LAW REVIEW 16018[1]
March 2016

Favorable Appellate Decision on Section 4311 of USERRA

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Update on Sam Wright

1.1.3.1—USERRA applies to voluntary service
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***Leisek v. Brightwood Corp.,* 278 F.3d 895 (9th Cir. 2002).**[3]

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[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) and other 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. 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 served in the Navy and Navy Reserve as a judge advocate and retired in 2007. I am a life member of ROA, and for six years (2009-15) I served as the Director of ROA's Service Members Law Center (SMLC). I have been dealing with USERRA (enacted in 1994) and the predecessor reemployment statute (enacted in 1940) for more than 33 years, as a judge advocate in the Navy and Navy Reserve, as an attorney for the United States Department of Labor (DOL), as an attorney for the Department of Defense organization called "Employer Support of the Guard and Reserve" (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as the SMLC Director, and as an attorney in private practice, at Tully Rinckey PLLC. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed rewrite of the 1940 reemployment statute that President George H.W. Bush presented to Congress (as his proposal) in February 1991. The version of USERRA that President Bill Clinton signed on 10/13/1994 (Public Law 103-353) was 85% the same as the Webman-Wright draft. After ROA disestablished the SMLC last year, I returned to Tully Rinckey PLLC, this time in an "of counsel" role. To arrange a consultation with me or another Tully Rinckey PLLC attorney, please call Ms. JoAnne Perniciaro (the firm's Client Relations Director) at (518) 640-3538. Please mention my name and this article when you call.

[3] This is a 2002 decision of the United States Court of Appeals for the Ninth Circuit, the federal appellate court that sits in San Francisco and hears appeals from district courts in Alaska, California, Guam, Idaho, Montana, Nevada, Northern Marianas Islands, Oregon, and Washington. In our federal appellate courts, the initial decision is ordinarily by a panel of three judges. In this case, the three judges were Susan P. Graber, A. Wallace Tashima, and David R. Thompson, all active judges of the Ninth Circuit at the time. Judge Graber was appointed by President Bill Clinton in 1998 and is still actively serving on the Ninth Circuit. Judge Tashima was appointed by President Clinton in 1994 and took senior status in 2004. He served in the United States Marine Corps from 1953-56. Judge Thompson was appointed by President Ronald Reagan in 1985 and passed away in 2011. He served in the United States Navy from 1955-57. Judge Tashima wrote the decision, and the other two judges joined in a unanimous decision. The citation means that you can find this case decision in Volume 278 of *Federal Reporter Third Series,* starting on page 895.

John C. Leisek was hired by Brightwood Corporation in December 1991 and fired in July 1996. At the time he was fired, his title was "quality assurance inspector." Leisek was a member of the Oregon National Guard[4] during the entire time he was employed by Brightwood, as well as before he was hired and after he was fired. Leisek owned and operated a hot-air balloon with National Guard insignia. For some years, Leisek frequently attended and participated in ballooning events, and he had National Guard orders for some but not all of the events.[5] Leisek's frequent absences from work for these ballooning events apparently caused a significant burden on his civilian employer, Brightwood Corporation.

From July 1953 (the end of the Korean War) until August 1990 (when President George H.W. Bush called up National Guard and Reserve service members to respond to Saddam Hussein's invasion and occupation of Kuwait), Reserve Component[6] (RC) service was generally limited to "one weekend per month [inactive duty training or drills] and two weeks in the summer [annual training]", but the protection of the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the predecessor reemployment statute[7] *has never been limited to this minimal service.*

During the 1953-90 period, the RC was considered to be a "strategic reserve" available only for World War III, which thankfully never happened. After Saddam Hussein's forces invaded and occupied Kuwait and threatened Saudi Arabia, President George H.W. Bush drew "a line in the sand" and announced that he would deploy American military personnel to protect Saudi Arabia and liberate Kuwait.

As part of his forceful response to Saddam Hussein's naked aggression, President Bush (41) called up RC units, in the first significant RC call-up since the Korean War.[8] President Bush's decision marked the start of the change-over from the strategic reserve (available only for World War III) to the operational reserve (routinely called up for intermediate military operations like Operation Desert Storm in 1990-91, Operation Iraqi Freedom in 2003-11, and Operation Enduring Freedom in 2001 to the present and continuing). The transition from the strategic reserve to the

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[4] The opinion does not mention his military rank, nor does it make clear whether he was in the Army National Guard (ARNG) or the Air National Guard (ANG).

[5] The apparent purpose of this activity was to promote National Guard recruiting.

[6] Our nation has seven Reserve Components: the ARNG, the Army Reserve, the ANG, the Air Force Reserve, the Navy Reserve, the Marine Corps Reserve, and the Coast Guard Reserve.

[7] As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA (Public Law 103-353) and President Bill Clinton signed it into law on 10/13/1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-4335).

