LAW REVIEW 15086[1]
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Sixth Circuit Reverses Unfavorable District Court USERRA Decision

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
1.8—Relationship between USERRA and other laws/policies

Eichaker v. Village of Vicksburg, 2015 WL 5827540 (6th Cir. October 5, 2015), *reversing Eichaker v. Village of Vicksburg,* 2015 WL 113902 (W.D. Mich. January 8, 2015).[3]

In Law Review 15005 (January 2015), I stated that the district judge got it wrong about section 4317(a) of the Uniformed Services Employment and Reemployment Rights Act (USERRA), concerning the continuation of an individual employee's employer-based health insurance

[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find almost 1,400 "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 is the author or co-author of more than 1,200 of the more than 1,400 "Law Review" articles available at www.servicemembers-lawcenter.org. He has been dealing with the federal reemployment statute for 33 years and has made it the focus of his legal career. He developed the interest and expertise in this law during the decade (1982-92) that he worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), he largely drafted the interagency task force work product that President George H.W. Bush presented to Congress (as his proposal) in February 1991. On October 13, 1994, President Bill Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA), Public Law 103-353. The version that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. Wright has also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), and as an attorney in private practice, at Tully Rinckey PLLC. For the last six years (June 2009 through May 2015), he was the Director of ROA's Service Members Law Center (SMLC), as a full-time employee of ROA. In June 2015, he returned to Tully Rinckey PLLC, this time in an "of counsel" relationship. To schedule a consultation with Samuel F. Wright or another Tully Rinckey PLLC attorney concerning USERRA or other legal issues, please call Mr. Zachary Merriman of the firm's Client Relations Department at (518) 640-3538. Please mention Captain Wright when you call.

[3] The Village of Vicksburg is a political subdivision of the State of Michigan. Because of the 11th Amendment to the United States Constitution, and because of section 4323(b)(2) of USERRA [38 U.S.C. 4323(b)(2)], it is not possible for an individual to sue a state in federal district court—such suits must be filed in state court, in accordance with the law of the state. But for USERRA purposes political subdivisions of states are treated as private employers, and political subdivisions do not have 11th Amendment immunity. It is possible to sue a political subdivision in federal court, just as one can sue a private employer. *See* 38 U.S.C. 4323(i). I invite the reader's attention to *Weaver v. Madison City Board of Education,* 771 F.3d 748 (11th Cir. 2014) and to Law Review 15011 (January 2015).

coverage while the individual is away from the civilian job for military service. I am pleased to report that on October 5, 2015 a three-judge panel of the Sixth Circuit[4] found that the district court judge got it wrong on several points and reversed the summary judgment for the employer and remanded the case back to the Western District of Michigan.

In 1999, David E. Eichaker was hired by the Village of Vicksburg (Michigan) as a police officer. At the time, he was a member of the Marine Corps Reserve (USMCR). In 2001, he transferred to the Air National Guard (ANG). Prior to the terrorist attacks of September 11, 2001 (the "date which will live in infamy" for our time), Eichaker's USMCR and ANG training responsibilities were largely limited to the traditional Reserve Component (RC)[5] pattern of "one weekend per month and two weeks of annual training in the summer." For Eichaker and more than 900,000 other RC personnel who have been called to the colors since September 2001, the terrorist attacks brought about a major change as the RC transitioned from the "strategic reserve" (available only for a major war like World War III, which thankfully never happened) to the "operational reserve" (routinely called upon for intermediate range military contingencies like Iraq and Afghanistan).

In January 2003, shortly after Eichaker returned from his call to the colors, Vicksburg Police Chief Mike Descheneau took a four-month leave of absence (LOA) for health reasons. Before leaving, Descheneau promoted Eichaker to Lieutenant (the only Lieutenant in the small department) and put Eichaker in charge of the department during Descheneau's absence. In 2007, Descheneau took a new LOA, this time to work in Afghanistan as a contractor. Again, Descheneau put Eichaker in charge of the department during Descheneau's absence.

In July 2009, Eichaker took a four-month LOA to attend a military school in his ANG capacity. Some folks within the police department and the village leadership objected to Eichaker being away from his civilian job for this military service.

In April 2010, Police Chief Mike Descheneau announced that he planned to retire. Eichaker contacted Village Manager Matthew Crawford about the vacancy, but Crawford refused to discuss the matter and later selected another police officer for promotion to Chief.

Crawford selected Eric West for promotion to Police Chief. The selection was discussed by the Village Council during a closed meeting. Crawford denied mentioning Eichaker's military service during the meeting, but Crawford's testimony was rebutted by the testimony of two other people who were present at the meeting. Gloria Kiel (the Village's office manager) testified that Crawford had said that Eichaker was not ready for the promotion to Chief "because he had a

[4] The Sixth Circuit is the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee.

