**LAW REVIEW 15105**[1]
**November 2015**

# Army Reservist Survives Summary Judgment in Section 4311 Case

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

1.2—USERRA prohibits discrimination
1.4—USERRA enforcement

***Junguzza v. Gemalto, Inc.,* 200 L.R.R.M. 3287, 2014 WL 3887753, 2014 U.S. Dist. LEXIS 108831 (E.D. Pa. August 6, 2014).**[3]

Joe M. Junguzza is an Army Reservist (rank not shown in the court decision). He worked for Gemalto, Inc., until he was fired on July 2, 2013. Gemalto is a large international corporation with its headquarters in Austin, Texas. Junguzza worked for the company at its facility in Montgomeryville, Pennsylvania, and he brought this suit in the United States District Court for the Eastern District of Pennsylvania.[4] In his lawsuit, Junguzza alleged that the firing violated

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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.

[3] This is an informally published decision by Judge Michael M. Baylson of the United States District Court for the Eastern District of Pennsylvania.

[4] "In the case of any action against a private employer [under the Uniformed Services Employment and Reemployment Rights Act], the action may proceed in the United States district court for any district in which the private employer of the person maintains a place of business." 38 U.S.C. 4323(c)(2). Montgomeryville is located in the Eastern District of Pennsylvania, so venue was proper in that court.

section 4311 of the Uniformed Services Employment and Reemployment Rights Act (USERRA). That section 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.
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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.[5]

[5] 38 U.S.C. 4311 (emphasis supplied).

Junguzza worked for Gemalto for several years. In late 2011, the company's finance department noted serious billing discrepancies in an account for which Junguzza was responsible. There was apparently no suggestion of embezzlement, but the company claimed that because of Junguzza's mishandling of the billing the company had to mark down a substantial portion of what was owed to the company. The company sent Ruby Goh to the Pennsylvania facility to sort out the discrepancy. Shortly thereafter, the company made Goh Junguzza's immediate supervisor.

On at least two occasions, Goh made negative remarks about Junguzza's Army Reserve service, to the effect that he should not be working "two jobs" and that his Army Reserve service was a problem for the company. On April 22, 2013, Junguzza learned that his ten-day Army Reserve annual training was scheduled for the next month (May). Junguzza immediately informed Goh of his training obligation, and she told him that May was a bad time because the company was launching a new product line during that month. Junguzza asked the Army to reschedule his annual training, and he performed the training from June 10 to 21 and returned to work on June 24.[6]

The company fired Junguzza on July 2, 2013, just one week after he returned from his annual training. The evidence showed that company officials decided to fire Junguzza on May 14, 2013.

After the completion of discovery,[7] Gemalto filed a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. A judge should grant a summary judgment motion only if he or she concludes, after a careful review of the evidence, that no reasonable jury could find for the non-moving party because there is no evidence (beyond a "mere scintilla") to support a verdict for the non-moving party (usually the plaintiff).

After carefully reviewing the evidence, Judge Baylson properly denied the defendant's summary judgment motion. Judge Baylson explained in his decision that there was some evidence that could lead a reasonable jury to find for Junguzza. There was a close proximity in time between April 22 (when Junguzza notified his employer of his upcoming annual training requirement) and May 14 (when the company decided to fire Junguzza). There were also at least two statements by Goh expressing animus against Junguzza because of his Army Reserve service.

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[6] Junguzza was *not required* to reschedule his military obligations to accommodate the convenience of the civilian employer. 20 C.F.R. 1002.104. But it is good that Junguzza and his Army Reserve commanding officer were willing to accommodate the civilian employer's objection to the timing of his annual training.

[7] Discovery is the often contentious process whereby opposing parties in civil litigation get to demand and obtain documents, deposition testimony, and other evidence from each other.

Goh was probably not the ultimate decision maker in the decision to fire Junguzza, but the company official who made that decision likely relied on unfavorable reports by Goh about Junguzza, and it is at least possible that in making unfavorable reports Goh was motivated by her antimilitary animus against Junguzza. Judge Baylson noted that the Supreme Court has held that: "if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA."[8]

Because Judge Baylson denied the employer's summary judgment motion, the next step is a trial, unless the parties settle. LEXIS (a computerized legal research service) shows no subsequent action in this case. It is quite likely that the parties settled and the case is over.

[8] *Staub v. Proctor Hospital,* 562 U.S. 411, 422 (2011). Please see Law Review 1122 (March 2011) for a detailed discussion of the *Staub* case. On behalf of ROA, and together with Thomas Jarrard, Esq., I filed an *amicus curiae* brief in the Supreme Court, urging the Court to overturn the unfavorable decision of the 7th Circuit, and the Court did exactly that.