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Department of the Army Flouts USERRA

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]
Update on Sam Wright

1.1.1.8—USERRA applies to the Federal Government
1.1.3.2—USERRA applies to regular military service
1.2—USERRA forbids discrimination
1.3.1.1—Left job for service and gave prior notice
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Whited v. Department of the Army, **Merit Systems Protection Board, Washington Regional Office, Docket Number DC-4324-15-1077-I-1, May 16, 2016.**

The Federal Government (especially the Department of the Army) should be a model employer in complying with USERRA.

The very first section of the Uniformed Services Employment and Reemployment Rights Act (USERRA)[3] expresses the "sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter."[4] If the Federal Government is expected

[1] Please see www.servicemembers-lawcenter.org. You will find more than 1500 "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. I am the author of more than 1300 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 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. In 1940, Congress enacted the Veterans' Reemployment Rights Act (VRRA), as a part of the Selective Training and Service Act. In 1994, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA), as a long-overdue rewrite of the VRRA. I have been dealing with the VRRA and USERRA for 34 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 VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law Public Law 103-353 (USERRA), and that version was 85% the same as the Webman-Wright draft. I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice at Tully Rinckey PLLC, and as SMLC Director. After ROA disestablished the SMLC last year, I returned to Tully Rinckey PLLC, this time in an "of counsel" role. To arrange for 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 Captain Wright when you call.

[3] USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-35).

[4] 38 U.S.C. 4301(b).

to be a model employer, the Army should be triply the model employer. The services (including the Army) are the principal beneficiaries of USERRA. Without a law like USERRA, the services would not be able to recruit and retain a sufficient quality and quantity of Reserve Component (RC) and Active Component (AC)[5] personnel to defend our country.

Only 25% of U.S. residents in the 17-24 age group are eligible for military service. The other 75% are disqualified by physical conditions (especially obesity and diabetes), use of illegal drugs or certain prescription medications like Ritalin, educational deficiencies (no high school diploma), felony convictions, and other problems. Only 1% of young Americans in this age group are both eligible for military service and willing to consider enlisting. The services need more than one third of that 1% to meet their AC and RC recruiting goals each year.[6] It is essential that all employers (especially the services themselves) comply with USERRA and go above and beyond USERRA in supporting employees and potential employees who serve in the military or who may consider enlisting.

Yes, having a National Guard or Reserve member as an employee can be a burden on civilian employers and supervisors and sometimes on the co-workers of those who serve.[7] Congress was fully aware of that burden when it enacted USERRA. Congress determined that imposing that burden was warranted because of the nation's need to defend itself. The burdens imposed on civilian employers, supervisors, and co-workers are tiny as compared to the much greater burdens (sometimes the ultimate sacrifice) voluntarily undertaken by those who serve our country in uniform, in the RC or the AC.

When the Army or another service flouts USERRA with respect to its own civilian employees or applicants for civilian employment, that flouting fundamentally undermines respect for and compliance with USERRA. How do we get the gas station owner in Fayetteville, North Carolina to comply with USERRA when word gets out that the Army (at nearby Fort Bragg) flouts this law?

Through an organization called Employer Support of the Guard and Reserve (ESGR),[8] the Department of Defense (DOD) urges employers to comply with USERRA and to go above and beyond USERRA in supporting RC members. DOD cannot effectively advocate for RC personnel

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[5] Yes, USERRA applies to the AC as well as the RC. Please see Law Review 0719.
[6] Please see Law Review 14080.
[7] Please see Law Review 15093.
[8] ESGR was established in 1972, on the eve of the elimination of the draft in 1973 and the establishment of the All-Volunteer Military and the Total Force Policy, under which DOD increased reliance on the Reserve Components as a cost-effective way to provide for national defense readiness. ESGR's website can be found at www.esgr.mil, and you can reach ESGR toll-free at (800) 336-4590. ESGR mission is to gain and maintain the support of civilian employers (federal, state, local, and private sector) for the men and women of the National Guard and Reserve.