[8] Only a handful of RC units were called up for the Vietnam War.

operational reserve continued after the terrorist attacks of September 11, 2001, the "date which will live in infamy" for our time.[9]

As I have explained in Law Reviews 15075 (September 2015) and 15093 (October 2015) and other articles, USERRA applies to voluntary as well as involuntary service or training, and *there is no "rule of reason" limiting the frequency, duration, or nature of RC service or the burden that can be put on any one civilian employer.* As long as an RC member like Leisek has military orders for the activity in question, he or she has the unfettered right to time off from his or her civilian job (unpaid but job protected) for the military activity. It is not up to the civilian employer or even the federal court to characterize the frequency or duration of the individual's military-related absences from work as "excessively burdensome" on the civilian employer.

This is not to say that I am unsympathetic to the situation of an employer like Brightwood Corporation, especially when the military activity in question (participating in ballooning events to promote National Guard recruiting) is seemingly frivolous. I think that the Adjutant General of Oregon[10] should have done a better job of reining in Leisek's enthusiasm. The Adjutant General should have told Leisek: "Thank you for volunteering, but we will not be giving you any more military orders for this ballooning activity." If the National Guard really needed this activity to promote recruiting, it should have found other Guard members to do the activity, so as not to put an inordinate burden on a single civilian employer.

In the spring of 1996, Leisek provided a list of ballooning events that he planned to attend and participate in, including the dates and locations. Leisek had National Guard orders for some but not all of these events. As he had done in past years, Leisek asked the employer for the whole summer off from his civilian job to participate in these ballooning events, but the employer denied that request. USERRA did not give Leisek the right to take the whole summer off because he was not performing military duty the whole summer. Each event lasted a few days (fewer than 31).

For example, Leisek planned to attend a ballooning event in Boise, Idaho from June 23 to 30. He had National Guard orders for that event and he did participate. The next event was in Montrose, Colorado, from July 3 to 7. Leisek participated in that event, despite the fact that he had no National Guard orders for that event and despite the employer's explicit message that Leisek did not have permission to be absent from his civilian job on those days. The next event was in Monroe, Wisconsin from July 8 to the 14. Leisek had orders for that event and did participate in it. There were several more ballooning events in July, August, and September, and Leisek participated in all of them.

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[9] In the almost 15 years since the September 11 attacks, 921,676 RC members have been called to the colors, including almost 400,000 who have been called up more than once. Office of the Secretary of Defense Report dated March 1, 2016.

[10] In each state, an official called the "Adjutant General" heads up the ARNG and ANG of that state.

Leisek had National Guard orders for the ballooning event in Boise, Idaho that was held June 23-30, 1996, and under USERRA he had the job-protected right to be absent from his civilian job on those dates. In 1996, June 30 was a Sunday. Leisek did not have National Guard orders for the event in Colorado July 3-7, and he was not in any military status between June 30 and July 8-14, when he had orders for the ballooning event in Monroe, Wisconsin. The District Court held and the Court of Appeals affirmed that Leisek did not have a job-protected right to be absent from his civilian job for the July 3-7 period. The District Court correctly granted Brightwood summary judgment on Leisek's reemployment claim.

After a period of service of fewer than 31 days, the RC member is required to report for work at the civilian job "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."[11] Thus, Leisek was required to report back to work at the Brightwood facility in Oregon on Monday or Tuesday, depending upon the time on Sunday when the military duty ended and the time reasonably required for safe transportation from the Idaho event to Leisek's Oregon residence.

Brightwood's personnel manager made it clear to Leisek that he did not have permission to attend the ballooning event in Colorado and that if he failed to report back to work in a timely manner after the June 30 end of the Idaho event he would be considered to have "abandoned his job." Leisek responded that he would "pursue other options." There was no further contact between Leisek and Brightwood until September 25, 1996, when Leisek applied for reemployment after the last scheduled ballooning event in 1996.

Brightwood refused to reemploy Leisek, citing the fact that he had not reported back to work in a timely manner after the end of the June 30 ballooning event and that he had no National Guard orders for the July 3-7 Colorado event. Brightwood's personnel director told Leisek that he could apply for a new job at the company, and that if he submitted an application the company would consider it. Leisek refused to submit a new job application and brought this lawsuit.

In his lawsuit, Leisek alleged that Brightwood violated section 4312 of USERRA (right to reemployment) and section 4311 (right to be free from discrimination). You can find the complete text of section 4311 in Law Review 16012, among many other articles.

After a lengthy and contentious discovery period, the defendant (Brightwood) filed a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. A federal judge should grant a motion for summary judgment only if he or she can say, after a careful review of the

[11] 38 U.S.C. 4312(e)(1)(A)(i).

evidence, that there is *no material issue of fact* remaining 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 there is no evidence (beyond a "mere scintilla") in support of the non-moving party's claim and that no reasonable jury could find for the non-moving party. The judge should make this determination separately with respect to each count of the non-moving party's claim or defense. The non-moving party is usually but not always the plaintiff.

