

## LAW REVIEW 15098<sup>1</sup>

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### **SSGT Baldo Bello's USERRA Lawsuit against the Village of Skokie**

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

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

***Bello v. Village of Skokie, 200 L.R.R.M. 3543, 2014 WL 4344391, 2014 U.S. Dist. LEXIS 121664 (N.D. Ill. September 2, 2014).***

In Law Review 14046 (April 2014), I reported on the federal lawsuit brought by Staff Sergeant (SSGT) Baldo Bello, USMCR (a member of ROA) against the Village of Skokie.<sup>3</sup> Bello is employed by Skokie as a police officer, and he alleged that the Village had violated his rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA). At the end of Law Review 14046, I promised to keep the readers informed of developments in this interesting and important case—hence, this article.

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<sup>1</sup> We invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find more than 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.

<sup>2</sup> 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](http://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.

<sup>3</sup> Skokie is a suburb of Chicago.

Bello enlisted in the Marine Corps in 2001 and joined Skokie's police department in 2007. Under the collective bargaining agreement (CBA) between Skokie and the police officer union, each officer gets nine regular days off (RDOs) per month, and the officer can also schedule military leave, jury leave, etc.<sup>4</sup> Each month, each officer submits his or her proposed work schedule for the next month, and the department makes the schedule accordingly. Scheduling is done by seniority, so more senior officers are much more likely to get their requested schedules.

In June of 2013, the police department changed its policy. Under the new policy, Bello's RDOs automatically include the days that he has requested for military leave.<sup>5</sup> This means that the days that Bello is away from his civilian job for his scheduled monthly Marine Corps Reserve training are *instead of*, rather than in addition to, days that he would ordinarily have off anyway.<sup>6</sup> Bello objected to the new policy, and he argued both orally and in written memoranda that the new policy violated his USERRA rights. This case is about the lawfulness of the new policy and also about the lawfulness of certain unfavorable personnel actions that the Village took against Bello—Bello claims that those actions were taken against him in reprisal for his having complained about asserted USERRA violations.

In September of 2013, the command staff of the police department accused Bello of misconduct and put him on administrative leave for using what Bello referred to as “an expression commonly used by members of the Marine Corps in order to indicate affirmation, acknowledgment, or readiness.” Bello reports that he had used the same expression for years without incident or objection. The allegation here is that Bello has been punished for pretextual reasons, when the real reason is animus against him because of his Marine Corps Reserve service and because of his complaints that his USERRA rights have been violated.

Bello's lawsuit relies on section 4311 of USERRA, which provides:

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<sup>4</sup> Under section 4302 of USERRA, the CBA can give Reserve Component (RC) members like Bello *greater or additional rights*, but it cannot take away the rights that the RC member enjoys under USERRA, nor can the CBA impose additional prerequisites upon the exercise of USERRA rights. 38 U.S.C. 4302.

<sup>5</sup> As a Marine Corps Reservist, Bello must perform one “weekend” of drills per month, but the “weekend” lasts for three or four days, not just Saturday and Sunday. Because of the increased responsibilities imposed upon the RC, and especially the Marine Corps Reserve, since the terrorist attacks of September 11, 2001, the periodic training that the individual RC member must undergo has increased. Please see Law Review 13099 (July 2013), titled “This Is not your Father’s National Guard.”

<sup>6</sup> Some RC members would welcome a policy like this, because it means that the individual does not lose money (civilian salary or wages) because of scheduled military training. USERRA does not require Skokie to pay Bello for days that he does not work, because of his military training, but Bello does have a limited right to *paid* military leave under Illinois state law. See *Monroe v. Standard Oil Co.*, 452 U.S. 549 (1981) and Law Review 0923 (June 2009). Other employees, apparently including Bello, value time off from work more than maximized earnings and object to a policy like Skokie's new policy.

§ 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 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.<sup>7</sup>

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<sup>7</sup> 38 U.S.C. 4311 (emphasis supplied).

In his complaint, Bello also alleged that the Village of Skokie and the individual defendants violated the Illinois Whistleblower Act (IWA), a state statute.<sup>8</sup>

Bello sued the Village of Skokie and four individuals—the police chief, the deputy police chief, Bello’s commander within the police department, and the Village’s personnel director.<sup>9</sup> The defendants made a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Such a motion should be granted only if the judge finds that *even assuming that the plaintiff’s factual allegations are correct* there is no relief that can be awarded to the plaintiff. Judge Matthew F. Kennelly properly denied the motion to dismiss, and that was 14 months ago (September 2014).

The next step is the discovery process. The plaintiff gets to demand documents, testimony, and other evidence from the defendants, and the defendants get to demand the same from the plaintiff. In a case like this, the discovery process can be most contentious and protracted.

After discovery has been completed, the defendants can make a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. If the judge finds, based on the evidentiary record at that point, that there is no evidence (beyond a “mere scintilla”) in support of the plaintiff’s case and that no reasonable jury could find for the plaintiff, the judge will grant the motion for summary judgment. If summary judgment is denied, the next step is a trial, unless the parties settle.

In an urban district like the Northern District of Illinois (Chicago), dockets are often crowded and it can take years for a civil case to get to trial. We will keep the readers informed of developments in this interesting and important case.

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<sup>8</sup> In a case like this, the plaintiff is well served by having private counsel, rather than relying upon the Veterans’ Employment and Training Service of the United States Department of Labor (DOL-VETS) and the Department of Justice (DOJ). Private counsel can consider and bring claims under various statutes and legal theories, while DOL-VETS and DOJ are limited to USERRA. When you have a federal court lawsuit under a federal statute like USERRA and you have closely related state law claims that arise out of essentially the same facts, you can bring your state law claims, along with your federal claims, in the federal court under the supplemental jurisdiction of the federal court. See 28 U.S.C. 1337(a). I discuss this issue in detail in Law Review 1173.

<sup>9</sup> Section 4303 of USERRA defines 16 terms, 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.” 38 U.S.C. 4303(4)(A)(i) (emphasis supplied). If an individual violates USERRA, the individual can in some circumstances be held personally responsible.