among civilian employers when DOD flouts USERRA as a civilian employer. "Do as I say and not as I do" has always been a losing argument.
I invite the reader's attention to the words of Jesus Christ:

> Judge not, that you be not judged. For with the judgment you pronounce you will be judged, and the measure you give will be the measure you get. Why do you see the speck that is in your brother's eye, but do not notice the log that is in your own eye? Or how can you say to your brother "Let me take the speck out of your eye" when there is the log in your own eye? You hypocrite, first take the log out of your own eye and then you will see clearly to take the speck out of your brother's eye.[9]

The *Whited* case is a good illustration of the fact that, far from being a model employer, the Federal Government is often the worst employer, and DOD is often the worst of the worst.

Enforcing USERRA against a federal executive agency[10]

The federal reemployment statute has applied to the Federal Government, as an employer, since 1940, but until 1994 (when Congress enacted USERRA as a long-overdue rewrite of the 1940 statute) there was no effective enforcement mechanism with respect to federal agencies as employers. Creating such an enforcement mechanism was one of the most important improvements brought about by the 1994 enactment of USERRA.

USERRA cases against federal executive agencies[11] are adjudicated by the Merit Systems Protection Board (MSPB), rather than by federal or state courts. The MSPB is a quasi-judicial federal executive agency that was created by the Civil Service Reform Act of 1978 (CSRA). USERRA (enacted in 1994) did not create the MSPB, but USERRA added to the jurisdiction and responsibility of the MSPB. The MSPB is responsible for adjudicating a claim, properly brought before the MSPB, that a federal executive agency has violated USERRA.[12]

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[9] *Gospel of Matthew,* Chapter 7, verses 1-5 (*Revised Standard Version).*

[10] Please see Law Review 15009 concerning the application of USERRA to the Legislative Branch and the Judicial Branch of the Federal Government.

[11] "The term 'Federal executive agency' includes the United States Postal Service, the Postal Regulatory Commission, any nonappropriated fund instrumentality of the United States, any Executive agency (as that term is defined in section 105 of title 5) other than an agency referred to in section 2302(a)(2)(C)(ii) of title 5 [intelligence agencies], and any military department (as that term is defined in section 102 of title 5), with respect to the civilian employees of that department." 38 U.S.C. 4303(5).

[12] 38 U.S.C. 4324(c)(1). The MSPB's jurisdiction to hear a claim that a federal executive agency has violated USERRA is not limited to cases involving federal employees in the traditional sense. The MSPB has jurisdiction to hear and adjudicate a claim that a federal executive agency violated USERRA while acting as the "joint employer" of a person employed by a federal contactor. *See Silva v. Department of Homeland Security,* 2009 MSPB 189 (September 23, 2009). I discuss this case in detail in Law Review 0953.

A person who claims that his or her USERRA rights have been violated by a federal executive agency (or any other employer) can file a formal written complaint with the Veterans' Employment and Training Services of the United States Department of Labor (DOL-VETS).[13] That agency shall investigate the complaint.[14] DOL-VETS has subpoena authority for use in USERRA investigations, including investigations of complaints against federal executive agencies.[15] DOL-VETS is required to complete its investigation within 90 days after receipt of the complaint.[16] Upon completing its investigation, DOL-VETS is required to inform the complainant of the results of the investigation and of the complainant's options for going forward.[17] The complainant can then request (in effect insist) that DOL-VETS refer the case file to the United States Office of Special Counsel (OSC).[18] If OSC agrees that the case has merit, it can represent the complainant in filing and prosecuting a USERRA case in the MSPB.[19]

The complainant has the right to insist that DOL-VETS refer the case file to OSC *even if DOL-VETS found "no merit" in its investigation.* OSC may disagree with DOL-VETS about the facts or about the law and OSC can bring a case for the complainant even in the face of a DOL-VETS "no merit" determination. I am aware of cases where OSC has done exactly that and has prevailed and has obtained significant relief for the complainant.

