

LAW REVIEW 16031¹

April 2016

Sergeant Kelly Hance's USERRA Saga Continues

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Update on Sam Wright

1.1.3.3—USERRA applies to National Guard service

1.2—USERRA prohibits discrimination

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

Hance v. Norfolk Southern Railway Co., 2006 U.S. Dist. LEXIS 32276, 179 LRRM 2935 (E.D. Tenn. May 17, 2006).

Hance v. Norfolk Southern Railway Co., 571 F.3d 511 (6th Cir. 2009).

Hance v. BNSF Railway Co., 2014 WL 6676773 (W.D. Tenn. October 29, 2014).

Hance v. BNSF Railway Co., No. 15-5858 (6th Cir. April 8, 2016).

Two lawsuits, four court decisions, in 15 years

As I have explained in Law Review 0753 (December 2007) and Law Review 14093 (December 2014), Kelly W. Hance is a noncommissioned officer (NCO) in the Tennessee Army National Guard (TNARNG) and has served continuously for almost 20 years, since he enlisted in

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.

²² 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 General's Corps officer and retired in 2007. I am a life member of ROA. For six years (2009-15), I served as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA. Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. I have been dealing with USERRA and the predecessor reemployment statute for more than 33 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. 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. On 10/13/1994, President Bill Clinton signed Public Law 103-353 (USERRA), and that version was 85% the same as the Webman-Wright draft. I have also dealt with the reemployment statute as a judge advocate (lawyer) in the Navy and Navy Reserve, 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), and as an attorney in private practice, at Tully Rinckey PLLC (TR). After ROA disestablished the SMLC last year, I returned to TR, this time in an "of counsel" role. To arrange for a consultation with me or another TR attorney, please call Ms. JoAnne Perniciaro (TR's Client Relations Director) at (518) 640-3538. Please mention Captain Wright when you call.

December 1996. In May 1999, he was hired by Norfolk Southern Railway Company (NSRC) as a conductor-trainee. While employed by the railroad, he was harassed by his NSRC supervisors about his TNARNG training and service and the absences from his civilian job necessitated by that training and service. He worked for NSRC for only 19 months, until he was suspended without pay in January 2001, for alleged insubordination.

Hance's lawsuit against NSRC

NSRC fired him in August 2001. Shortly thereafter, he sued NSRC in the United States District Court for the Eastern District of Tennessee, asserting that the firing violated section 4311 of the Uniformed Services Employment and Reemployment Rights Act (USERRA).³ He survived NSRC's Motion for Summary Judgment (MSJ)⁴ and the case proceeded to a bench trial (without a jury).

At the end of the trial, the judge ruled in favor of Hance, finding that the firing was motivated at least in part by Hance's performance of uniformed service (necessitating periods of absence from his NSRC job) and his obligation to perform future service. The judge ordered the railroad to reinstate Hance to his job, and the judge further ordered NSRC to pay Hance \$352,846 in back pay, lost benefits, and interest (plus attorney fees to be awarded later at the conclusion of the case).⁵

NSRC appealed to the United States Court of Appeals for the 6th Circuit, the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee. The 6th Circuit largely affirmed the district court decision for Hance but reversed on two minor points related to the computation of damages. The appeals court remanded the case to the Eastern District of Tennessee to recompute the damages.

On remand, Hance and the railroad settled. Hance received a settlement in the amount of \$593,502, including attorney fees. The settlement apparently did not provide for reinstatement of Hance by NSRC, and he did not return to work for the railroad, but he did receive ten years of credit for NSRC employment, under the Railroad Retirement Act. Hance's lawsuit against NSRC ended in 2009.

³ 38 U.S.C. 4311. The citation is to section 4311 of title 38 of the United States Code. USERRA is codified at 38 U.S.C. 4301-4335.

⁴ Under Rule 56 of the Federal Rules of Civil Procedure (FRCP), a party (usually but not always the defendant) can make a motion for summary judgment (MSJ) after the completion of the discovery process but before the trial. The judge should grant the MSJ only if he or she concludes (after a careful review of the evidence) that there is no evidence (beyond a "mere scintilla") to support the non-moving party's case and that the moving party is entitled to judgment as a matter of law. In granting the MSJ, the judge is effectively holding that no reasonable jury could find for the non-moving party.

