LAW REVIEW 15063[1]
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New Favorable Case on Section 4311 of USERRA

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

1.1.1.7—USERRA applies to state and local governments
1.2—USERRA forbids discrimination
1.4—USERRA enforcement

***Croft v. Village of Newark,* 35 F. Supp. 3d 359 (W.D.N.Y. 2014).**[3]
William Croft is a Major in the New York Army National Guard (ARNG). He is not a member of the Reserve Officers Association (ROA), but he is certainly eligible and we are trying to recruit him. Since August 2006, he has worked for the Village of Newark (New York) as a police officer. He sued the Village of Newark and David Christler, the Chief of the Newark Police Department, alleging that they had violated section 4311 of the Uniformed Services Employment and Reemployment Rights Act (USERRA)[4] when they denied him several promotion and training opportunities on the basis of his ARNG service and obligations and his having made prior USERRA complaints. Section 4311 reads as follows:

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

[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. Approximately half of the inquiries were about the Uniformed Services Employment and Reemployment Rights Act (USERRA), a law that Captain Wright helped to draft while employed as an attorney for the United States Department of Labor (1982-92). Captain Wright is no longer employed by ROA, but he is continuing the SMLC as a part-time, volunteer effort, as a member of ROA. He can be reached at SWright@roa.org or (800) 809-9448, ext. 730. Please understand that Captain Wright is a volunteer, and he may not be able to respond to your e-mail or telephone call the same day.

[3] This is a decision by Judge Elizabeth A. Wolford of the United States District Court for the Western District of New York. She was appointed by President Obama and confirmed by the Senate in 2013. She graduated from Colgate University and Notre Dame Law School. The citation means that you can find this decision in Volume 35 of *Federal Supplement Third Series,* and the case decision starts on page 359.

[4] As I have explained in Law Review 104 and other articles, 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. USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-4335).

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.[5]

To prevail on his section 4311 claim, Croft need that prove that his ARNG service or his assertion of USERRA rights were *the sole reason* for the denial of promotion and education opportunities. It is sufficient that he prove that his service and/or his claims were *a motivating factor* in the employer's decision. If he proves motivating factor (what we call a *prima facie* case), the *burden of proof* (not just the burden of going forward) shifts to the employer to *prove* (not just say) that the decision would have been the same in the absence of the ARNG service and/or the USERRA claims.

Here is the test. Let us assume that the decision maker is asked at the moment of the decision for the reasons for the decision and answers truthfully. The decision maker lists 15 reasons why

[5] 38 U.S.C. 4311 (emphasis supplied).

another person was promoted instead of Croft, and one of the reasons is that Croft is a Reserve Component member and the other person is not. In this situation, Croft has proved his *prima facie* case and the burden of proof shifts to the employer.

There need not be a "smoking gun" proving unlawful motivation. Motivating factor can be proved by circumstantial as well as direct evidence. A close proximity in time between the exercise of USERRA rights (e.g., taking military leave for a period of service) or the making of a USERRA complaint and the unfavorable personnel action (denial of promotion, firing, etc.) may be sufficient to establish motivating factor.

If a supervisor (not the ultimate decision maker) makes an unfavorable report on the plaintiff, and if the supervisor was motivated by anti-military animus in making the unfavorable report, and if the unfavorable report was a proximate cause for the unfavorable personnel decision, the employer is liable.[6]

After the completion of discovery in this case, the defendants (Village of Newark and Chief Christler) made a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. A court should grant summary judgment if the court can say that, examining the evidence as a whole, there is not sufficient evidence that would enable a reasonable jury to find for the non-moving party. In a scholarly and well-written decision, Judge Wolford held that there was sufficient evidence to support a jury verdict for Croft, and she denied the defendants' summary judgment motion. The case is set for trial this fall, unless the parties settle.

Section 4303 of USERRA defines 16 terms used in this statute, including the term "employer." That definition includes "a *person,* institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities."[7] Based on this definition, Croft named the Chief of Police (Christler) as a defendant, along with the Village of Newark. Christler strenuously sought to be dismissed as a defendant, but Judge Wolford properly refused to dismiss him.[8]

I congratulate attorney Jon P. Getz of the firm Muldoon Getz & Reston (Rochester, NY) for his diligent and effective representation of Major Croft.

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[6] *See Staub v. Proctor Hospital,* 562 U.S. 411 (2011). The citation means that you can find this United States Supreme Court case in Volume 562 of *United States Reports,* starting on page 411. I invite the reader's attention to Law Review 1122 (April 2011), in which I discuss this very important case in detail. On behalf of ROA, and with the assistance of Thomas Jarrard, Esq., I wrote and filed an *amicus curiae* (friend of the court) brief in the Supreme Court, urging the Court to overturn the unfavorable decision of the United States Court of Appeals for the 7th Circuit. I also assisted Professor Eric Schnapper (Staub's Supreme Court attorney) in his preparation for the oral argument.

[7] 38 U.S.C. 4303(4)(A)(i) (emphasis supplied).

[8] Maintaining at least the possibility of personal liability gives supervisors like Chief Christler an incentive to avoid violating USERRA.