

LAW REVIEW 16014¹

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Another Recent Federal Sector USERRA Victory

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

Update on Sam Wright

1.1.1.8—USERRA applies to Federal Government

1.2—USERRA forbids discrimination

1.4—USERRA enforcement

1.6—USERRA and statute of limitations

Horneman v. Department of Veterans Affairs, No. DE-4324-15-0102-I-1 (Merit Systems Protection Board March 4, 2016).

Douglas Horneman is a Lieutenant Commander in the Navy Reserve. He is not a member of the Reserve Officers Association (ROA), but we are working on recruiting him. Since 1995, except for a short break when his father was seriously ill, Horneman has worked for the United States Department of Veterans Affairs (VA) as a medical lab technician at the Carl T. Hayden VA Medical Center in Phoenix, Arizona. In 2007, Horneman applied for an advertised vacancy for “Supervisor Medical Technologist” at the Hayden Medical Center, a position that would have amounted to a significant promotion for Horneman.

Horneman was interviewed and considered for the supervisor position but was not selected. In this case, Horneman alleges that the non-selection was a violation of section 4311 of the

¹ I invite the reader’s attention to www.servicemembers-lawcenter.org. You will find more than 1400 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find 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. I am the author of more than 1200 of the articles.

² BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I am retired from the Navy Reserve Judge Advocate General’s Corps. I have dealt with the federal reemployment statute as a judge advocate, as an attorney for the United States Department of Labor (DOL), 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 six years (2009-15), I was the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA. After ROA disestablished the SMLC last year, I returned to Tully Rinckey, this time in an “of counsel” role. To arrange a consultation with me, or with Michael W. Macomber (the attorney who represented Douglas Horneman in the case discussed in this article), or another Tully Rinckey attorney, please call Ms. JoAnne Perniciaro (the firm’s Client Relations Director) at (518) 640-3538. Please mention this article when you call.

Uniformed Services Employment and Reemployment Rights Act (USERRA).³ The lawfulness of the 2007 non-selection of Horneman is the only issue in this case.⁴

As I have explained in Law Review 16012 and other articles, USERRA cases involving federal executive agencies, as employers, are brought in the Merit Systems Protection Board (MSPB), under section 4324 of USERRA.⁵ Evan J. Roth is an Administrative Judge (AJ) of the MSPB, at its regional office in Denver, Colorado. Judge Roth presided over the process of discovery and over two hearings in this case in late 2015, and he wrote a scholarly decision on March 4, 2016, finding that the VA violated USERRA when it selected another candidate, rather than Horneman, for the 2007 promotion opportunity.

Horneman performed Navy Reserve active duty at the Naval Hospital at Camp Pendleton, California for slightly more than four months, from March 5 to July 9, 2007.⁶ The advertised vacancy for Supervisor Medical Technologist occurred shortly after Horneman returned to work from this military service period.⁷

In the weeks following Horneman's return to work in July 2007, he had several conversations with Ms. Jeannine Ozias, his immediate supervisor at the VA. Ms. Ozias expressed hostility toward Horneman's military service and obligations, saying "I need someone here who I can depend upon" and that she could not depend upon Horneman because of his military obligations. Ozias' expressed hostility is particularly relevant because she served on the panel of five VA supervisors that interviewed Horneman in connection with the promotion opportunity on August 29, 2007.⁸

³ 38 U.S.C. 4311. The citation is to section 4311 of title 38 of the United States Code. USERRA is codified in title 38 at sections 4301 through 4335. The entire text of section 4311 is quoted in Law Review 16012, and that article also discusses in detail the USERRA enforcement mechanism with respect to federal agencies as employers.

⁴ Horneman did not initiate this enforcement action until 2015. USERRA has no statute of limitations and specifically precludes the application of any other statutes of limitations. See 38 U.S.C. 4327(b) and 5 C.F.R. 1201.22(b)(2). The latter citation refers to title 5 of the Code of Federal Regulations, at section 1201.22(b)(2). You can bring a USERRA case years after the alleged violation, but I do not recommend that you sleep on your rights. The longer you wait, the more difficult it may be to prove your case, because memories dim, potential witnesses die or otherwise become unavailable, and records may be lost or destroyed.

⁵ 38 U.S.C. 4324. Cases involving state and local governments and private employers are brought in federal district court under section 4323, 38 U.S.C. 4323.

⁶ Horneman is apparently a Medical Service Corps (MSC) officer in the Navy Reserve. During his 2007 active duty period, he was responsible for quality assurance at the laboratory of the Naval Hospital. In Horneman's case, there is a direct correlation between his Reserve Component role (both as to medical laboratory science and as to leadership skills and experience) and his role as a civilian employee of the VA.

⁷ As is explained in *Sheehan v. Department of the Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001), proximity in time between the performance of military service and the adverse personnel action is one of four identified factors that the MSPB should consider in determining whether a petitioner's military service was a motivating factor in the adverse personnel action that is the subject of the complaint.

⁸ Attorney Michael W. Macomber, representing Horneman, was able to obtain this evidence through his excellent cross examination of Ozias at the MSPB hearing.

Anthony Millett was another VA supervisor who served on the panel that interviewed Horneman in connection with the promotion opportunity. Millett specifically considered Horneman's military obligations in terms of whether Horneman was "fully committed" to the VA position.⁹

In his scholarly decision, Judge Roth found that the VA violated section 4311 in 2007, and Judge Roth cited and relied upon a very recent Federal Circuit decision.¹⁰ Judge Roth ordered the VA to promote Horneman now and to compensate him for the pay he has lost because he was denied this promotion in 2007.¹¹

I congratulate Michael W. Macomber, Esq. (my Tully Rinckey colleague) for his imaginative, diligent, and effective representation of Lieutenant Commander Horneman.

⁹ This Millett consideration was established through Millett's interview notes (entered into evidence) and the testimony of Millett under cross examination by Macomber.

¹⁰ *McMillan v. Department of Justice*, 2016 U.S. App. LEXIS 2605 (Fed. Cir. February 16, 2016). I discuss *McMillan* in detail in Law Review 16013, the immediately preceding article in this series.

¹¹ It will be necessary to compute the difference (on a pay period by pay period basis) between what Horneman would have received had he been promoted and what he has received from the VA in the lower position that he has continuously held. The back pay will be substantial because a period of almost nine years is involved. Horneman is also entitled to interest on the back pay and to attorney fees. Please see Law Review 206 for a discussion of the computation of damages under USERRA.