⁵ Section 4323(h)(2), 38 U.S.C. 4323(h)(2), provides for a court to award attorney fees, expert witness fees, and litigation expenses to a USERRA plaintiff who proceeds through private counsel and prevails.

Hance's lawsuit against BNSF

In January 2013, Hance applied to the Burlington Northern Santa Fe Railway Company (BNSF) for a conductor trainee position. After extensive interviews, he was not offered employment. He sued BNSF in the United States District Court for the Western District of Tennessee, asserting that the company's refusal to offer him initial employment violated section 4311(a) and 4311(b) of USERRA.⁶

Section 4311(a) makes it unlawful for an employer to deny a person initial employment (as well as retention in employment, promotion, or a benefit of employment) on the basis of the person's membership in a uniformed service, application to join a uniformed service, performance of service, or application or obligation to perform service. Section 4311(b) makes it unlawful for an employer to deny one of these things because of the person's action to enforce a USERRA protection for any person, testimony or making a statement in a USERRA proceeding, assistance or other participation in a USERRA investigation, or exercise or assertion of a USERRA right. Section 4311(c)⁷ provides that if the USERRA plaintiff proves that one of these protected factors was *a motivating factor* (not necessarily the only reason) for the employer's unfavorable employment decision, the plaintiff wins, unless the employer can *prove* (not just say) that it would have made the same unfavorable decision in the absence of the protected factor, for lawful reasons unrelated to plaintiff's military service or obligations.

After completion of the discovery process, BNSF made a MSJ. The district judge granted the MSJ on the section 4311(a) claim but not the 4311(b) claim. After a two-day bench trial, the judge ruled for the defendant, BNSF. Hance appealed, and the 6th Circuit affirmed the district court.

When Hance applied for BNSF employment in 2013, he completed BNSF forms. He claimed to have ten years of railroad experience, at NSRC from 1999 to 2009, and he claimed that he "resigned with notice" from NSRC in 2009. He claimed to have held a leadership position at NSRC, and he claimed that he "had over ten years of experience in implementing solid strategies."

During the BNSF interview, he was asked if he had ever been disciplined by an employer. He initially answered "no." After he was confronted, he acknowledged that NSRC had fired him in 2001 and that he had sued and prevailed. He provided the interviewer a copy of the 6th Circuit decision—he had brought the copy with him to the interview.

⁶ 38 U.S.C. 4311(a) and (b). Since 1968, it has been unlawful to fire a National Guard member or Reservist, or to deny the person a benefit or promotion, because of his or her obligations as a member of a Reserve Component of the armed forces. In 1986, Congress expanded this provision to outlaw discrimination in initial hiring.

⁷ 38 U.S.C. 4311(c).

Hance's 4311(b) claim was based on the theory that BNSF denied him initial employment because he had asserted USERRA rights by suing NSRC and winning.⁸ I have no doubt that an employer would be reluctant to offer initial employment to a person who had already sued another employer in the same industry and had received monetary relief in six figures. But in this case the district court found that BNSF denied Hance's application for initial employment because of Hance's misrepresentations and lack of candor in the application and interview process. The 6th Circuit affirmed.

As a next step, Hance can ask the 6th Circuit for rehearing *en banc*. If that request is granted, there will be new briefs and a new round of oral arguments, in front of all the active 6th Circuit judges. If Hance does not ask for rehearing *en banc*, or if the 6th Circuit denies the request, or if the 6th Circuit grants the request for rehearing and then affirms the decision of the three-judge panel, Hance's final step is to apply to the United States Supreme Court for a writ of *certiorari* (discretionary review).

Certiorari is granted if four or more of the nine (currently eight) Justices vote for it. *Certiorari* is denied about 99% of the time, and the denial of *certiorari* means the case is over and the appeals court decision is final.

I think that it is most unlikely that the 6th Circuit would grant a motion for rehearing *en banc* and even less likely that the Supreme Court would grant *certiorari*. I will keep the readers informed of further developments in this case, in the unlikely event that there are any further developments.

USERRA and the right to trial by jury

The Seventh Amendment of the United States Constitution (one of the Bill of Rights) provides as follows:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.⁹

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA in 1994, as a complete rewrite of the Veterans' Reemployment Rights Act (VRRA),

⁸ This is an unusual but not illogical application of section 4311(b). The theory is that BNSF was annoyed with Hance for having sued a different company, NSRC.

