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Interesting USERRA Discrimination Case

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Update on Sam Wright

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***Grosjean v. FirstEnergy,* 481 F. Supp. 2d 878 (N.D. Ohio 2007).**[3]

William J. Grosjean enlisted in the United States Army in 1965, at the height of the Vietnam War. He served on active duty for three years and then the next two years in the Individual Ready Reserve. In 1970, he affiliated with the Army Reserve. He served continuously for the next 35 years, until he retired in July 2005. His rank is not mentioned in the decision, but he must have held a senior rank to be able to serve so long.

At FirstEnergy (a major corporation) Grosjean's title was "Associate Maintenance Planner." His direct supervisor was Rob Warner. In early 2005, Grosjean received his work evaluation for calendar year 2004, prepared and signed by Warner. Warner rated Grosjean as "partially effective" meaning that Grosjean was not eligible for a bonus for 2004. Warner's evaluation of Grosjean included the following paragraph:

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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 Ms. JoAnne Perniciaro of the firm's Client Relations Department at (518) 640-3538. Please mention Captain Wright when you call.

[3] This is a decision by Judge Jack Zouhary of the United States District Court for the Northern District of Ohio. The citation means that you can find this decision in Volume 481 of *Federal Supplement Second Series,* starting on page 878.

> [Grosjean] was also due for a military leave of absence during this time which created another obstacle and helped reinforce the decision to reassign the contract. [Grosjean] had a significant amount of time off during the second half of the year due to vacation and his military leave. I feel this had a negative effect on his performance and his ability to show any improvement.

In March 2005, Grosjean met with Warner to discuss the evaluation. Warner again referred to Grosjean's military service as an obstacle to his receiving a favorable job performance evaluation. Shortly thereafter, FirstEnergy put Grosjean on a "development plan." Grosjean alleged that the company put him on the plan because of his military service and his prior complaints of discrimination. Judge Zouhary held that placing Grosjean on this "development plan" was not a form of discipline and was not an adverse employment action.[4]

In September 2005, Grosjean received his mid-year evaluation and was again rated as "partially effective." This evaluation, unlike the calendar year 2004 evaluation, did not mention Grosjean's military service.[5] The September 2005 evaluation set forth specific examples of Grosjean's performance issues.

In November 2005, Grosjean applied for an open position of "Associate Maintenance Planner/Maintenance Planner." The company did not grant him an interview before selecting another employee for the position. Judge Zouhary held that refusing to grant Grosjean the interview was not an adverse employment action because the position to which Grosjean applied was equivalent to the position he already held.

Also in November, Grosjean met with Warner and with Daniel Rossero, Warner's new supervisor, to discuss Grosjean's work performance. Rossero and Warner told Grosjean that his performance needed to improve and that he could face termination if it did not improve.

Two days after the meeting, Grosjean sent a letter to Rossero, stating that he intended to consult his attorney and that anyone wishing to discuss his past or present performance issues should contact his attorney.[6] Rossero responded immediately, stating the Grosjean's attorney is not now nor will he be involved in the performance improvement process that Grosjean must meet all his performance goals and expectations in order to keep his job.

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[4] I disagree with that conclusion. Putting an employee on a "development plan" or "performance improvement plan" and thereby threatening the employee's continued employment is viewed by employees generally as an unfavorable employment action.

[5] Grosjean's military service apparently ended in July 2005 with his retirement from the Army Reserve. It is unclear if the supervisors were aware of Grosjean's recent retirement or aware that the retirement meant that he would most likely not be taking any more military leave.

[6] I believe that Grosjean made a serious error when he adopted this aggressive, confrontational stance with his employer.

In his year-end evaluation for 2005, Grosjean was rated as “not effective” and he was placed on a new development plan for the first half of 2006. The year-end evaluation detailed specific performance failures. Grosjean’s mid-year 2006 evaluation was no better, and the company fired him in June 2006. Grosjean filed this lawsuit in December 2005 and he amended his complaint to include the termination, after it occurred.

In his lawsuit, Grosjean claimed that the termination and several other employment actions by FirstEnergy 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 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.

(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.[7]

As provided for in the Federal Rules of Civil Procedure (FRCP), the filing of the lawsuit was followed by a lengthy process of discovery, in which the plaintiff had the opportunity to obtain documents, deposition testimony, and other evidence from the defendant and the defendant had the same opportunity to obtain evidence from the plaintiff. After the discovery process was completed, both parties filed motions for summary judgment in accordance with Rule 56 of the FRCP.

Under Rule 56, the judge should grant summary judgment only if he or she can say, after a careful review of the evidence, that there is *no material issue of fact* and that the moving party is entitled to judgment as a matter of law. In order for the judge to grant summary judgment and for the Court of Appeals to uphold the summary judgment on appeal, the judge needs to be able to say that there is *no evidence* (beyond a "mere scintilla") to support the non-moving party's position and that no reasonable jury could find for the non-moving party on that issue.

Judge Zouhary granted Grosjean's motion for partial summary judgment on the issue of the "partially effective" evaluation for calendar year 2004 and Grosjean's resulting ineligibility for a bonus for that year. By specifically referring to Grosjean's absences from work for military service in the 2004 evaluation and later in a meeting with Grosjean, Warner clearly established that Grosjean's military service was *a motivating factor* in the unfavorable evaluation. This means that Grosjean would win his case on this issue unless FirstEnergy could *prove* (not just say) that it would have taken the same action in the absence of Grosjean's protected military leave periods.

Judge Zouhary granted FirstEnergy's motion for summary judgment on the development plans (holding that these were not unfavorable personnel actions) and on the company's failure to give Grosjean an interview on the application he had submitted (on the ground that the position for which Grosjean had applied was the same position he already held). Judge Zouhary refused to grant the company's summary judgment motion on the issue of the termination.

The next step would have been a jury trial, but LEXIS (a computerized legal research service) shows "no subsequent history" on this case. It is most likely that no trial was held because the parties settled. It is likely that FirstEnergy made a payment to Grosjean while denying liability, and the settlement probably included a "confidentiality clause" in which Grosjean promised not to disclose the terms of the settlement. In any case, this case is over.

[7] 38 U.S.C. 4311 (emphasis supplied). Please see Law Review 15106 (December 2015) for a recent and definitive discussion of section 4311.