If OSC decides not to represent the complainant, it must notify the complainant of the declination in writing within 60 days after receiving the referral from DOL-VETS.[20] After the complainant receives such a declination notice from OSC, he or she may bring an action in the MSPB through private counsel that he or she retains.[21]

In lieu of requesting referral to OSC, the complainant can retain private counsel and bring the action in the MSPB.[22] The complainant can also bypass DOL-VETS altogether and retain private counsel to bring the action in the MSPB.[23] If the complainant proceeds with private counsel and

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[13] 38 U.S.C. 4322(a) and (b).
[14] 38 U.S.C. 4322(d).
[15] 38 U.S.C. 4326.
[16] 38 U.S.C. 4322(f).
[17] 38 U.S.C. 4322(e).
[18] 38 U.S.C. 4324(a)(1). Like the MSPB, the OSC was created by the CSRA. That 1978 law divided the former Civil Service Commission (CSC) into three separate agencies. The Office of Personnel Management (OPM) inherited the CSC's headquarters building on E Street NW in our nation's capital and most of the CSC resources and staff and administrative responsibilities as the personnel office for the Executive Branch of the Federal Government. The MSPB inherited the adjudicatory functions, and the OSC inherited the investigative and prosecutorial functions.
[19] 38 U.S.C. 4324(a)(2)(A).
[20] 38 U.S.C. 4324(a)(2)(B).
[21] 38 U.S.C. 4324(b)(4).
[22] 38 U.S.C. 4324(b)(3).
[23] 38 U.S.C. 4324(b)(1).

prevails, the MSPB may (in its discretion) award the complainant reasonable attorney fees, expert witness fees, and other litigation expenses.[24]
The complainant can also represent himself or herself in filing and prosecuting a case in the MSPB. I do not recommend that course of action. 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 during Lincoln's lifetime.

An MSPB case starts before an Administrative Judge (AJ) of the MSPB. The MSPB has regional offices around the country, and the AJ usually conducts the hearing at a place that is reasonably convenient for the complainant and the agency. The AJ conducts a hearing and makes findings of fact and conclusions of law, finding merit or no merit to the complaint.

The losing party (either the complainant or the agency) can appeal to the MSPB itself, in our nation's capital. The MSPB has three members, each of whom is appointed by the President with Senate confirmation. The complainant (but not the agency) can appeal the MSPB's decision to the United States Court of Appeals for the Federal Circuit.[25]

Section 4324 provides as follows concerning the relief that the MSPB is to award if it finds that a federal executive agency has violated USERRA:

> If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.[26]

USERRA's enforcement mechanism for federal agencies, under section 4324, has some deficiencies, as compared to USERRA's enforcement mechanism (under section 4323) with respect to state and local governments and private employers. Under section 4323(d)(1)(C)[27] a federal district court can order a state or local government or private employer to pay liquidated damages (double damages) if the court finds that the employer has violated USERRA willfully. Section 4324 has no provision for ordering a federal agency to pay extra damages for a willful violation.

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[24] 38 U.S.C. 4324(c)(4).
[25] 38 U.S.C. 4324(d)(1). The Federal Circuit is a specialized federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from MSPB decisions.
[26] 38 U.S.C. 4324(c)(2).
[27] 38 U.S.C. 4323(d)(1)(C)..

Section 4323(e)[28] provides for the federal district court to use its equity powers (injunctions, temporary restraining orders, etc.) to vindicate fully the plaintiff's USERRA rights. Section 4324 has no corresponding provision.

The Department of the Army violated the USERRA rights of James S. Whited.

James S. Whited is a noncommissioned officer (NCO) in the Army Reserve (USAR). On the civilian side, he is a civilian employee of the Department of the Army (DOA) at the United States Army John F. Kennedy Special Warfare Center and School (SWC) at Fort Bragg, North Carolina. At the relevant time, his first level supervisor, in his DOA civilian job, was Lieutenant Colonel (LTC) Anthony Quinn, and his second level supervisor was Timothy Fitzpatrick.