The District Court granted the defendant's motion for summary judgment on both counts of the plaintiff's complaint.[12] Leisek filed a timely appeal with the 9th Circuit. After written briefs and oral argument, the 9th Circuit panel affirmed the grant of summary judgment on the reemployment claim (section 4312) but overturned the grant of summary judgment on the discrimination claim (section 4311).

As I have explained in Law Review 15116 (December 2015) and other articles, an individual must meet five simple conditions in order to have the right to reemployment under USERRA:

a. Must have left a civilian job (federal, state, local, or private sector) for the purpose of performing service in the uniformed services, *as defined by USERRA.*
b. Must have given the employer prior oral or written notice.
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 person seeks reemployment.
d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.
e. Must have been *timely in reporting back to work* or applying for reemployment, after release from the period of service.

It is necessary to meet all five of these conditions in order to have the right to reemployment after a period of uniformed service. It is clear that Leisek did not report back to work within the time permitted after he was released from the Idaho service period on June 30, 1996. Moreover, Leisek did not perform service in the uniformed services *as defined by USERRA* during the Colorado ballooning event.[13]

The 9th Circuit panel held that the District Judge was correct in granting the defendant's motion for summary judgment on the reemployment claim *but not on the discrimination claim.* Under section 4311, Leisek is not required to prove that his protected National Guard service was *the reason for the firing. It is sufficient for Leisek to prove that his protected National Guard service was "a motivating factor" in the employer's decision to terminate his employment.* From the record, it seems clear that Brightwood was greatly annoyed with Leisek about his repeated

[12] *Leisek v. Brightwood Corp.,* 2000 U.S. Dist. LEXIS 11707 (D. Or. June 28, 2000).

[13] No orders means that this was not "under competent authority" which means that this activity did not constitute service in the uniformed services.

absences from work for these National Guard ballooning activities. Brightwood was annoyed with Leisek about the *protected periods* (like the Idaho period) as well as the unprotected periods (like the Colorado period).

It seems clear that there was sufficient evidence from which a reasonable jury could conclude that Leisek's *protected* periods of uniformed service amounted to a motivating factor in Brightwood's decision to fire him. Under section 4311(c), Brightwood can avoid liability by proving that it *would have* (not just could have) fired him for lawful reasons. The 9th Circuit panel held that Brightwood had not "established as an uncontroverted fact" that it would have fired Leisek in any case.[14]

Judge Tashima's scholarly opinion includes the following instructive paragraphs:

> Even though Leisek's unexcused absences would be a legitimate basis for Brightwood's decision to terminate his employment for the resulting absences from work on July 1 through 3, we nonetheless must examine whether the record supports the inference that Brightwood was also motivated by some other factor, namely, Leisek's Guard status, in terminating his employment. As noted, USERRA requires only that military status be a "motivating factor" in Brightwood's adverse employment action.
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> We agree with Leisek's contention that the district court erred by concluding that he [Leisek] failed to present evidence from which a reasonable fact finder could infer that Leisek's Guard status was a "motivating factor" in Brightwood's decision to terminate him.
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> … The record includes testimony supporting an inference that Leisek's Guard-duty absences since his promotion to the position of quality assurance inspector had created an increased burden for Brightwood and that it had proposed a plan that would restrict Leisek's future Guard-related absences to a period of three weeks and would deduct those absences from his vacation time. In addition, Duncan [Brightwood's personnel director] had informed Leisek that Brightwood had decided not to honor any future Guard orders, except for those that it already had in hand, and had instructed him to discontinue his solicitation of ballooning events. This evidence is sufficient to support an inference that Leisek's military status or conduct was a substantial or motivating factor in Brightwood's decision to terminate his employment.
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> … As we have noted, the record contains evidence that Brightwood's corporate policy made unexcused absences a reason for termination of employment. However, even though Leisek's unexcused absences would be a legitimate reason for terminating his employment, Brightwood has not established as an uncontroverted fact that it *would have* terminated Leisek even if he had not been active in the Guard's [ballooning] program. …

[14] *Leisek,* 278 F.3d at 900.

> There are thus genuine material issues of fact both as to whether Leisek's Guard status and duty was a "motivating factor" in Brightwood's decision to terminate Leisek's employment and, if so, whether Brightwood would have made the same decision to terminate Leisek without regard to his protected status.[15]

The 9th Circuit remanded this case back to the District of Oregon for a trial on the section 4311 claim. LEXIS (an on-line legal research service) shows "no subsequent history" in this case. The most likely explanation is that the parties settled. It is likely that Brightwood made a cash payment to Leisek in exchange for the dismissal of the case, and Leisek likely agreed to keep the amount confidential. This case is over.

[15] *Leisek,* 278 F.3d at 900-01 (emphasis supplied).