, and he may not be able to respond to your call or e-mail the same day.

[3] Title VII of the Civil Rights Act of 1964 outlaws discrimination in employment on the basis of race, color, sex, religion, or national origin. It is not controversial to say that Title VII outlaws *disparate treatment* discrimination. An example of such disparate treatment would be punishing black employees more harshly than white employees for the same or similar offenses or shortcomings. The Supreme Court established the *disparate impact* theory of discrimination in 1971. *See Griggs v. Duke Power Co.,* 401 U.S. 424 (1971). That case involved an employer requirement that laborers have a high school diploma. In the years immediately following the lamentable "Jim

me to achieve in just eight months a number of billable hours that my colleagues have 12 months to achieve?

A: First, let me reiterate the advice that I gave in Law Review 106 (December 2003), titled "Don't Try To Work at your Civilian Job while on Active Duty." For several reasons, I think that "moonlighting" in your pre-service job, or in any civilian job, while you are on active duty or training duty, is a bad idea, and I urge you not to try this.

The basic idea behind the Uniformed Services Employment and Reemployment Rights Act (USERRA) is that you leave a job for voluntary or involuntary service, and then you return to that job after you complete that period of service. You only confuse matters when you work part-time at the civilian job during the period of service.

If your active duty assignment is within a reasonable commuting distance of your civilian job, it may be geographically feasible to get to your civilian worksite for a few hours each week, but you must have the permission of your military commander to moonlight in this way. Your commander may give you that permission, but with the clear understanding that your military duties come first. You will not be allowed to say, "I cannot stay late tonight here at the military base, because I need to get to my civilian job."

If you are to work part-time at your civilian job, your civilian employer will probably schedule you for work at certain times. The first time that you are unable to get to work at one of those times, because of conflicting military duties, your civilian employer may try to discipline you or fire you for missing scheduled work. Will USERRA protect you under those circumstances? That is unclear. Better to avoid the issue by not trying to work at your civilian job while on active duty.

If you are on full-time active duty, voluntarily or involuntarily, you should be devoting your full time and attention to your military duties. The whole point of USERRA, as well as the Servicemembers Civil Relief Act, is to remove civilian legal distractions in order to enable you to do your military duties. Especially if you are called to active duty for a national emergency, you should not be trying to serve your civilian employer simultaneously. "War is a 24-hour job. There will be no novel-writing on the USS Caine." LCDR Queeg (Humphrey Bogart) to LT Keefer (Fred McMurray), in *The Caine Mutiny* (my favorite movie).

Crow" era, the requirement of a high school diploma disqualified a much greater percentage of black applicants than white applicants. This disparate impact, plus the fact that the employer could not establish a "business necessity" for the diploma requirement, meant that the requirement violated Title VII, the Supreme Court held.

Section 4311 of USERRA[4] forbids discrimination in initial employment, retention in employment, promotions, and benefits of employment based on membership in a uniformed service, application to join a uniformed service, performance of service, or application or obligation to perform service. The Merit Systems Protection Board (MSPB)[5] has held that USERRA does not provide for a claim under a disparate impact theory. *See Harellson v. United States Postal Service,* 115 M.S.P.R. 378 (Jan. 5, 2011). *Harellson* is not necessarily the last word on this important question. Very recently (June 25, 2015), the United States Supreme Court has upheld the use of the disparate impact theory under the Fair Housing Act, although that statute does not explicitly provide for disparate impact liability. *See Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.,* 576 U.S. ___ (2015).

I also believe that even without explicitly adopting the disparate impact theory of liability under USERRA a court can and should find that terminating your employment based on your failure to meet a numerical productivity standard that is reasonable for a full year is unlawful when you were away from work for military service (protected by USERRA) for a substantial part of the year. I invite your attention to the following paragraphs from a Federal Circuit[6] decision:

> In its notice of removal, the Postal Service stated that the sole reason for removing Mr. Erickson from his position was his excessive use of military leave. The full Board acknowledged that "on its face" that admitted purpose would seem to constitute direct evidence of discrimination under USERRA. Nonetheless, the Board found that Mr. Erickson had failed to show that his military service was a motivating factor for the agency's action because the "real reason" for his removal was his absence from work--regardless of whether that absence was caused by his military obligation.
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> We reject that argument. HN4 An employer cannot escape liability under USERRA by claiming that it was merely discriminating against an employee on the basis of his absence when that absence was for military service. As other courts have held, military service is a motivating factor for an adverse employment action if the employer "relied on, took into account, considered, or conditioned its decision" on the employee's military-related absence or obligation. *Petty v. Metro. Gov't of Nashville-Davidson County*, 538 F.3d 431, 446 (6th Cir. 2008), quoting *Coffman v. Chugach Support Servs*.,

[4] 38 U.S.C. 4311.

