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The French Company Fired my Wife!

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

1.1.1.6—USERRA applies to foreign employers in the U.S.
1.2—USERRA forbids discrimination
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1.8—Relationship between USERRA and other laws/policies

Q: I spent a 25-year career working in the United States for a French company, headquartered in Paris. As I had long planned and had informed the employer, I retired on September 30, 2015. In the months leading up to my retirement, the manager of the U.S. plant (a French citizen sent here from Paris and reporting directly to the Paris headquarters) asked me to recommend a replacement, and I suggested a young woman—let's call her Mary Jones. The manager interviewed Mary Jones but did not hire her. I asked the manager why Mary was not hired, and he informed me: "We cannot hire Mary because she is in the Army Reserve, and accommodating her drill weekends and annual training, to say nothing of the possibility of mobilization, is a nuisance."

I found your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) by doing an Internet search. I contacted Mary and told

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[1] We invite the reader's attention to 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.

[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.

her about what the plant manager had told me and about your USERRA articles. Mary hired a lawyer, who sued the French company. The lawyer contacted me, and I told him about what the plant manager had said about Mary's Army Reserve service disqualifying her from being hired. The lawyer listed my name as a potential witness in the lawsuit, and I expected to be called as a witness. I was scheduled to give a deposition, but the case settled a week before the scheduled deposition, and the deposition never happened.

The company paid Mary a substantial but undisclosed amount of money to settle her case and drop her lawsuit. The plant manager was mad at me for having informed Mary and her lawyer about what he had said about her Army Reserve service disqualifying her from consideration of being hired. He could not do anything to me, because I was already retired, so he fired my wife. She has worked for the company almost as long as I had worked there, but she was still five years away from her planned retirement date.

Neither my wife nor I have ever served in the military. I read in one of your articles that, under some circumstances, USERRA protects non-veterans. Do you think that firing my wife, to get back at me for having cooperated with Mary's lawyer in a USERRA case, was a USERRA violation?

A: I think that the company violated section 4311(b) of USERRA when it fired your wife as retaliation for your having assisted Mary Jones in her USERRA complaint. Here is the entire text of section 4311:

> § 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.*

(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.[3]

As is explained in Law Review 15067 (August 2015), Congress enacted USERRA[4] and President Bill Clinton signed it into law on October 13, 1994. USERRA was a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA's legislative history explains the purpose and effect of section 4311(b) as follows:

> Section 4311(c) [later renumbered 4311(b)] makes explicit the anti-retaliation provisions contained in the reported bill apply to persons who not only file a complaint, either with his or her employer … or with a government agency, but applies as well to persons who testify in any proceeding under chapter 43 [USERRA], even if that person was not the subject of the proceeding, and to persons who assist or otherwise participate in an investigation under chapter 43, even if those persons were not the subject of the investigation. Accordingly, a person protected under this section need not be a member of the uniformed services.[5]

The same committee report contains the following sentence: "The Committee [House Committee on Veterans' Affairs] intends that these anti-discrimination provisions [section 4311] be broadly construed and strictly enforced."[6] Here is another pertinent paragraph of the legislative history:

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[3] 38 U.S.C. 4311 (emphasis supplied).
[4] Public Law 103-353, 108 Stat. 3153.
[5] House Report No. 103-65, 1994 *United States Code Congressional & Administrative News (USCCAN)* 2449, 2457.
[6] 1994 *USCCAN* at 2456.

> The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protection against employment-related discrimination, and the protection of certain other rights and benefits have been eminently successful for over fifty years. Therefore, the Committee wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act, remains in full force and effect in interpreting these provisions. *This is particularly true of the basic principle established by the Supreme Court that the Act is to be "liberally construed." See Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946); *Alabama Power Co. v. Davis,* 431 U.S. 581, 584 (1977).[7]

The fact that it is your wife, not you, who was fired complicates matters somewhat. In this regard, I invite your attention to *Thompson v. North American Stainless,* 562 U.S. 170 (2011). In that case, Eric L. Thompson was fired three weeks after the employer was notified by the Equal Employment Opportunity Commission (EEOC) that his fiancée (later wife) Miriam Regalado had filed a sex discrimination complaint against the company. Thompson alleged that firing him was a reprisal against his fiancée for her having filed a complaint with the EEOC. The 6th Circuit[8] affirmed the district court's grant of the employer's motion for summary judgment. The district court and the 6th Circuit concluded that such third-party retaliation did not violate Title VII of the Civil Rights Act of 1964. The Supreme Court granted *certiorari* (discretionary review) and unanimously reversed the 6th Circuit.

