

## LAW REVIEW 16008<sup>1</sup>

February 2016

### ***Bello v. Village of Skokie—Continued***

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Update on Sam Wright

1.1.1.7—USERRA applies to state and local governments

1.2—USERRA forbids discrimination

1.3.2.11—Vacations, holidays, and days off

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

***Bello v. Village of Skokie, 2015 WL 9582986 (N.D. Ill. Dec. 31, 2015).***

As I have explained in Law Review 14046 (April 2014) and Law Review 15098 (November 2015), Baldo Bello is a Staff Sergeant (SSGT) in the United States Marine Corps Reserve (USMCR) and a member of the Reserve Officers Association (ROA).<sup>3</sup> On March 12, 2014 he sued the Village of Skokie, Illinois in the United States District Court for the Northern District of Illinois.<sup>4</sup> The discovery process has been completed.<sup>5</sup> In accordance with Rule 56 of the Federal Rules of Civil

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<sup>1</sup> We invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find more than 1400 "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.

<sup>2</sup> BA 1973 Northwestern University; JD (law degree) 1976 University of Houston; LLM (advanced law degree) 1980 Georgetown University. Captain Wright is retired from the Judge Advocate General's Corps (JAGC) of the United States Navy Reserve and is a life member of ROA. He is the author of more than 1200 of the 1400-plus articles published at [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). He has been dealing with the federal reemployment statute for more than 33 years. 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), a complete rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. Public Law 103-353 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. To arrange a consultation with Captain Wright or another Tully Rinckey PLLC attorney, please call Ms. JoAnne Perniciaro, the firm's Director of Client Services, at (518) 640-3538. Please mention Captain Wright when you call.

<sup>3</sup> In 2013, ROA members amended the ROA Constitution and made noncommissioned officers (NCOs) eligible for full membership in ROA. The President of ROA's Department of Florida is a Chief Master Sergeant (E-9) in the Air Force Reserve.

<sup>4</sup> Skokie is a suburb of Chicago. The principal courthouse of the Northern District is in Chicago,

<sup>5</sup> In a civil lawsuit, each party has the opportunity to obtain documents, deposition testimony, and other evidence from opposing parties, and this process is called discovery. Successfully utilizing the discovery process is critical to victory. To win you need evidence, and the evidence is normally in the hands of your opponent. You need to pry the

Procedure (FRCP)<sup>6</sup> the defendants filed motions for summary judgment. On December 31, 2015, Judge Matthew F. Kennelly denied the motions for summary judgment and issued a detailed and scholarly opinion, and that opinion is the occasion for this update on the interesting and important *Bello* case.

SSGT Bello is a police officer for the Village of Skokie. As readers can appreciate, police officers work irregular hours, because the Village needs police officers on duty 24 hours per day and 365 days per year. Like other Skokie police officers, Bello submits on a monthly basis his proposed schedule for the next month, including his proposed work shifts and his Regular Days Off (RDOs). The police department prepares a schedule for the next month based on the expressed preferences of individual officers, the needs of the department, and seniority of individual officers.

As a member of the USMCR, SSGT Bello is required to perform inactive duty training (IDT or drills) each month and annual training each year in order to maintain his military readiness. Several years ago, he was involuntarily called to active duty (along with his USMCR unit) and deployed to Iraq for seven months. Bello normally has advance notice of the IDT schedule.

Under the Uniformed Services Employment and Reemployment Rights Act (USERRA),<sup>7</sup> Bello has the job-protected right to absent himself from his civilian job in order to perform “service in the uniformed services” as defined by section 4303(13) of USERRA.<sup>8</sup> USERRA’s definition of uniformed service most definitely includes IDT. Bello is required to give his employer prior oral or written notice of work periods that he will miss in order to perform uniformed service<sup>9</sup> unless giving such notice is precluded by military necessity or otherwise impossible or unreasonable.<sup>10</sup> Bello does not need the employer’s permission to miss work for service, and the employer does not get a veto.<sup>11</sup>

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evidence from your opponent’s hands so that you can use it in the trial. Discovery is often contentious and protracted.

