LAW REVIEW 15087[1]

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Seventh Circuit Reverses Unfavorable District Court USERRA Decision

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

1.1.3.1—USERRA applies to voluntary service
1.2—USERRA forbids discrimination
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***Arroyo v. Volvo Group North America LLC, 805 F.3d 278 (7th Cir. October 6, 2015), reversing Arroyo v. Volvo Group North America LLC,* 2014 U.S. Dist. LEXIS 138696 (N.D. Ill. September 30, 2014).**[3]

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[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] This is a decision of a three-judge panel of the United States Court of Appeals for the Seventh Circuit, the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin. The panel consisted of two active 7th Circuit judges and one judge who has taken senior status but continues to hear cases. It probably helped that two of the three judges have served our country in uniform. Judge William J. Bauer was appointed to the 7th Circuit in 1974 by President Gerald Ford. He took senior status in 1994. He served in the Army from 1945 to 1947. Judge Michael J. Kanne was appointed to the 7th Circuit in 1987 by President Ronald Reagan. He served in the Air Force from 1962 to 1965. Judge Ann Claire Williams was appointed to the 7th Circuit in 1999 by President Bill Clinton. Judge Kanne wrote the opinion, and the other two judges joined in a unanimous

Introduction

According to the Department of Defense (DOD), more than 910,000 Reserve Component (RC) personnel have been called to the colors since the terrorist attacks of September 11, 2001 (the "date which will live in infamy" for our time), and more than 350,000 of them have been called up more than once. Among that group of patriotic young Americans is Luz Maria Arroyo, an enlisted member of the United States Army Reserve (USAR). She has been called to active duty three times since that fateful Tuesday 14 years ago.

Arroyo was employed by Volvo Group North America LLC (Volvo)[4] from June 2005 (when she was hired) until November 2011 (when she was fired). While employed by Volvo, she was called to active duty and deployed to Iraq from April 2006 to May 2007 and from April 2009 to August 2010.[5] She was also away from her Volvo job for weekend drills, annual training, and other short tours of military training or duty. Altogether, she was away from her Volvo job on military leave for 900 days during her 6 ½ years of employment with the company.

The job-protected right to be away from work for military training and service is essentially unlimited.

Under the Uniformed Services Employment and Reemployment Rights Act (USERRA)[6] a person has the job-protected right to unpaid leave and has the right to reemployment in a civilian job if he or she meets five simple conditions:

a. Left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services.
b. Gave the employer prior oral or written *notice.* The individual does not need the employer's permission, and the employer does not get a veto.
c. Has not exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, related to the employer relationship for which the person seeks reemployment.
d. Has served honorably, and has been released from the period of service without having received a disqualifying bad discharge from the military.
e. After release from the period of service, has made a timely application for reemployment.[7]

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decision. The reversed district court decision was by Judge Robert M. Dow, Jr. of the United States District Court for the Northern District of Illinois, appointed to the court by President George W. Bush in 2007. Judge Dow has never served our country in uniform.

[4] When a foreign company like Volvo operates in the United States and employs Americans, it must comply with U.S. laws.

[5] Her first call-up was before she began her employment at Volvo.

[6] As is explained in Law Review 15067 (August 2015), USERRA was enacted and signed into law by President Bill Clinton 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. 4301-35).

Under section 4312(h) of USERRA, there is *no limit* on the frequency or duration of permissible military leaves for military service and training, other than the five-year limit. Section 4312(h) provides:

> In any determination of a person's entitlement to protection under this chapter [USERRA], the timing, frequency, and duration of a person's training or service, or the nature of such training or service (including voluntary service) in the uniformed services *shall not be a basis for denying protection* of this chapter if the service does not exceed the limitations set forth in subsection (c) and the notice requirements established in subsection (a)(1) and the notification requirements [timely application for reemployment] established in subsection (e) are met.[8]

USERRA's five-year limit

Moreover, under section 4312(c)[9] there are nine exemptions to the five-year limit—kinds of service that do not count toward exhausting the individual's five-year limit with that employer. Most or all of Arroyo's 900 days of military leave while employed by Volvo was exempt from her five-year limit. Her first Iraq call-up was exempt because it was prior to her start of Volvo employment. Her second and third call-ups were exempt because they were involuntary.[10] Her periods of inactive duty training (drill weekends) and annual training were exempt under section 4312(c)(3).[11]

Employers: Don't carp, comply.

Here at ROA headquarters in our nation's capital, we have the Minuteman Statue—donated to ROA by Brigadier General and Mrs. Roger L. Zeller as a memorial to Lieutenant Edwin F. Dietzel. The statue sits on a marble pedestal. On the pedestal, these words are inscribed: "Each citizen of a free government owes his services to defend it." Those words are attributed to General George Washington in 1783.