[5] The MSPB is a quasi-judicial federal agency created by the Civil Service Reform Act of 1978. Section 4324 of USERRA (38 U.S.C. 4324) gives the MSPB the jurisdiction to adjudicate claims that federal agencies (as employers) have violated USERRA. If you sue DCH (a private employer) under USERRA, your case will go to the appropriate federal district court, not to the MSPB. 38 U.S.C. 4323.

[6] The Federal Circuit is the specialized federal appellate court that sits here in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from MSPB decisions.

411 F.3d 1231, 1238 (11th Cir. 2005); *see Robinson v. Morris Moore Chevrolet-Buick, Inc*., 974 F. Supp. 571, 576 (E.D. Tex. 1997), citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241-42, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989). The most significant--and predictable--consequence of reserve service with respect to the employer is that the employee is absent to perform that service. To permit an employer to fire an employee because of his military absence would eviscerate the protections afforded by USERRA, the overarching goal of which is to prevent those who serve in the uniformed services from being disadvantaged by virtue of performing their military obligations. *See* 38 U.S.C. §4301(a); *see also* S. Rep. No. 90-1477, at 2 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 3421, 3421 (stating that the precursor to section 4311 was enacted in response to the "increasing problem" of discrimination against reservists who were discharged or denied benefits because of their obligation to attend military drills or training exercises).

In upholding the agency's action as nondiscriminatory, the Board relied on the fact that an agency is otherwise entitled to remove an employee for prolonged non-military leaves of absence. But as we held in the case of the precursor to section 4311, HN5"an employer can not treat employees on military duty like those on non-military leave of absence." *Allen v. U.S. Postal Serv*., 142 F.3d 1444, 1447 (Fed. Cir. 1998), citing *Carlson v. N.H. Dep't of Safety*, 609 F.2d 1024, 1027 (1st Cir. 1979) ("The mandated standard of comparison is not . . . to those coworkers away on non-military leave of absence.") (internal quotation marks omitted). Thus, the fact that the Postal Service could have lawfully removed Mr. Erickson if his absence had not been service related does not excuse its action in this case. Mr. Erickson was absent from work because of his military service, and USERRA protects against removal for that reason.

The agency's explanation that firing Mr. Erickson was necessary in order to fill his position in the Postal Service is similarly without merit. The Supreme Court rejected that argument in *Monroe v. Standard Oil Co*., 452 U.S. 549, 101 S. Ct. 2510, 69 L. Ed. 2d 226 (1981), its first decision construing the antecedent to USERRA's nondiscrimination provision. The Court wrote:

HN6[T]he nondiscrimination requirements of [the statute] impose substantial obligations upon employers. The frequent absences from work of an employee-reservist may affect productivity and cause considerable inconvenience to an employer who must find alternative means to get necessary work done. Yet Congress has provided . . . that employers may not rid themselves of such inconveniences and productivity losses by

> discharging or otherwise disadvantaging employee-reservists solely because of their military obligations.
> *Monroe*, 452 U.S. at 565. Congress enacted USERRA in part to make clear that discrimination in employment occurs when a person's military service is "a motivating factor," and not to require, as *Monroe* had suggested, that military service be the sole motivating factor for the adverse employment action. H.R. Rep. No. 103-65, at 24, *as reprinted in* 1994 U.S.C.C.A.N. at 2457; *see Sheehan*, 240 F.3d at 1012-13. That change broadened the employment protections afforded to reservists, *see Sheehan* 240 F.3d at 1013; it did not alter *Monroe's* unambiguous instruction that discharging an employee because of his military-related absence constitutes unlawful discrimination. The fact that the Postal Service may have wanted to fill Mr. Erickson's position (presumably with an employee who was not performing military service) cannot shield it from liability for removing him from his position based on his military-related absence.[7]

If DCH denies you retention in employment (fires you) because of your failure to meet the quantitative standard on amount of work in calendar year 2014 when you were absent from work for a substantial part of the year for military service protected by USERRA, that is fundamentally the same as the Postal Service trying to fire Erickson because of his *absence from work* when the absence was necessitated by military service, protected by USERRA.

[7] *Erickson v. United States Postal Service,* 571 F.3d 1364, 1368-69 (Fed. Cir. 2009).