<sup>6</sup> Under Rule 56, the judge should grant a motion for summary judgment, and thereby avoid a trial on part or all of the case, only if the judge can say, after a careful review of the evidence, that there is no evidence (beyond a mere scintilla) in support of the non-moving party’s case and that the moving party is entitled to judgment as a matter of law. In granting a motion for summary judgment, the judge is saying that no reasonable jury could find for the non-moving party on that issue.

<sup>7</sup> USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-4335).

<sup>8</sup> 38 U.S.C. 4303(13).

<sup>9</sup> 38 U.S.C. 4312(a)(1).

<sup>10</sup> 38 U.S.C. 4312(b).

<sup>11</sup> 20 C.F.R. 1002.87. The citation refers to title 20, Code of Federal Regulations, section 1002.87. This is one of the sections of the DOL USERRA Regulations. Section 4331 of USERRA, 38 U.S.C. 4331, gives DOL the authority to promulgate regulations about the application of USERRA to state and local governments and private employers.

USERRA does not require the employer to pay an employee for work periods that the employee does not work because of uniformed service. As a Reserve Component (RC)<sup>12</sup> member who is an employee of a political subdivision<sup>13</sup> of the State of Illinois Bello is entitled to a limited period of *paid* military leave under the Illinois Military Leave of Absence Act (ILMLOAA).<sup>14</sup>

Under section 4302 of USERRA<sup>15</sup> the federal law is a floor and not a ceiling on the rights of RC members with respect to their civilian employers. USERRA does not supersede or override a state law that gives RC members *greater or additional rights*. The ILMLOAA gives RC members an additional right—the right to paid military leave. Accordingly, the ILMLOAA is not superseded by USERRA.

Under the police department's original policy, Bello submitted his proposed work schedule each month without regard to his IDT schedule. When he received his work schedule, and when he found that he was scheduled to work at a time that conflicted with his IDT schedule, he brought the issue to the attention of the scheduler. Then, Bello was granted paid military leave under the ILMLOAA, and he was excused from civilian work for that work period. If he exhausted his right to paid military leave under state law, he was granted unpaid military leave under USERRA.

The police department changed its scheduling policy some years ago. Now, Bello is required to include his anticipated IDT days in the proposed schedule that he submits each month. That is he must schedule RDOs for military days, in his proposed schedule. This means that his IDT periods almost always fall on RDOs. It also means that he is deprived of the right to take paid military leave under the ILMLOAA. This is the gist of Bello's complaint.

As I have explained in Law Review 15116 (December 2015) and other articles, an individual must meet five conditions to have the right to reemployment after a period of uniformed service:

- a. Must have left a civilian job (federal, state, local, or private sector) for the purpose of performing uniformed service as defined by USERRA.
- b. Must have given the employer prior oral or written notice, unless giving such notice was precluded by military necessity or otherwise impossible or unreasonable.
- c. Must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which the individual seeks reemployment.<sup>16</sup>

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<sup>12</sup> Our nation has seven Reserve Components: the Marine Corps Reserve, the Navy Reserve, the Coast Guard Reserve, the Army Reserve, the Army National Guard, the Air Force Reserve, and the Air National Guard.

<sup>13</sup> Political subdivisions include villages, cities, counties, school districts, and other units of local government.

<sup>14</sup> The ILMLOAA is codified in title 5 of Illinois Consolidated Statutes, section 325/1 (5 ILCS 325/1).

<sup>15</sup> 38 U.S.C. 4302.

<sup>16</sup> Please see Law Review 201 (August 2005) with regard to the five-year limit. There are nine exemptions—kinds of service that do not count toward exhausting the individual's limit. Bello's IDT periods and annual training periods and his involuntary activation for Iraq service do not count toward exhausting his limit.

- d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.
- e. After release from the period of service, must have been timely in reporting back to work or applying for reemployment.

