**LAW REVIEW 16013**[1]
**March 2016**

# Recent Favorable Federal Circuit USERRA Decision

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Update on Sam Wright

1.1.1.8—USERRA applies to the Federal Government
1.2—USERRA forbids discrimination
1.4—USERRA enforcement

***McMillan v. Department of Justice,* 812 F.3d 1364 (Fed. Cir. February 16, 2016).**

In Law Review 16012, the immediately preceding article in this series, I explained the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the enforcement of USERRA against federal executive agencies as employers. This is a recent favorable decision of the United States Court of Appeals for the Federal Circuit, a specialized federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from the Merit Systems Protection Board (MSPB). In the Federal Circuit and all other federal Article III appellate courts[3] cases are heard initially by a panel of three judges, and in this case those three judges were Pauline Newman,[4] Kathleen M. O'Malley,[5] and Richard G. Taranto.[6] Judge O'Malley wrote the opinion, and the other two judges joined in a unanimous decision.

Peter A. McMillan is a Lieutenant Colonel in the Army Reserve[7] and a member of the Reserve Officers Association (ROA). He is also a GS-13 Special Agent for the Drug Enforcement Agency (DEA), a federal law enforcement agency in the United States Department of Justice (DOJ). As a DEA agent, he was assigned to the DEA post in Lima, Peru in late 2007, for a three-year

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[1] Please see 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) established this column in 1997.

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[3] The term "Article III courts" refers to Article III of the United States Constitution. Article III judges are appointed by the President and confirmed by the Senate and serve for life.

[4] Judge Newman was appointed to the Federal Circuit by President Ronald Reagan in 1984.

[5] Judge O'Malley was appointed to the Federal Circuit by President Barack Obama in 2010.

[6] Judge Taranto was appointed to the Federal Circuit by President Obama in 2013.

[7] He was a Major at the time of the events that gave rise to this case.

assignment that was to end in late 2010. He requested and was granted a one-year extension, and he left Peru for his next DEA assignment in Puerto Rico at the end of 2011.

In 2010, McMillan requested a two-year extension of his DEA assignment in Peru, to extend his tour there to the end of 2013, but his request was denied. McMillan wanted to extend his Peru assignment to give his oldest child the opportunity to remain in the same school through high school graduation and also because a DEA overseas assignment provides for substantial additional financial compensation. McMillan claims that the opportunity to remain in Peru for another two years (all of calendar year 2012 and calendar year 2013) was a "benefit of employment" as defined by section 4303(2) of USERRA.[8] McMillan claims that denying him the benefit of employment (the two-year tour extension) violated section 4311 of USERRA.[9]

In accordance with section 4322 of USERRA,[10] McMillan filed in February 2011 a formal written USERRA complaint against DOJ with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). After a perfunctory investigation, DOL-VETS found McMillan's USERRA complaint to be "without merit"[11] in May 2011. As I explained in Law Review 16012, McMillan could have insisted that DOL-VETS refer the case file to the United States Office of Special Counsel (OSC), and it is possible that OSC would have taken the case, despite the negative determination by DOL-VETS. Instead, McMillan retained attorney Adam Augustine Carter of the DC law firm called "The Employment Law Group." The results amply demonstrate the wisdom of McMillan's choice to proceed with private counsel and with this particular private counsel.[12]

To prevail under section 4311 of USERRA, McMillan was required to prove that his performance of uniformed service or obligation to perform future service was "a motivating factor" (not necessarily the sole reason) for the denial of his tour extension request. If McMillan proves motivating factor by a preponderance of the evidence, the burden of proof shifts to the employer (DOJ) to prove that the tour extension request would have been denied anyway, for lawful reasons unrelated to McMillan's Army Reserve service.[13]

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[8] 38 U.S.C. 4303(2). This definition of "benefit of employment" includes "the opportunity to select work hours *or location of employment.*" (Emphasis supplied.)

[9] 38 U.S.C. 4311. The entire text of section 4311 is quoted in Law Review 16012, the immediately preceding article in this series.

[10] 38 U.S.C. 4322.

[11] As I have explained in Law Reviews 197, 0701, 0758, 1152, 1181, 13126, and other articles, the DOL-VETS "investigation" all too often consists solely of sending a letter to the employer and then accepting at face value the legal and factual assertions of the employer or employer's attorney. All too often, DOL-VETS finds "no merit" in cases that do have merit, and I believe that *McMillan* is such a case.

[12] On December 28, 2015, I participated as a "judge" at a "moot court" that Mr. Carter conducted as part of his preparation for the oral argument of this case, and on January 4, 2016 I observed the Federal Circuit oral argument. I congratulate Mr. Carter for his imaginative, diligent, and effective representation of McMillan.

[13] *See* 38 U.S.C. 4311(c).

The MSPB ruled against McMillan, holding that he had not established by a preponderance of the evidence that his Army Reserve service was a motivating factor in the denial of his tour extension request.[14] McMillan appealed to the Federal Circuit, which reversed the MSPB and held that McMillan had established that his service was a motivating factor in the denial of the extension request and that DOJ had not established that it would have denied the extension request in any case.[15] The Federal Circuit remanded the case to the MSPB, not to reconsider the merits, but solely to fashion an appropriate remedy.[16]

In July 2010, McMillan worked for DOJ at the DEA office in Lima, Peru. In the Army Reserve, he was an Individual Mobilization Augmentee (IMA) for United States Southern Command (SOUTHCOM). He was scheduled to perform and did perform military duty at SOUTHCOM headquarters (Miami, Florida) from July 17 through July 26, 2010. His military supervisors were aware of his civilian employment as a DEA agent in Peru. McMillan's military superiors tasked him to prepare "a two or three page intelligence assessment on the historical impact of DEA's expulsion from Bolivia." The superiors directed McMillan to use his "DEA expertise" to "look at a couple of other products" during his upcoming military tour at SOUTHCOM headquarters.

