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Section 4311 of USERRA

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1.2—USERRA forbids discrimination
1.4—USERRA enforcement

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA). Congress enacted the VRRA in 1940, as part of the Selective Training and Service Act, the law that led to the drafting of more than ten million young men (including my late father) for World War II.[3]

For the first 15 years (1940-55) of the reemployment statute's existence, this statute only applied to *active duty,* which for most people was a once in a lifetime experience. For example, my father was drafted in May 1941 and honorably discharged in October 1945.[4] The right to

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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] As originally enacted in 1940, the VRRA only applied to those who were drafted. In 1941, as part of the Service Extension Act, Congress expanded the VRRA to make it apply to voluntary enlistees as well as draftees. Almost from the very beginning, the reemployment statute has applied to voluntary as well as involuntary service.

[4] Upon discharge, he was entitled to reemployment at Peat Marwick Mitchell, a "Big 8" accounting firm, but he chose not to return to that company. Instead, he used his GI Bill educational benefits to go to law school, and he

return to their pre-service civilian jobs, and to be treated as if they had been continuously employed in those jobs during their military service, was extremely valuable for millions of young men and a few thousand young women returning from military service after victory in World War II. But there was no perceived need for a law forbidding discrimination, because it was most unlikely that these men and women who again leave their civilian jobs for military service.

In 1955 (for members of the Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve, and Coast Guard Reserve), and in 1960 (for members of the Army National Guard and Air National Guard), Congress expanded the VRRA to make it apply to initial active duty training, active duty for training, and inactive duty training—the kinds of service typically performed by Reserve Component (RC) members. Thus, leaving a civilian job for military service or training and returning to the civilian job after training or service became a recurring phenomenon rather than a once in a lifetime phenomenon.

Congress came to recognize that the recurring nature of military training for RC members meant that those members would need protection from discrimination by civilian employers. An employer would often be tempted to fire or discriminate against an RC member, in order to avoid the recurring inconvenience of accommodating absences from work for drill weekends and annual training. Accordingly, in 1968, Congress amended the VRRA to add a provision making it unlawful for an employer to deny a member of the RC retention in employment (i.e., firing the employee), promotion, or an incident or advantage of employment because of obligations as a member of a Reserve component of the armed forces.

Employers then came to switch the discrimination to the hiring process. In 1986, Congress expanded the protection to make it apply to discrimination *in hiring,* as well as discrimination against those already employed. Here is the text of the VRRA's anti-discrimination provision:

> Any person who *seeks or* holds a position described in clause (A)[5] or (B)[6] of subsection (a) of this section shall not be denied *hiring,* retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.[7]

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had a successful practice as a tax attorney and Certified Public Accountant in Houston, until he passed away in 1988.

[5] Clause A refers to positions in the United States Government, its territories or possessions and political subdivisions thereof, and the District of Columbia Government.

[6] Clause B refers to positions in state governments and the governments of political subdivisions of states and private employers.

[7] 38 U.S.C. 4321(b)(3) (1988 edition of the United States Code). The italicized words were added by the 1986 amendment, concerning hiring discrimination.

In 1981, the Supreme Court decided an important VRRA case. The Court cited the legislative history of section 2021(b)(3) [later renumbered as 4321(b)(3)] and held, "The legislative history thus indicates that section 2021(b)(3) was enacted for the significant but limited purpose of protecting the employee-Reservist against discriminations like discharge and demotion, motivated *solely* by Reserve status."[8]

This quoted language had unfavorable consequences that the Supreme Court probably did not intend or anticipate. In *Sawyer v. Swift & Co.,*[9] the United States Court of Appeals for the 10th Circuit[10] cited the quoted language and held that a Reservist claiming to have been fired because of his Reserve obligations must prove that the discharge was motivated *solely* by the Reserve obligations. As you can imagine, it is most difficult to prove that anything that happens can be attributed *solely* to something else—human life is seldom that simple.

