LAW REVIEW 15104[1]
November 2015

Navy Reservist Survives Employer's Motion for Summary Judgment but then Loses Jury Trial

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

1.2—USERRA forbids discrimination
1.4—USERRA enforcement
1.8—Relationship between USERRA and other laws/policies

***Kiehl v. ActioNet, Inc.,* 201 L.R.R.M. 3418, 2014 WL 6450346, 2014 U.S. Dist. LEXIS 160927 (D. Md. Nov. 17, 2014), *motion for new trial denied* 2015 U.S. Dist. LEXIS 36412 (D. Md. Mar. 24, 2015).**

Brian D. Kiehl is a Navy Reservist (rank not shown in decision). He brought this lawsuit against ActioNet, Inc. and survived the defendant's motion for summary judgment in late 2014. The case proceeded to trial in early 2015, and the jury ruled against Kiehl. Kiehl urged the judge to grant a motion for new trial, but the judge declined to do so. This case is probably over.

ActioNet had a contract with the United States Department of Energy to provide various support services. When ActioNet has staff vacancies, it normally fills them through a

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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.

contractual relationship with Apex Systems, a staffing agency. Under this arrangement, Kiehl was brought on board as an Apex employee on a 90-day trial period referred to as "temp to perm."[3] The idea is that if the temporary Apex employee proves to be satisfactory, he or she is then offered permanent ActioNet employment. Kiehl's 90-day evaluation period expired on October 27, 2012, and the company decided not to "convert" him to an employee of ActioNet, thus terminating his employment. Kiehl claimed that ActioNet's decision not to convert him from Apex temporary employee to ActioNet permanent employee was motivated, at least in part, by his Navy Reserve service and obligations.

In August 2012, Kiehl learned from the Navy that his required annual training period would begin on October 29, 2012, and he shared that information with his employers. The timing of Kiehl's annual training period was most unfortunate, because the training period began just two days after the end of Kiehl's 90-day evaluation period and just as ActioNet would be required to decide whether to convert Kiehl to permanent status. In his decision denying the employer's motion for summary judgment, Senior Judge William M. Nickerson wrote: "Internal e-mails from ActioNet show that the HR team was less than enthusiastic about finding a solution to accommodate both Kiehl's start date and his military leave."

In his lawsuit, Kiehl asserted that ActioNet's decision not to convert him from temporary to permanent status violated section 4311 of the Uniformed Services Employment and Reemployment Rights Act (USERRA). That section 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

[3] In this situation, Apex and ActioNet are referred to as "joint employers" of an employee like Kiehl. Please see Law Review 15080 (September 2015) and Law Review 0953 (October 2009) for a detailed discussion of the joint employer doctrine as it applies to USERRA.

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.[4]

As I explained in detail in Law Review 15067 (August 2015), Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. As I explained in Law Review 64 (January-February 2003), Congress amended the VRRA in 1968 to outlaw discrimination against already employed Reserve Component (RC) members based on their obligations as RC members, and in 1986 Congress amended the VRRA again to expand this protection to outlaw *discrimination in initial employment.* This broadened protection was carried over into section 4311 of USERRA in 1994.

As I explained in Law Review 0739 (July 2007), the RC member challenging an unfavorable personnel action under section 4311 is not required to prove that the employer's decision was motivated *solely* by the plaintiff's RC membership, performance of service, or obligation to perform service. It is sufficient to prove that the RC service or obligation was *a motivating factor* in the employer's decision.[5] If the plaintiff proves motivating factor by a preponderance of the evidence, the *burden of proof* (not just the burden of going forward with the evidence) shifts to the employer to *prove* (not just say) that the employer *would have made the same decision* (not just could have) in the absence of the protected factor. The employer violates

[4] 38 U.S.C. 4311 (emphasis supplied).
[5] If the employer had 15 reasons for making the unfavorable personnel decision, and one of the reasons related to the individual's RC membership or service, then a protected factor was *a motivating factor* in the employer's decision.

section 4311 if it considers the RC service and obligation negatively in making the employment decision, but the employer can avoid liability by establishing as an affirmative defense that it would have made the same decision anyway in the absence of the protected factor.

After the lengthy process of discovery[6] was completed, defendant ActioNet made a *motion for summary judgment.* Under Rule 56 of the Federal Rules of Civil Procedure, the judge should grant a motion for summary judgment only if he or she concludes, after reviewing the evidence in detail, that *no reasonable jury could find for the non-moving party* (usually the plaintiff) because there is no evidence (beyond a "mere scintilla") to support a judgment for the non-moving party. Judge Nickerson concluded that there was evidence to support a jury finding for the plaintiff (Kiehl) and properly denied the defendant's motion for summary judgment.

There was some evidence in the record to support a jury verdict for Kiehl. There was a close proximity in time between Kiehl's Navy Reserve annual training obligation and the employer's unfavorable personnel decision, and there was e-mail evidence and testimony about employer irritation over the timing of Kiehl's training obligation. In ruling on a motion for summary judgment, the judge should not weigh the evidence—that is the job of the jury. The judge's role is simply to determine if there is evidence through which a reasonable jury might find for the plaintiff. Judge Nickerson's decision was proper.

This case proceeded to trial in early 2015, and the jury rendered a verdict for the defendant (ActioNet), finding that Kiehl had not established by a preponderance of the evidence that his Navy Reserve service was a motivating factor in the company's decision not to offer him permanent employment at the end of his 90-day trial period. Kiehl filed a motion for new trial, asserting that the jury's decision was against the great weight of the evidence and that the defense verdict was a manifest injustice. Kiehl also challenged the wording of some of Judge Nickerson's jury instructions. Judge Nickerson denied the motion for new trial on March 24, 2015.

[6] In civil litigation, discovery is the process whereby plaintiffs and defendants get to demand and obtain from each other documents, testimony by deposition, and other evidence.