The Court's decision (written by Justice Antonin Scalia) includes the following paragraphs:

> [W]e have little difficulty concluding that if the facts alleged by Thompson are true, then NAS's firing of Thompson violated Title VII. In *Burlington N. & S. F. R. Co.* v. *White*, 548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006), we held that Title VII's antiretaliation provision must be construed to cover a broad range of employer conduct. We reached that conclusion by contrasting the text of Title VII's antiretaliation provision with its substantive antidiscrimination provision. [3] Title VII prohibits discrimination on the basis of race, color, religion, sex, and national origin " 'with respect to . . . compensation, terms, conditions, or privileges of employment,' " and discriminatory practices that would " 'deprive any individual of employment opportunities or otherwise adversely affect his status as an employee.' *Id*., at 62, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (quoting 42 U.S.C. § 2000e-2(a) (emphasis deleted)). In contrast, Title VII's antiretaliation provision prohibits an employer from " 'discriminat[ing] against any of his employees' " for engaging in protected conduct, without specifying the employer acts that are prohibited. 548 U.S., at 62, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (quoting § 2000e-3(a)

[7] 1994 *USCCAN* at 2452.

[8] The 6th Circuit is the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee.

(emphasis deleted)). Based on this textual distinction and our understanding of the antiretaliation provision's purpose, we held that "the antiretaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment." *Id.,* at 64, 126 S. Ct. 2405, 165 L. Ed. 2d 345. Rather, Title VII's antiretaliation provision prohibits any employer action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.,* at 68, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (internal quotation marks omitted).

We think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired. Indeed, NAS does not dispute that Thompson's firing meets the standard set forth in *Burlington*. Tr. of Oral Arg. 30. NAS raises the concern, however, that prohibiting reprisals against third parties will lead to difficult line-drawing problems concerning the types of relationships entitled to protection. Perhaps retaliating against an employee by firing his fiancé would dissuade the employee from engaging in protected activity, but what about firing an employee's girlfriend, close friend, or trusted co-worker? Applying the *Burlington* standard to third-party reprisals, NAS argues, will place the employer at risk any time it fires any employee who happens to have a connection to a different employee who filed a charge with the EEOC.

Although we acknowledge the force of this point, we do not think it justifies a categorical rule that third-party reprisals do not violate Title VII. As explained above, we adopted a broad standard in *Burlington* because Title VII's antiretaliation provision is worded broadly. We think there is no textual basis for making an exception to it for third-party reprisals, and a preference for clear rules cannot justify departing from statutory text.[9]

I think that it is clear that firing your wife as retaliation for your having assisted an Army Reservist with her USERRA claim violated section 4311(b) of USERRA.

The employer is a French company operating in the United States. USERRA and other U.S. laws apply to the U.S. operations of foreign corporations.

Section 4331 of USERRA gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. The Department of Labor (DOL) published proposed USERRA Regulations in the *Federal Register* in September 2004. After considering the comments received and making a few adjustments, DOL

[9] *Thompson,* 562 U.S. at 173-75. I invite the reader's attention to Law Review 1127 (March 2011) for a detailed discussion of *Thompson* and its implications for USERRA enforcement. Law Review 1127 was written by Commander Sharif Abdrabbo, USCGR.

published the final regulations in the *Federal Register* on December 19, 2005. The regulations are published in title 20 of the Code of Federal Regulations, at Part 1002. 20 C.F.R. Part 1002. The pertinent section is as follows:

> USERRA applies to foreign employers doing business in the United States. A foreign employer that has a physical location or branch in the United States (including U.S. territories and possessions) must comply with USERRA for any of its employees who are employed in the United States.[10]

[10] 20 C.F.R. 1002.34(b).