In 1994, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA), a complete rewrite of the reemployment statute construed by the Supreme Court in *Monroe.* Section 4311 of USERRA (38 U.S.C. 4311) is a much broader and stronger anti-discrimination provision than section 2021(b)(3). Section 4311(c) of USERRA provides that an individual challenging a discharge or other alleged discrimination is only required to prove that the protected factor (like performance of uniformed service) was *a motivating factor* (not necessarily the sole reason) for the employer's unfavorable action. USERRA's legislative history clearly indicates that the intent of section 4311(c) was to overrule *Monroe* and *Sawyer* on this "motivated solely" issue.[11]

Here is the text of section 4311 of USERRA:

> § 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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[8] *Monroe v. Standard Oil Co.,* 452 U.S. 549, 559 (1981) (emphasis supplied).
[9] 836 F.2d 1257, 1261 (10th Cir. 1988).
[10] The 10th Circuit is the federal appellate court that sits in Denver and hears appeals from district courts in Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.
[11] I invite the reader's attention to Law Review 0739 for a detailed discussion of *Monroe, Sawyer,* and the legislative history on this point.

(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.[12]

With regard to the meaning of section 4311, and particularly section 4311(c), I offer a long quotation from a 1993 report of the House Committee on Veterans' Affairs:

> Section 4311(b) [later renumbered 4311(c)] would reaffirm that the standard of proof in a discrimination or retaliation case is the so-called 'but for' test and that the burden of proof is on the employer, once a *prima facie* case is established. This provision is simply a reaffirmation of the original intent of Congress when it enacted current section 2021(b)(3), in 1968. See Hearings on H.R. 11509 before Subcommittee No. 3 of the House Committee on Armed Services, 89th Cong., 1st Sess. at 5320 (Feb. 23, 1966). In 1986, when Congress amended section 2021(b)(3) to prohibit initial hiring discrimination against Reserve and National Guard members, Congressman G.V. Montgomery (sponsor of the legislation and chairman of the House Committee on Veterans Affairs) explained that, in accordance with the 1968 legislative intent cited

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

above, the courts in these discrimination cases should use the burden of proof analysis adopted by the National Labor Relations Board and approved by the Supreme Court under the National Labor Relations Act. See 132 Cong. Rec. 29226 (Oct. 7, 1986) (statement of Cong. Montgomery) citing *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

This standard and burden of proof is applicable to all cases brought under this section regardless of the date of accrual of the cause of action. To the extent that the courts have relied on *dicta* from the Supreme Court's decision in *Monroe v. Standard Oil Co.*, 452 U.S. 549, 559 (1981), that a violation of this section can occur only if the military obligation is the sole factor (see *Sawyer v. Swift & Co.*, 836 F.2d 1257, 1261 (10th Cir. 1988)), those decisions have misinterpreted the original legislative intent and history of 38 U.S.C. 2021(b)(3) and are rejected on that basis.[13]

The appellate courts that have addressed the burden of proof issue under section 4311 since Congress enacted USERRA in 1994 have been unanimous in putting the burden of proof on the employer (defendant) to show lack of pretext, rather than putting the burden of proof on the employee (plaintiff) to show that the employer's proffered reason for taking an employment action was a pretext for unlawful discrimination. See *Velasquez-Garcia v. Horizon Lines of Puerto Rico, Inc.*, 473 F.3d 11 (1st Cir. 2007); *Coffman v. Chugach Support Services Inc.*, 411 F.3d 1231, 1238-39 (11th Cir. 2005); *Gagnon v. Sprint Corp*., 284 F.3d 839, 853-54 (8th Cir. 2002); *Leisek v. Brightwood Corp*., 278 F.3d 895, 898-99 (9th Cir. 2002); *Hill v. Michelin North America Inc*., 252 F.3d 307, 312 (4th Cir. 2001); *Sheehan v. Department of the Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001); *Gummo v. Village of Depew, New York*, 75 F.3d 98, 106 (2nd Cir. 1996).