As an NCO in the USAR, Whited was called to the colors for almost two years, from 2010 until 2012. He left his civilian DOA job at SWC for this active duty period, and upon return he met the USERRA conditions for reemployment.[29] Because he met the five conditions, he was entitled to prompt reemployment in the position that he would have attained if he had been continuously employed or in another position (for which he was qualified) that was of like seniority, status, and rate of pay.[30]

In July 2013, Whited's first level supervisor changed when LTC Quinn replaced Major Counsill on the SWC staff. When Quinn took over, Whited was behind in his USAR drills because he had been holding off pending the change in management. On Friday, August 23, 2013, Whited's USAR unit contacted him and ordered him to perform a drill on Monday, August 26.[31] Because Quinn was on leave and not available on that Friday, Whited got the drill postponed until Wednesday, August 28. On that Friday, Whited notified Quinn by e-mail that he would be performing USAR duty on the following Wednesday, but Quinn claimed not to have received the e-mail.[32]

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[28] 38 U.S.C. 4323(e).

[29] Whited left a civilian job (federal, state, local, or private sector) for the purpose of performing service in the uniformed services, as defined by USERRA, and he gave the employer prior oral or written notice. His cumulative period or periods of uniformed service, relating to his employer relationship with the Federal Government, did not exceed five years. There are nine exemptions—kinds of service that do not count toward exhausting his five-year limit. Please see Law Review 16043. Whited served honorably and did not receive a disqualifying bad discharge from the Army. After release from the period of service, he made a timely application for reemployment with the DOA.

[30] 38 U.S.C. 4313(a)(2)(A).

[31] Contrary to popular misconception, inactive duty training (drill) periods are not limited to Saturdays and Sundays but can be held on any day of the week. The days when RC participation is limited to "one weekend per month and two weeks in the summer" are gone, probably forever. Please see Law Review 13099.

[32] The DOL-VETS investigator found the e-mail and verified that Whited did give his employer prior notice of the August 28 drill.

Under USERRA, Whited was entitled to job-protected leave without pay[33] to perform inactive duty training (drills) on Wednesday, August 28, 2013. He was required to give his employer prior oral or written notice,[34] unless giving such notice was precluded by military necessity or otherwise impossible or unreasonable.[35]

On Friday, August 23, Whited gave his employer five days of advance notice that he would be performing inactive duty training on Wednesday, August 28. Five days is not a lot of advance notice, but Whited could not give his employer more notice than the USAR gave him. Under the circumstances of this case, Whited gave sufficient notice, and he had the right to be away from his job for uniformed service on August 28.[36]

Although Whited had the legal right to be absent from his civilian job for military service on August 28, Quinn recorded him as "absent without leave" (AWOL) for that day and suspended him without pay for five days (later reduced to three days by the second level supervisor). Quinn rated Whited a two (next to lowest on a five-point scale) in his annual performance evaluation and gave Whited several negative comments in the narrative portion of the evaluation. One of the negative comments referred to Whited's alleged deficiency in "recalling significant suspense's [sic] and/or place of duty." This comment, coming just a few weeks after the dispute about the August 28 drill, clearly shows that Quinn was annoyed with Whited about his USAR participation and the absences from his civilian job necessitated by that participation.

In November 2013, there was a new dispute between Whited and Quinn concerning the USAR.[37] Quinn attempted to prevent Whited from performing military duty on November 25, 2013 by assigning that very day as the due date for a job assignment. Although Whited turned in the assignment on November 26, the day after he returned from military duty, and although Whited credibly claimed that he had been told that November 26 was the due date, Quinn issued Whited a letter of reprimand for tardiness in turning in the assignment.

It should be emphasized that Whited does not need the permission of his civilian employer or supervisor (Quinn) to be absent from work on a particular day in order to perform uniformed

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[33] He may have been entitled to military leave *with pay* for that day, under 5 U.S.C. 6323, but the MSPB decision does not discuss that issue. Under section 6323, federal employees are entitled to 15 work days per fiscal year of paid military leave. Whited was entitled to use a day of paid military leave for the Wednesday drill unless he had already exhausted his 15 days of paid military leave for the fiscal year. Section 6323 is an example of another federal law that gives service members greater or additional rights and therefore is not superseded by USERRA, in accordance with 38 U.S.C. 4302(a).