For most of our nation's history, we had a tiny standing Army of professional career soldiers, and a Navy that was only slightly larger. When conflict arose, the standing Army was quickly supplemented by calling up state militia forces, the citizen soldiers of that era. For a major military conflict, our nation established a draft and conscripted young men into service. This pattern held for the Civil War, World War I, World War II, the Korean War, the Vietnam War, and the first 28 years (1945-73) of the Cold War competition with the Soviet Union.

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[7] Please see Law Review 1281 (August 2012) for a detailed discussion of USERRA's five eligibility criteria.
[8] 38 U.S.C. 4312(h) (emphasis supplied). Please see Law Review 15075 (September 2015) for a detailed discussion of the unlimited nature of the right to military leave under USERRA.
[9] 38 U.S.C. 4312(c).
[10] 38 U.S.C. 4312(c)(4)(A).
[11] 38 U.S.C. 4312(c)(3).

All of that changed in 1973, when Congress abolished the draft. Today, the United States military, Active Component and Reserve Component, is the best motivated, best trained, best led, best equipped, and most effective military in the world, and perhaps in the history of the world. Few in today's military would contemplate returning to the draft. The vast majority of our population is not asked to participate in the defense of the nation, beyond the payment of taxes. Today's military establishment, including the National Guard and Reserve, amounts to less than ¾ of 1% of the U.S. population.

In a speech to the House of Commons on August 20, 1940, Prime Minister Winston Churchill said:

> The gratitude of every home in our Island, in our Empire, and indeed throughout the world, except in the abodes of the guilty, goes out to the British airmen who, undaunted by odds, unwearied in their constant challenge of mortal danger, are turning the tide of world war by their prowess and their devotion. Never in the field of human conflict was so much owed by so many to so few.

Prime Minister Churchill's paean to the Royal Air Force in the Battle of Britain applies equally to the United States military in the Global War on Terrorism. It is these few, these hardy few, who have prevented a recurrence of the horrors of September 11, by their prowess and their devotion.

According to the Department of Defense, more than 910,000 RC personnel have been called to the colors since September 11, 2001, our generation's "date which will live in infamy." Some (including Luz Maria Arroyo) have been called three or more times, and their civilian employers are tired of the "burden" and seek to shed the burden by flouting USERRA.

To our nation's employers—I say that your burdens, while not inconsiderable, pale in comparison to the burdens, and sometimes the ultimate sacrifice, made by those in uniform. Because our country abolished the draft 42 years ago, we are not calling you to involuntary military service, and we are not calling your children or grandchildren. That entire burden is borne by that tiny sliver of the population that volunteered to serve, in the Active Component or the Reserve Component. Employers—do not complain about the burden on you—honor and celebrate the much greater burden voluntarily undertaken by those who serve. When you find RC members in your work force or among job applicants, you must do all that USERRA requires and more and not complain about your "burdens."

The reemployment statute is not new—it is 75 years old. It was originally enacted in 1940, as part of the Selective Training and Service Act, the law that led to the drafting of millions of young men, including my late father, for World War II. A year later, as part of the Service Extension Act of 1941, Congress expanded the reemployment provision to make it apply to voluntary enlistees as well as draftees. Congress strengthened the law when it enacted USERRA

in 1994, but you should think of this law as 75 years old, not 21. This law is an integral part of the fabric of our society.

In the era of the all-volunteer military, many employers just don't get it.

With each year that passes since Congress abolished the draft in 1973, a greater and greater percentage of those who are called upon to decide things have never served in our military. Two of the three appellate judges who heard this case have served our country in uniform, but the district court judge and all of the Volvo supervisors who were involved in making decisions about Arroyo and her USAR service have never served. Indeed, Arroyo was the only active RC member employed at Volvo's facility in Joliet, Illinois.

Arroyo's USERRA lawsuit

After Volvo fired Arroyo in November 2011, she sued the company in the United States District Court for the Northern District of Illinois, alleging that the firing violated section 4311 of USERRA, which reads 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.

(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.[12]

The tale is in the e-mail.

In a lengthy process of discovery, Arroyo (through her lawyer) was able to obtain a great deal of most valuable evidence supporting her claim that the firing was motivated (at least in part) on her USAR service and obligation to perform future service. Some of the most valuable evidence was found in a series of e-mails that Volvo supervisors exchanged among themselves about Arroyo's military service and how it created problems for the company and about how they might go about ridding themselves of Arroyo by firing her.

Comply with USERRA, don't cover up the violation.

I am aware of an e-mail blast from a prominent employer-side attorney, advising clients and potential clients to avoid putting incriminating statements in e-mails, because e-mails are discoverable in litigation. I respectfully suggest that employer-side attorneys have an ethical obligation to advise their clients to comply with USERRA and other laws. I question the propriety of advising clients as to how to flout the law and get away with it by cover-up.