The two-pronged burden-shifting analysis under USERRA and the National Labor Relations Act [*National Labor Relations Board v. Transportation Management Corp*., 462 U.S. 393 (1983)] is markedly different from and much more pro-employee than the three-pronged analysis under Title VII of the Civil Rights Act of 1964. (Title VII makes it unlawful for an employer to discriminate in employment on the basis of race, color, sex, religion, or national origin.) In Title VII cases, the employee (plaintiff) must first prove that one of the Title VII factors (race, sex, etc.) was the reason, or at least a reason, for the employer's action, then the burden of going forward with the evidence (but not the burden of proof) shifts to the employer, to offer a legitimate, non-discriminatory reason for the action. The burden of proof then shifts back to the plaintiff, to show that the employer's proffered reason for the action is a pretext for discrimination. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

Under section 4311, it is unlawful for an employer to deny an individual any one of the following things:

a. Initial employment.

[13] House Report No. 103-65, 1994 *United States Code Congressional & Administrative News (USCCAN)* 2449, 2457.

b. Reemployment.
c. Retention in employment.
d. Promotion.
e. Benefit of employment.[14]

Section 4311(a)[15] makes it unlawful for an employer or prospective employer to deny one of the above benefits based on:

a. The individual's membership in a uniformed service.[16]
b. The individual's application to join a uniformed service.
c. The fact that the individual performs or has performed uniformed service.[17]
d. The fact that the individual has applied to perform or has an obligation to perform service in a uniformed service.

Section 4311(b)[18] makes it unlawful for an employer or prospective employer to deny an individual one of the enumerated benefits based on:

a. The fact that the individual has taken an action to enforce a protection afforded to any person under USERRA.
b. The fact that the individual has testified or otherwise made a statement in or in connection with any proceeding under USERRA.
c. The fact that the individual has assisted or otherwise participated in an investigation under USERRA.
d. The fact that the individual has exercised a right provided for in USERRA.

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[14] The term "benefit of employment" is broadly defined by USERRA: "The term 'benefit,' 'benefit of employment,' or 'rights and benefits' means the terms, conditions, or privileges of employment, including any advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed) that accrues by reason on an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment." 38 U.S.C. 4303(2).

[15] 38 U.S.C. 4311(a).

[16] As defined by USERRA, the uniformed services are the Army, Navy, Marine Corps, Air Force, Coast Guard, and the commissioned corps of the Public Health Service (PHS), including the Reserve Components of these services. The commissioned corps of the National Oceanic & Atmospheric Administration (NOAA) is a uniformed service as defined by 10 U.S.C. 101(a)(5), but the NOAA Corps is not a uniformed service for purposes of USERRA. Please see Law Review 15002 (January 2015).

[17] USERRA defines "service in the uniformed services" as follows: "The term 'service in the uniformed services' means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32." 38 U.S.C. 4303(13).

[18] 38 U.S.C. 4311(b).

It is unlawful for an employer or prospective employer to consider negatively any of the 4311(a) or 4311(b) factors when making an employment decision (hiring, firing, promotion, etc.). But the employer or prospective employer can avoid liability by *proving* (not just saying) that *we would have made the same decision in the absence of the protected factor.*[19] This should be considered to be an affirmative defense for which the employer bears the burden of proof.

To prevail under the section 4311(c) affirmative defense, it is necessary for the employer to prove that it *would have* taken the same action in the absence of the protected factor. It is not sufficient for the employer to prove that it *could have* taken the same action.

For example, let us say that Josephine Smith is a Coast Guard Reservist and is employed by the XYZ Corporation. Smith's XYZ supervisor has repeatedly made it clear that he is annoyed with her concerning her USCGR service. One snowy morning, Smith is 35 minutes late for work. The XYZ *Employee Handbook* provides that being more than 30 minutes late for work, even once, can be considered grounds for discharge. But the evidence establishes that it has been many years since the last time the company fired an employee for 35 minutes of tardiness. XYZ may be able to establish that it *could have* fired Smith for 35 minutes of tardiness even if she were not in the Coast Guard Reserve, but the company cannot establish that it *would have* fired Smith anyway. The purported affirmative defense fails.