[34] 38 U.S.C. 4312(a)(1).

[35] 38 U.S.C. 4312(b).

[36] Please see Law Review 16050.

[37] Also in November, the SWC "reorganized" the work force and removed Whited from the bargaining unit represented by the union, probably because Whited had been assisted by the union in grieving USERRA violations.

service protected by USERRA—Whited is only required to give notice. The DOL USERRA Regulations provide as follows on this point:

> **Is the employee required to get permission from his or her civilian employer before leaving to perform service in the uniformed services?**
>
> No. The employee is not required to ask for or get his or her employer's permission to leave to perform service in the uniformed services. The employee is only required to give the employer notice of pending service.[38]

Almost two months in advance, Whited requested annual leave for the period of January 16-23, 2014, for purposes of a family vacation, and he spent thousands of dollars on that vacation. He was on military leave on January 15, the last day before the start of the vacation. Quinn waited until January 15 (after Whited had spent thousands of dollars on travel arrangements for the vacation) to notify Whited, by e-mail, that leave for the January 21-23 period had been denied. Whited did not check his work e-mail while on military leave, and he was unaware that part of his requested annual leave request had been denied. He reported back to the civilian job on January 24, on the day after the last day of leave that he had requested. Quinn recorded Whited as AWOL for the January 21-23 period.

It is clear that Quinn denied part of Whited's leave request because Quinn was annoyed with Whited because of the latter's military duty (protected by USERRA) and because of Whited's complaints to DOL-VETS about USERRA violations. Quinn also intentionally waited until January 15 to deny part of Whited's leave request in an attempt to set up Whited for punishment for AWOL.

Section 4311(a) of USERRA 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.[39]

Section 4311(b) 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*

[38] 20 C.F.R. 1002.87 (bold question in original). The citation is to title 20 of the Code of Federal Regulations, section 1002.87.

[39] 38 U.S.C. 4311(a).

> *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 to a person regardless of whether that person has performed service in the uniformed services.[40]

Section 4311(c) provides:

> An employer shall be considered to have engaged in actions prohibited—
> (1)under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed service is *a motivating factor* in the employer's action, unless the employer can *prove* that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or
> (2)under subsection (b), if the person's (A) *action to enforce a protection* afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) *exercise of a right provided for in this chapter, is a motivating factor* in the employer's action, unless the employer can *prove* that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.[41]

It is clear that Quinn had an animus against Whited because of Whited's performance of uniformed service, and denying Whited benefits of employment based on that animus violated section 4311(a). Quinn also had an animus against Whited because of Whited's exercise of USERRA rights (taking days off from his civilian job to perform uniformed service) and his taking of enforcement actions to enforce his USERRA rights.[42] Under section 4311(b), it was unlawful for Quinn to take adverse actions against Whited because of Quinn's annoyance with Whited over Whited's exercise of USERRA rights and taking enforcement actions under USERRA.

Under section 4311(c), Whited was not required to prove that the adverse personnel actions against him were motivated *solely* by his performance of service, his exercise of USERRA rights, or his taking of enforcement actions. He was only required to prove that these protected activities were *a motivating factor* in the employer's decision to take the adverse actions. If Whited proves motivating factor, the burden of proof shifts to the employer to *prove* (not just say) that it would have taken the same actions in the absence of the protected activities.

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[40] 38 U.S.C. 4311(b) (emphasis supplied).
[41] 38 U.S.C. 4311(c) (emphasis supplied).
[42] Whited filed formal USERRA complaints with DOL-VETS in October 2013 and February 2014. He also asserted that his USERRA rights had been violated, in complaints that he filed within the SWC chain of command.