The right to time off from work under USERRA includes travel and rest time on the front end (before service) and the back end (after service).

In the fall of 2005, shortly after Arroyo began her employment at Volvo, she worked in Joliet, Illinois but performed her USAR drills at Fort Benning, Georgia. Thus, she needed time off from the civilian job not only on Saturday and Sunday but also on Friday and Monday, to travel to and return from the drill weekend. Material Handling Supervisor Michael Temko (Arroyo's immediate supervisor) sent an e-mail to Keith Schroeder (Volvo's director of distribution) asking "Are we required to give her [Arroyo] the day before and the day after [her drill weekend] for travel?" After checking with Volvo's Human Relations (HR) department, Schroeder erroneously replied to Temko, saying that the company was not required to accommodate Arroyo's need

[12] 38 U.S.C. 4311 (emphasis supplied).

for travel time and that the Friday before and Monday after her drill weekends should be treated as unexcused absences from her Volvo job. In fact, USERRA most definitely does protect travel and rest on the front end and the back end of a drill weekend or other period of uniformed service.[13]

Employers and supervisors: Please don't bother recalled RC members when they are in combat.

While Arroyo was on active duty in Iraq, Temko (her immediate supervisor) complained to another Volvo supervisor that Arroyo had not communicated with him during her active duty period, during the most active and dangerous period of the Iraq war. Because Temko has never served our country in uniform, it never occurred to him that Arroyo was fully engaged with her military duties and did not have time to communicate with her civilian supervisor back home. The whole point of USERRA, as well as the Servicemembers Civil Relief Act (SCRA), is to take these civilian issues off the service member's mind while he or she is on active duty, and especially when he or she is deployed to combat. While on active duty, the member should be devoting his or her full attention to military duties. This is a safety issue, for the individual service member and for his or her colleagues in the military unit.[14]

Arroyo is fired in November 2011

Volvo fired Arroyo in November 2011 for seven very brief periods of tardiness. On four occasions, she was one minute late for work. On one occasion, she was two minutes late. On two occasions, she was five minutes late. Arroyo did not perform military service on any of those seven days, and she did not claim a military-related excuse for these brief tardiness periods. But the three-judge appellate panel seemed to believe that it was at least possible that other Volvo employees with such brief tardiness periods had not been fired and that Volvo treated Arroyo more harshly than it treated other Volvo employees with similar tardiness records who were not active RC members.

The district judge should not have granted the employer's motion for summary judgment, and the appeals court panel reversed the summary judgment on appeal.

After a lengthy period of discovery, but before trial, District Judge Dow granted Volvo's motion for summary judgment in full. Under Rule 56 of the Federal Rules of Civil Procedure, a district judge should grant a motion for summary judgment only if the judge can say, based on a thorough review of the record, that there is *no material issue of fact* and that the moving party

[13] Please see Law Review 15030 (March 2015) and Law Review 14092 (December 2014).
[14] Please see Law Review 134 (September 2004). The article is titled: "Employers: Please Don't Bother them in Iraq!"

is entitled to judgment as a matter of law. In granting summary judgment, the judge is saying that *no reasonable jury could find for the non-moving party* (usually the plaintiff).

In granting Volvo's motion for summary judgment, Judge Dow minimized the significance of the e-mails, saying that they merely "demonstrate an awareness of Plaintiff's rights as an active service member as well as discussions about the company's rights and obligations."

Arroyo made a proper and timely appeal to the 7th Circuit, and the unanimous panel overturned the summary judgment. In his scholarly opinion for the unanimous panel, Judge Kanne explained the rationale for overturning the summary judgment as follows:

> We think this assessment underestimates the strength of the emails as support for Arroyo's case. Granted, Arroyo did a poor job of presenting her case to the district court. Her statement of undisputed facts under Local Rule 56.1 made only general, broad-brush statements about Volvo's discrimination, accompanied by bulk citations to the emails, affidavits, and other materials. As the district court noted, she "[did] not cite to any specific emails," and HN7 it is "not the Court's job to sift through the record to find the evidence." *Arroyo I* at *34.[15] Nevertheless, Arroyo did include the emails and other materials in the record, so we are free to consider them.[1] *See* Fed. R. Civ. P. 56(c)(3).
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> Taking all the evidence as a whole, a reasonable jury could infer that Volvo was motivated, at least in part, by anti-military animus toward Arroyo. There is evidence that from the beginning of her employment, her supervisors disliked the burden her frequent military leave placed on the company. They repeatedly discussed disciplining her and denied her rights, such as travel time, to which she was entitled. Some of the emails come close to a direct admission of management's frustration. For example, Schroeder discussed his "dilemma" of "disciplin[ing] a person for taking too much time off for military reserve duty." He later reportedly told Arroyo that accommodating her orders placed an undue hardship on Volvo; Jarvis repeated the same sentiment. Temko complained about Arroyo's lack of communication while she was deployed in Iraq. A jury could understandably detect in these communications animus toward Arroyo's military service.
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> Animus or frustration alone, however, does not support a claim of discrimination. It must have been linked, as a motivating factor, to an adverse employment action. 38 U.S.C. § 4311(c)(1); *Adams*, 324 F.3d at 939. Again, we think a jury could reasonably conclude that there was such a link here. The emails expressing management's frustration often transitioned directly to a discussion about disciplining Arroyo under