Congress enumerated the five conditions that the returning service member must meet to have the right to reemployment. Under the doctrine of *expressio unius est exclusio alterius*,<sup>17</sup> the employer is precluded from imposing additional conditions, and the court is precluded from finding additional “implied” conditions. By requiring Bello to schedule his RDOs to include his military days, the Village of Skokie has imposed an additional prerequisite upon Bello’s right to reemployment, and that is unlawful.

Section 4316(d) of USERRA provides:

Any person whose employment with an employer is interrupted by a period of service in the uniformed services shall be *permitted*, upon request of that person, to use during such period of service any vacation, annual leave, or similar leave with pay accrued by the person before the commencement of such service. *No employer may require any such person to use vacation, annual, or similar leave with pay during such period of service.*<sup>18</sup>

By requiring Bello to use his RDOs for his USMCR training, the Village of Skokie violated the second sentence of section 4316(d).

In his lawsuit, Bello asserted that the police department’s scheduling policy violated section 4311(a) of USERRA, which provides:

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.<sup>19</sup>

Section 4303 of USERRA defines 16 terms used in this law, including the term “benefit of employment.” That term’s definition includes “the opportunity to select work hours or location of employment.”<sup>20</sup> By forcing Bello to schedule RDOs for military duty days, Skokie deprived Bello of a benefit of employment, in violation of section 4311.

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<sup>17</sup> This Latin phrase means “to express one is to exclude all the others.” I have discussed this doctrine in detail in Law Reviews 0730 (June 2007), 13067 (May 2013), 13145 (November 2013), 13167 (December 2013), and 15044 (May 2015).

<sup>18</sup> 38 U.S.C. 4316(d) (emphasis supplied).

<sup>19</sup> 38 U.S.C. 4311(a) (emphasis supplied).

<sup>20</sup> 38 U.S.C. 4303(2) (final clause).

After Bello complained that the police department's scheduling policy violated USERRA and the ILMLOAA, the department took adverse personnel actions against him, including suspending him without pay and referring him for a psychological examination. Bello complained that these adverse personnel actions violated section 4311(b) of USERRA, which provides:

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.<sup>21</sup>

Bello also asserted that reprising against him for having complained about violations of USERRA and the ILMLOAA violated the Illinois Whistleblower Act (IWA).<sup>22</sup>

In this lawsuit, Bello is ably represented by Diana Kurtz, Esquire, a Chicago attorney. It is fortunate that Bello chose to retain private counsel, rather than relying on DOL and the United States Department of Justice (DOJ). Competent private counsel like Ms. Kurtz can consider and include many statutes and legal theories, while DOL and DOJ are limited to USERRA.

In addition to suing the Village of Skokie, Bello also named four individuals as defendants.<sup>23</sup> USERRA's definition of "employer" includes "a *person*, institution, organization, or other entity to whom the employer has delegated employment-related responsibilities."<sup>24</sup> The four individual defendants meet this criterion and were properly named as defendants in this lawsuit.

In his December 31 decision, Judge Kennelly rejected the Village of Skokie's motions for summary judgment, and he also rejected the attempt of the individual defendants to get out of the case. This case will likely go to trial in July 2016, unless the parties settle. We will keep the readers informed of developments in this interesting and important case.

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<sup>21</sup> 38 U.S.C. 4311(b).

<sup>22</sup> 740 ILCS 174/5. Because Bello's IWA and ILMLOAA claims were closely related to his USERRA claims, he was permitted to bring these state law claims, along with his federal claims, in federal court, under the supplemental jurisdiction of the federal court, in accordance with 28 U.S.C. 1337(a). Please see Law Review 0909 (February 2009) for a detailed discussion of supplemental jurisdiction.

<sup>23</sup> The individuals are Anthony Scarpelli (Police Chief), Alfredo Lopez (Deputy Police Chief), Michael Krupnik (Bello's direct supervisor in the police department), and Christa Bellowe (Personnel Director of the Village of Skokie).

<sup>24</sup> 38 U.S.C. 4303(4)(A)(i) (emphasis supplied).