The Supreme Court has made clear that the unlawful animus of the direct supervisor against the claimant, based on the claimant's performance of uniformed service, is to be attributed to the employer, even with respect to adverse actions that the direct supervisor did not have the unilateral authority to take on his or her unilateral initiative.[43]

Quinn may try to make the following argument:

> I had no animus against Whited because of his service in the United States Army—I am a soldier myself. I was annoyed with Whited because of his *absences from work.*

The Federal Circuit has forcefully rejected this nonsensical distinction:

> We reject that argument. An employer cannot escape liability under USERRA by claiming that it was merely discriminating against an employee on the basis of absence when that absence was for military service. … The most significant—and predictable—consequence of reserve service with respect to the employer is that the employee is absent to perform that service. To permit an employer to fire an employee because of his military absence would eviscerate the protections afforded by USERRA.[44]

The MSPB proceeding and its outcome

After DOL-VETS was unable to persuade the DOA to come into compliance with USERRA, James S. Whited filed his USERRA appeal with the MSPB. The case was assigned to AJ Nicole DeCrescenzo.

In his MSPB appeal, Whited asserted that the DOA violated USERRA in the following ways:

a. Three letters of reprimand issued to Whited.
b. Whited's negative performance evaluation in the fall of 2013.
c. Denial of a military leave of absence.
d. Denial of the full amount of annual leave that he requested to take in January 2014.
e. The five-day suspension without pay (later downgraded to three days).
f. The "constant abuse and harassment" of Whited by Quinn and other SWC supervisors because of Whited's USAR service, his exercise of USERRA rights, and his taking of USERRA enforcement actions.

In a scholarly opinion, Judge DeCrescenzo ruled for Whited on all of these issues except the last one. She held that the abuse and harassment of Whited did not amount to a "hostile work

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[43] *Staub v.Proctor Hospital,* 562 U.S. 411 (2011). I discuss *Staub* in detail in Law Review 1122.

[44] *Erickson v. United States Postal Service,* 571 F.3d 1364, 1368 (Fed. Cir. 2009). LTC Mathew Tully (Founding Partner of Tully Rinckey PLLC) and I discuss the implications of *Erickson* in detail in Law Review 14090.

environment."[45] I hope that it will not be necessary to bring multiple MSPB actions against the DOA to get SWC supervisors to stop harassing Whited about his USAR service.

Judge DeCrescenzo ordered the DOA to comply with USERRA and to rescind the letters of reprimand and the suspension without pay. She also ordered the DOA to expunge all records of this discipline from Whited's personnel file and to amend his personnel record to show that he had been granted the full amount of annual leave that he requested in January 2014. She ordered the DOA to upgrade the performance evaluation that Whited received in the fall of 2013 and to provide the attendant bonus and compensation. She ordered the DOA to compensate Whited for the pay that he had lost and to pay reasonable attorney fees.[46]

The DOA could have appealed this decision to the MSPB itself, but it did not do so, and the deadline has now passed. This case is over, except for the determination of the amount of attorney fees owed by the DOA.

Kudos to Whited's attorney and law firm

I congratulate Allen A. Shoikhetbrod, Esq., my Tully Rinckey PLLC colleague, for his imaginative, diligent, and effective representation of James S. Whited in this difficult and important case. Allen is an associate at the firm's Albany office.

Tully Rinckey PLLC Founding Partner Mathew Tully is a recently retired Lieutenant Colonel in the New York Army National Guard. He served several tours of duty in Iraq and Afghanistan. Gregory Rinckey, the other named partner, is a veteran of the Army Judge Advocate General's Corps. Like Mathew Tully, Gregory Rinckey is an expert in USERRA, the Uniform Code of Military Justice, the Servicemembers Civil Relief Act, and other laws that are especially pertinent to those who serve our country in uniform. Many of the other Tully Rinckey PLLC attorneys are veterans, and the dedication that they learned in the military is routinely applied to their diligent and effective representation of the firm's clients.

To arrange a consultation with Mathew Tully, Gregory Rinckey, Allen Shoikhetbrod, myself, 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.

[45] By the time Judge DeCrescenzo was called upon to decide this case, Quinn was no longer Whited's supervisor. That fact was likely crucial in the judge finding no "hostile work environment."

[46] The specific amount of the attorney fees is still to be determined.