⁹ United States Constitution, Amendment VII.

which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA).¹⁰ The VRRA has applied to private employers since 1940, and in 1974 it was amended to make it apply to state and local governments also.

Under the VRRA, lawsuits were filed in federal district courts, either by the United States Department of Justice (DOJ) or by private counsel retained by the individual plaintiff. If the VRRA plaintiff prevailed, the court would order the employer defendant to come into compliance and to pay the plaintiff back pay and interest. The VRRA did not provide for liquidated damages (double damages) for willful violations.

Under the VRRA, no jury trial was available. A VRRA lawsuit was deemed to be on the “equity side” of the federal district court and therefore not to be a “suit at common law” for 7th Amendment purposes.¹¹ Is there a right to a jury trial under USERRA after the 1994 enactment of USERRA? The leading USERRA treatise provides:

USERRA does not expressly grant a right to a jury trial. The Seventh Amendment provides that “[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.” The right extends to statutory causes of action with “legal rights and remedies, enforceable in an action for damages in the ordinary courts of law,” the Supreme Court has held.¹² Does USERRA meet this standard? As discussed below, courts that have considered the issue have concluded that jury trials are available under USERRA, *at least when liquidated damages are sought.*¹³

Section 4323(d)(1) provides for the relief that a court may award to a successful USERRA plaintiff in a case against a state or local government or private employer:

In any action under this section, the court may award relief as follows: (A) The court may require the employer to comply with the provisions of this chapter. (B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer’s failure to comply with the provisions of this chapter. (C) *The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer’s failure to comply with the provisions of this chapter was willful.*¹⁴

¹⁰ The STSA is the law that led to the drafting of more than ten million young men, including my late father, for World War II.

¹¹ See *Troy v. Hampton*, 756 F.2d 1000, 1003 (4th Cir. *en banc*), cert. denied *sub nom. Blackmon v. Observer Transportation Co.*, 474 U.S. 864 (1985).

¹² *Curtis v. Loether*, 415 U.S. 189, 194 (1974).

¹³ *The USERRA Manual, 2015 Edition*, by Kathryn Piscitelli and Edward Still, pages 349-50 (emphasis supplied).

¹⁴ 38 U.S.C. 4323(d)(1) (emphasis supplied).

The 7th Circuit¹⁵ has held that by including the provision for liquidated damages, Congress converted an equitable claim under the VRRA to a legal claim under USERRA, and that this means that a jury trial is available.¹⁶

Hance retained private counsel for his lawsuit against BNSF, just as he retained private counsel for his lawsuit against NSRC. In his complaint in the BNSF case, the attorney did not allege a willful violation and did not explicitly demand liquidated damages. On the eve of trial, well after the deadline to amend the complaint as a matter of right, the attorney sought leave of court to amend his complaint. The district judge denied leave, and the 6th Circuit held that the district judge did not abuse his discretion by denying such leave.

By failing to make a proper demand for liquidated damages, the attorney effectively waived Hance's right to a jury trial on his section 4311(b) claim. Would a jury have reached a different conclusion than the district judge reached? Maybe, but probably not.

Lessons to be learned from Hance's suit against BNSF

In communications with your employer or prospective employer, it is essential that you be entirely truthful and candid. Hance ruined what might have been a winning section 4311(b) case by his misrepresentations and lack of candor in the BNSF application and interview process. Those who come to court seeking equity must do so with "clean hands."¹⁷

In a USERRA lawsuit, you need an attorney who is competent and diligent, concerning federal civil practice generally, as well as USERRA in particular. This stuff is complicated. Don't even try to represent yourself in a USERRA case. Abraham Lincoln said, "A man who represents himself has a fool for a client." And the law is so much more complicated today than it was in Lincoln's lifetime.

UPDATE December 2016

Please see Law Review 16123 (December 2016) for the final outcome of this case.

¹⁵ The 7th Circuit is the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.

¹⁶ *Middleton v. City of Chicago*, 578 F.3d 655, 659 (7th Cir. 2009).

¹⁷ Please see Law Review 15025 (March 2015) for a detailed discussion of the "clean hands doctrine" in reemployment rights cases.