[5] There are seven Reserve Components of the United States armed forces: the Army Reserve, the Army National Guard, the Air Force Reserve, the Air National Guard, the Navy Reserve, the Marine Corps Reserve, and the Coast Guard Reserve.

young family and was focusing on his military career." Council Member Christine Klok testified that she got the same comment from Crawford when she asked if Eichaker had been interested in the Chief position.

Sometime later, Marc Boyer (a new member of the Council) asked Crawford why Eichaker had been "passed over" for Chief. Boyer testified that Crawford told him that it would be hard to have Eichaker as Chief if he were called away for military duty.

Shortly after taking over as Chief, West eliminated the Lieutenant position that Eichaker was holding and demoted Eichaker to Sergeant. Seconds later, West said to Eichaker: "You think you can go on military leave any time you feel like it."

Years earlier, West complained that union members had to fill in for Eichaker every time he went on military leave. West was the head of the police officers' union before he was promoted to Chief.

Six weeks after the demotion from Lieutenant to Sergeant, Eichaker said to West that he might have to report West to the "military office that mediates disputes."[6] West yelled, "Are you threatening me?" West then stormed out of the office and slammed the door. Later that same afternoon, West demanded that Eichaker turn over his keys to the Chief's office.

Six months later, West demoted Eichaker from Sergeant to Patrolman. During the spring of 2011, Eichaker was again on military leave for four months. Shortly after Eichaker returned to work after this military duty, a resident of the village was killed in action in Afghanistan. Although Eichaker was the only Village police officer with a military background, West excluded him from the funeral detail.

In November 2011, Eichaker was called to active duty again, and this time he was deployed to Afghanistan. During this deployment, unlike earlier ones, the Village made Eichaker pay for the continuation of his civilian health insurance coverage.[7]

In February 2012, while on active duty in Afghanistan, Eichaker complained to ESGR. In March 2012, Eichaker complained to the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). Eichaker returned from active duty in July 2012 but did not return to work.

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[6] Eichaker was apparently referring to the Department of Defense organization called Employer Support of the Guard and Reserve (ESGR).

[7] Eichaker did not need or want the Village to continue his health insurance coverage during his active duty, because Eichaker had quite adequate coverage for himself and his family from the military system while he was on active duty. Please see Law Review 15005.

Eichaker filed suit against the Village in the United States District Court for the Western District of Michigan, complaining about the following employment decisions:

a. Eichaker was not selected for Chief after Descheneau retired.
b. Eichaker was demoted from Lieutenant to Sergeant.
c. Eichaker was demoted from Sergeant to Patrolman.
d. Eichaker was excluded from the funeral detail when a resident of the Village was killed in action in Afghanistan.
e. Eichaker was unlawfully charged for health insurance plan coverage while he was on active duty.

Eichaker complained that each of these unfavorable personnel actions violated section 4311 of USERRA, which provides as follows:

> § 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited
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> (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.
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> (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.
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> (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.
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> (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.[8]

In his lawsuit, Eichaker alleged that these unfavorable personnel actions violated both section 4311(a) (motivated by his performance of uniformed service and his obligation to perform future service) and section 4311(b) (motivated by his assertion of USERRA rights and by his having taken steps to enforce his rights, such as contacting ESGR and DOL-VETS). Under section 4311(c), Eichaker was not required to prove that his protected activities were *the sole reason* for the unfavorable personnel decisions. Eichaker only needed to prove that his protected activities were *a motivating factor* in the employer's decisions. Once Eichaker proved motivating factor, the *burden of proof* (not just the burden of going forward with the evidence) shifted to the employer to *prove* (not just say) that the same unfavorable personnel decisions would have been made, for lawful reasons, *even if the protected activities had not occurred.*

In the District Court, the defendant made a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. A motion for summary judgment is ordinarily made after the discovery process has been completed, and the evidence has been amassed, but before the trial has been held. The judge should grant the summary judgment motion only if he or she can say that based on the evidence that has been amassed *no reasonable jury could find for the non-moving party* (usually the plaintiff). The district judge granted the defendant's motion for summary judgment. Eichaker appealed, and the Sixth Circuit reversed. The Sixth Circuit panel found that there was sufficient evidence in the record from which a reasonable jury could find for the plaintiff, so the summary judgment motion should not have been granted.

The Sixth Circuit remanded the case to the district court. There will now be a trial, unless the parties settle.

I have seen USERRA cases wherein juries have found for plaintiffs, based on evidence that was much weaker than the evidence that Eichaker has in support of his case. In those cases, jury verdicts for the plaintiffs were not overturned by the district judges or by the appellate courts.

I congratulate attorney David F. Piper for his excellent representation of Mr. Eichaker in this case. We will keep the readers informed of developments in this interesting and important case.

[8] 38 U.S.C. 4311 (emphasis supplied).