[15] The fact that both the district judge and the appellate panel criticized Arroyo's lawyer demonstrates that in these complicated USERRA cases you need a lawyer who is both competent and diligent, not only as to USERRA, but as to civil trial practice in general. And don't even think about trying to represent yourself in a case such as this.

the local attendance policy for her tardiness and absences. In the end, she was not disciplined directly for her military leave. But she was disciplined for other instances of tardiness, often of a relatively minor nature—one or only a few minutes late. A jury could infer from the evidence that Arroyo's punishment for such infractions was actually motivated by her supervisors' long-standing frustration about her frequent absences.

These facts distinguish Arroyo's case from cases where the employer demonstrated frustration but took no materially adverse action, *e.g., Breneisen v. Motorola, Inc.*, 512 F.3d 972, 981-82 (7th Cir. 2008), where the employer's negative comments were isolated and unconnected to the termination decision, *e.g., Teruggi v. CIT Group/Capital Fin., Inc.*, 709 F.3d 654, 656-57 (7th Cir. 2013), or where there were merely "[s]tray remarks by non-decisionmakers or by decisionmakers unrelated to the decision process," *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 545 (3d Cir. 1992). In contrast to these cases, Arroyo suffered adverse action (termination), the emails were arguably connected to the termination, and the complaining Volvo personnel were supervisors and decision-makers with power over her job.

It is true that Volvo granted Arroyo a considerable amount of military leave during her tenure at the company and did not directly discipline her for those particular absences. That fact will likely support Volvo's arguments before a jury. But it does not negate an inference of discriminatory motive on summary judgment. *See Maxfield v. Cintas Corp. No. 2*, 427 F.3d 544, 554 (8th Cir. 2005). Here, a jury could reasonably conclude that Volvo "was looking for a reason to discharge [Arroyo] because of the large number of absences from work due to [her] reserve status." *Id.* (reversing summary judgment on USERRA claims).

We conclude, then, that Arroyo presented sufficient evidence to make a *prima facie* case of USERRA discrimination. The burden therefore shifted to Volvo to show that it would have fired her even in the absence of her military service. 38 U.S.C. § 4311(c)(1). Volvo did not carry that burden; genuine issues of fact remain on this critical issue.

The district court emphasized that "Volvo's decision to hold employees to a strict start time is within its discretion." *Arroyo I* at *48-49. But that is the wrong standard. Even if Arroyo's tardiness was a "fireable offense ... that is only the beginning of the analysis." *Velazquez-Garcia v. Horizon Lines of Puerto Rico, Inc.*, 473 F.3d 11, 20 (1st Cir. 2007) (reversing summary judgment on USERRA claims). Instead, Volvo must prove that it would have fired Arroyo regardless of her military service. *Id.*

Volvo points out that it disciplined five other employees, and not just Arroyo, for being between one and ten minutes late to work. But Volvo only contends that one of them, Victor Jackson, was disciplined and fired. Arroyo counters that Volvo did not enforce its policy so rigorously against other employees. Volvo has not conclusively established that

it necessarily would have terminated Arroyo for her tardiness. There is sufficient doubt on this issue to make it a jury question.

For these reasons, Volvo is not entitled to summary judgment on Arroyo's discrimination claim under USERRA.[16]

Where do we go from here?

The Court of Appeals reversed the summary judgment for Volvo and remanded the case to the Northern District of Illinois. The next step in a trial, unless the parties settle. We will keep the readers informed of developments in this interesting and important case.

The issue of costs

Under Rule 54(d)(1) of the Federal Rules of Civil Procedure, Judge Dow ordered Arroyo to pay Volvo $9,476.30 in "reasonable costs"—due to the company because it was the prevailing party. The 7th Circuit panel vacated the award of costs as "premature." Both the district judge and the three appellate judges were apparently unaware that USERRA *specifically precludes ordering the USERRA plaintiff to pay costs, even if he or she loses.*[17]

[16] *Arroyo,* footnotes omitted.

[17] Section 4323(h)(1) provides: "No fees or court costs may be charged or taxed against any person claiming rights under this chapter." 38 U.S.C. 4323(h)(1). Please see Law Review 1082 (September 2010), by Thomas G. Jarrard, Esq., concerning the implications of section 4323(h)(1).