You don't need a "smoking gun" to prove a section 4311 discrimination case.[20] You can prove "motivating factor" by circumstantial as well as direct evidence. If there is proximity *in time* between the plaintiff's exercise of USERRA rights or notification of the employer of a period of impending service and the unfavorable personnel action, the proximity in time may be sufficient, in and of itself, to establish motivating factor.

For example Albert Adams (a Lance Corporal in the Marine Corps Reserve) learned during his November 21-22 drill weekend that his unit will be mobilized and deployed in March 2016. On Monday, November 23, shortly after reporting to work, he shared that information with his civilian supervisor. On Wednesday, November 25, Adams is fired. The close proximity in time is probably sufficient to prove motivating factor.

In *Erickson v. United States Postal Service,* the United States Postal Service (USPS—the employer) argued, and the Merit Systems Protection Board (MSPB) agreed, that firing Erickson was not unlawful because it was motivated by Erickson's *absence from work,* not by his *military*

[19] 38 U.S.C. 4311(c).

[20] *See Wagner v. Novartis Pharmaceuticals Corp.,* 565 F. Supp. 2d 940 (E.D. Tenn. 2008). I discuss that case in detail in Law Review 0906 (February 2009).

service. The United States Court of Appeals for the Federal Circuit[21] lambasted the MSPB for accepting that nonsensical USPS argument:

> We reject that argument. An employer cannot escape liability under USERRA by claiming that it was merely discriminating against an employee on the basis of absence when that absence was for military service. … The most significant—and predictable—consequence of reserve service with respect to the employer is that the employee is absent to perform that service. To permit an employer to fire an employee because of his military absence would eviscerate the protections afforded by USERRA.[22]

As I have explained in Law Reviews 15104 and 15105 (November 2015), you should expect the employer-defendant to make a *motion for summary judgment* after discovery has been concluded. If the District Court judge denies the employer's motion for summary judgment, or if the trial judge grants the motion and the Court of Appeals reverses, there will then be a trial, unless the parties settle.[23] To survive summary judgment, you need some evidence (beyond a "mere scintilla") upon which a reasonable jury *could* find that one of the protected factors mentioned in section 4311 was *a motivating factor* in the employer's decision to take an unfavorable personnel action.

If you survive summary judgment, that does not mean that you have won, but it means that you have reached "second base" or "scoring position." At trial, the employer can still win in one of two ways. The employer can convince the jury (or the judge if the case is tried without a jury) that your military service or obligation was *not a motivating factor* in the employer's decision.[24] Alternatively, the employer can win by establishing the "we would have fired him anyway" affirmative defense.

Section 4311 cases are inherently difficult, and *don't try to do this on your own.* Abraham Lincoln said, "A man who represents himself has a fool for a client." And the law is so much more complicated today than it was during Lincoln's lifetime. You need a lawyer and his or her law firm that have the expertise, diligence, resourcefulness, and resources to go the distance on your behalf. The employer (especially a large employer) will often devote considerable resources to fighting you tooth and nail.

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[21] The Federal Circuit is the specialized federal appellate court that sits here in Washington and has nationwide jurisdiction over certain kinds of cases, including appeals from MSPB decisions.

[22] *Erickson v. United States Postal Service,* 571 F.3d 1364, 1368 (Fed. Cir. 2009). I invite the reader's attention to Law Review 14090 (December 2014), by Mathew Tully and myself, for a detailed discussion of the *Erickson* saga, including three published Federal Circuit decisions.

[23] If you survive summary judgment, the employer will likely make you an offer to make the case go away. Depending upon the amount of the offer and other factors, you might be well advised to accept the offer.

[24] You survived summary judgment by bringing forth sufficient evidence that the jury *could* find in your favor, but that does not necessarily mean that the jury *will* find in your favor. Please see Law Review 15104.