In preparation for his upcoming military duty at SOUTHCOM, McMillan contacted Michael Walsh, a DEA colleague at the Lima post. Walsh had worked for DEA for 23 years and had previously been assigned to the DEA post in Bolivia at the time DEA was expelled from that country. Walsh was an intelligence specialist for DEA and had access to and knowledge of DEA information and documents, beyond what McMillan knew. Walsh and McMillan were not in the same direct chain of command. Walsh did not report to McMillan, and McMillan did not report to Walsh, but they shared the same third-level supervisor, Patrick Stenkamp, the DEA Regional Director and head of the Lima DEA post.

During their conversation, Walsh made McMillan aware of the existence of a DEA "Foreign Situation Report" (FSR) on Bolivia and suggested that the FSR might be useful to McMillan in preparing his report for SOUTHCOM. Walsh indicated that Stenkamp's approval would be required for release of the FSR outside DEA, to SOUTHCOM. Walsh and McMillan walked down the hall to Stenkamp's office and discussed the matter with him. Stenkamp gave McMillan permission to use and cite the FSR in his SOUTHCOM report.

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[14] *McMillan v. Department of Justice,* 121 M.S.P.R. 703, 2014 MSPB LEXIS 7286 (2014).

[15] As I have explained in Law Reviews 189, 0722, 0726, 0752, 0901, 0921, 0971, 1103, and other articles, the Federal Circuit has a long and distinguished history of reversing the MSPB when that agency fails to give proper deference to the rights of veterans and Reserve Component personnel.

[16] Because of the passage of time, it is not feasible now to grant McMillan's tour extension request retroactively. If McMillan had remained in Peru for all of calendar years 2012 and 2013, he would have received an additional $200,000 (approximately) in DEA compensation. On remand, he will likely receive that sum plus interest and attorney fees.

A few days later, McMillan traveled to Miami for his military duty at SOUTHCOM headquarters. McMillan prepared the report, using and citing the DEA FSR. On July 19, 2010, McMillan shared the draft report with Walsh, by e-mail, and requested that Walsh pass it along to Stenkamp, which Walsh did. Stenkamp then changed his mind and ordered McMillan to remove the reference to the FSR from his report and ordered him not to refer to his DEA employment during a video teleconference to be held at the SOUTHCOM headquarters during McMillan's active duty period. McMillan reluctantly complied with Stenkamp's directive, after sending Stenkamp a rebuttal by e-mail from Miami.[17]

When McMillan returned from his military duty, he was given a written memorandum dealing with the relationship between his DEA duties and his Army Reserve duties, and he complied with the memorandum's directives. The memorandum by its terms was prospective—it applied "from the date of receipt of this memorandum." Nonetheless, he was criticized for having violated the memorandum before it was issued, when no such rules had been communicated to him.

McMillan applied for a tour extension two months after his July 2010 military duty period, and his request was denied. Shifting reasons were cited for the denial of his request, but one of the reasons cited was the "tone" of his e-mail communication to Stenkamp, the regional director. Also cited was his alleged failure to meet expectations concerning the number of drug arrests made, although it seems unlikely that a DEA agent in a foreign country like Peru would ever have the opportunity to arrest anyone—the host country is unlikely to permit U.S. law enforcement officers to make arrests in the foreign country.

In her scholarly opinion, Judge O'Malley quoted from an earlier Federal Circuit USERRA decision, as follows:

> Discriminatory motivation under the USERRA may be reasonably inferred from a variety of factors, including (1) proximity in time between the employee's military activity and the adverse employment action, (2) inconsistencies between the proffered reasons and other actions of the employer, (3) an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and (4) disparate treatment of certain employee compared to other employees with similar work records or offenses.[18]

Judge O'Malley went on to write:

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[17] DOJ claimed and the MSPB agreed that the tone of McMillan's e-mail to Stenkamp was disrespectful and that this disrespectful tone justified the denial of McMillan's tour extension request. The Federal Circuit specifically reversed the MSPB on this issue.

[18] *Sheehan v. Department of the Navy,* 240 F.3d 1008, 1014 (Fed. Cir. 2001).

> The Board [MSPB] never formally shifted the burden to the government because it concluded that McMillan failed to meet his initial burden of showing by a preponderance of the evidence that his military service and obligations were relied upon, taken into account, or considered in the adverse employment action [denial of McMillan's tour extension request]. Whether a petitioner's military service was a motivating factor in the employment decision is a flexible inquiry. We conclude that the evidence permits only one reasonable finding. The evidence establishes the presence of all four of the *Sheehan* factors, which together demonstrates that McMillan satisfied his burden.

*McMillan* is slightly different from the typical USERRA discrimination case. In the typical case, the employer's objection to the employee's military service is based upon the employer's inconvenience because the employee's military service necessitates absence from work. In this case, Stenkamp and other decision makers objected to the specific activities that McMillan was tasked to perform while on military duty—studying and commenting upon the expulsion of DEA from Bolivia. The fact that the objection was atypical does not make it any less unlawful.

This decision is helpful in demonstrating how a federal employee who is a Reserve Component member can establish that he or she has been denied a benefit of employment based on military service or obligations.[19]

[19] Please see Law Review 16014, the next article in this series. That article is about *Horneman v. Department of Veterans Affairs,* a March 4, 2016 favorable USERRA decision by MSPB Administrative Judge Evan J. Roth in Denver. In his scholarly opinion, he cites and relies upon *McMillan.*