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Section 4311 of USERRA Protects HR Professionals who Oppose USERRA Violations

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Update on Sam Wright

1.2—USERRA forbids discrimination
1.4—USERRA enforcement

***Vaughn v. Titan International, Inc.,* 72 F. Supp. 3d 809 (N.D. Ohio 2014).**[3]

This is a decision on a lawsuit arising under the Uniformed Services Employment and Reemployment Rights Act (USERRA).[4] There were two plaintiffs, Shirley Vaughn and Kyle Metz.

Beginning in February 2012, Vaughn was the Manager of the Human Relations (HR) Department for Titan Tire Corporation at its facility in Bryan, Ohio. Vaughn served on active duty in the

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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 Jeffrey J. Helmick of the United States District Court for the Northern District of Ohio. The citation means that you can find this case in Volume 72 of *Federal Supplement Third Series* and the decision starts on page 809.

[4] As is explained in Law Review 15067 (August 2015), Congress enacted USERRA (Public Law 103-353) and President Bill Clinton signed it into law on October 13, 1994. USERRA was a long-overdue rewrite of the Veterans' Reemployment Rights Act, which was originally enacted in 1940, as part of the Selective Training and Service Act.

military for two years and for five years as a reservist, but at the time of her employment by Titan she had no military status other than that of honorably separated veteran.

Metz was a Marine Corps Reservist[5] and was employed at the Bryan facility. Like Vaughn, he began his Titan employment in February 2012. He began as an hourly employee and was promoted to Third Shift Supervisor (a salaried position) of the South Side Tire Room.

Titan was in apparent financial difficulty, and that difficulty necessitated a layoff of 50 employees in December 2012. The layoff affected 46 hourly employees and four salaried employees, including Metz. The hourly employees of the plant were represented by a union, and under a collective bargaining agreement (CBA) the hourly employees were laid off in seniority order (junior employees were laid off, senior employees were retained). The salaried employees, including Vaughn and Metz, were outside the bargaining unit represented by the union and were not covered by the CBA. When it was necessary to lay off salaried employees, management selected employees for layoff without regard to seniority.

As HR Manager, Vaughn dealt with a question relating to Metz, concerning the deadline for Metz to return to work at Titan after a short period of military training.[6] Sometime later, Vaughn dealt with the question of how Metz came to be selected for layoff and whether targeting Metz for layoff violated USERRA.[7]

In December 2012, Metz was laid off and Vaughn was terminated. They filed suit together, and both were represented by the same attorney. In their lawsuit, they claimed that the termination of Vaughn and the layoff of Metz violated section 4311 of USERRA, which provides as follows:

> § 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

[5] Rank not mentioned in the decision.

[6] Under section 4312(e)(1)(D) of USERRA, 38 U.S.C. 4312(e)(1)(D), a person returning from a period of uniformed service of more than 180 days must apply for reemployment with the pre-service employer within 90 days after the date of release from the period of service. Under section 4312(e)(1)(C), a person returning from a period of service of 31-180 days must apply for reemployment within 14 days. Under section 4312(e)(1)(A), a person returning from a period of service of less than 31 days (like a drill weekend or a traditional two-week annual training tour) must report for work "not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for safe transportation of the person from the place of that service to the person's residence."

[7] Unlike Vaughn, Metz survived Titan's motion for summary judgment. *See Vaughn v. Titan International Inc.,* 201 L.R.R.M. 3622, 2014 U.S. Dist. LEXIS 168893 (N.D. Ohio Dec. 5, 2014). Metz did not deny that the layoff of four salaried employees and 46 hourly employees was necessary for economic reasons, but he claimed that the employer violated section 4311 of USERRA when it selected Metz (as opposed to some other salaried employee) for the layoff. Judge Helmick held that there was enough evidence in the record to go to trial on Metz's claim.

(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.

(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.[8]

The attorney's theory was that laying off Metz violated section 4311(a)—he was selected for layoff because his periodic periods of Marine Corps Reserve training inconvenienced Titan and his Titan supervisors—and that terminating Vaughn violated section 4311(b)—she was

[8] 38 U.S.C. 4311 (emphasis supplied). Please see Law Review 15106 (November 2015) for a recent and definitive discussion of the history, purpose, and interpretation of section 4311.

terminated because Titan supervisors were annoyed with her because as HR manager she took action to ensure that Titan complied with USERRA in its dealings with Metz and other employees who were Reserve Component members.

As to Metz, the attorney was successful, at least at the summary judgment stage. As to Vaughn, I give the attorney an A for effort—it was a good theory, but after the discovery process was completed there was no evidence to support this theory, Judge Helmick found.

Judge Helmick found that there were two snafus for which Vaughn was properly held accountable, and neither snafu had anything to do with Metz or with USERRA. At considerable trouble and expense, the company brought its outside counsel to the Bryan facility for a series of arbitration hearings involving Titan employees at the facility. Apparently because of insufficient preparation by Vaughn and her staff, the hearings could not be held as scheduled, and a great deal of money and time was wasted.

The other snafu involved an individual who had left Titan employment and who had exercised his rights under the Consolidated Omnibus Budget Reconciliation Act (COBRA).[9] Under that law, Titan had the right to collect the entire health insurance premium plus a two percent service charge from the former employee. Due to inattention to detail in the HR office headed by Vaughn, the company continued paying the entire premium for several months without collecting reimbursement from the former employee. Vaughn blamed this snafu on a specific employee on her HR staff. Judge Helmick found that as the HR manager Vaughn could appropriately be held accountable for the failings of her staff.

Judge Helmick found that the firing of Vaughn was motivated by these two snafus and that annoyance with Vaughn for having advocated for Metz's USERRA rights was not *a motivating factor* in Titan's decision to fire Vaughn. Accordingly, he granted Titan's motion for summary judgment with respect to Vaughn's USERRA claim. Vaughn could have appealed to the United States Court of Appeals for the 6th Circuit.[10] Vaughn has not appealed, and the deadline for doing so has passed. This case is over, at least as to Vaughn.

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[9] As I have explained in Law Review 14033 (March 2014) and other articles, COBRA applies to the situation of an employee of a covered employer who has health insurance coverage through his or her civilian job and who leaves that job for any reason other than gross employee misconduct. In that situation, the former employee is permitted to elect continued health insurance coverage through the former employer until 18 months have passed or until the former employee has found a new job with equivalent coverage, whichever comes first. The employer is permitted to charge the former employee for the *entire premium,* including the part the employer normally pays for active employees, plus an additional two percent service charge.

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