

LAW REVIEW 16059¹

July 2016

Discrimination, Harassment, Spoliation, and USERRA

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

Update on Sam Wright

1.1.1.7—USERRA applies to state and local governments

1.2—USERRA forbids discrimination

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

Montoya v. Orange County Sheriff's Department, 987 F. Supp. 2d 981 (C.D. Cal. 2013) (Montoya I).

Montoya v. Orange County Sheriff's Department, 2013 U.S. Dist. LEXIS 180682 (C.D. Cal. October 15, 2013) (Montoya II).

Montoya v. Orange County Sheriff's Department, 2014 U.S. Dist. LEXIS 160414 (C.D. Cal. November 13, 2014) (Montoya III).

¹ I invite the reader's attention to 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 was 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 the 1940 Veterans' Reemployment Rights Act (VRRA) and the 1994 Uniformed Services Employment and Reemployment Rights Act (USERRA) for 34 years. I developed an interest and expertise in the VRRA 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 VRRA 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, 108 Stat. 3153, USERRA, as a long-overdue rewrite of the 1940 VRRA. USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-35). 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 (TR), and as SMLC Director. 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 (the firm's Client Relations Director) at (518) 640-3538. Please mention Captain Wright when you call.

Facts

The three scholarly decisions cited are by Judge Jesus G. Bernal of the United States District Court for the Central District of California. He was nominated by President Obama and confirmed by the Senate in 2012. He has a BA from Yale University in 1986 and a JD from Stanford University in 1989.

In 1989, Scott Montoya joined the Orange County Sheriff's Department (OCSD) as a special officer. In 1995, he enlisted in the United States Marine Corps Reserve (USMCR) and took a leave of absence from his OCSD job for basic training. After he successfully completed basic training, he became a drilling member of the USMCR, and he returned to his civilian OCSD job. The OCSD promoted Montoya to Deputy Sheriff I in 1997 and to Deputy Sheriff II in 2001.

Montoya was recalled to active duty in 2002 and participated in the 2003 invasion of Iraq, serving as a scout sniper. He was awarded the Navy Cross³ for action during the Battle of Baghdad, on April 8, 2003. Later in 2003, he was released from active duty and returned to the status of a drilling USMCR member and returned to his civilian OCSD job. He was honorably discharged from the USMCR in 2004.⁴

After returning from his Iraq deployment, Montoya's relationship with his employer (OCSD) and his co-workers was filled with bitterness and difficulties. He was placed on paid administrative leave on December 8, 2009, and he was fired on September 2, 2010.

Montoya's lawsuit against OCSD

Montoya filed this lawsuit on December 13, 2011. He contended that OCSD initiated and manipulated multiple personnel investigations against him and eventually fired him because of a pervasive animus against him based on his Marine Corps service and his receipt of a Navy Cross. He also alleged that he was the target of service-related harassment from other OCSD deputies and that OCSD failed to investigate or discipline any of the personnel involved in

³ The Navy Cross is the second highest award of the U.S. military, right below the Medal of Honor. It is meant to recognize any member of the U.S. armed forces who has performed an exceedingly heroic act in the face of great personal danger, while serving in actual combat with the Navy, Marine Corps, or Coast Guard. Montoya formally received the Navy Cross at a public ceremony in January 2005, after he had been honorably discharged from the USMCR. Many Orange County dignitaries and OCSD representatives attended the ceremony.

⁴ As I have explained in Law Review 15107 (November 2015) and other articles, discrimination cases under section 4311 of USERRA, 38 U.S.C. 4311, usually involve persons who are currently serving as members of a Reserve Component (RC) of the armed forces. The employer and supervisors have an incentive to discriminate in initial employment, promotions, and firing because part-time RC service can be inconvenient for civilian employers and supervisors. In this case, it appears that Montoya's supervisors and co-workers had an animus against him based upon his service in the U.S. military, and the Marine Corps in particular, rather than a practical objection to inconvenience caused by absences from work for RC training and service.

harassing him. He claimed that the persistent harassment amounted to a “hostile work environment” in violation of USERRA.⁵ Montoya also claimed that OCSD violated section 4311 of USERRA⁶ by denying him promotion to Sergeant in the OCSD, by refusing to consider his application for the OCSD SWAT Team, and by firing him.

After a lengthy and very contentious discovery period, OCSD filed a motion for summary judgment, which Judge Bernal denied. The case proceeded to a jury trial, and the jury ruled for Montoya. The jury found that OCSD violated section 4311 of USERRA and awarded Montoya almost \$250,000 for back pay and lost vacation pay.⁷ The jury also found that OCSD violated USERRA willfully and the court awarded a like amount (almost \$250,000) in liquidated damages.⁸

Judge Bernal propounded to the jury a special question:

Do you find that Scott Montoya has proved by a preponderance of the evidence that he has been unable to work because of the hostile work environment [during his OCSD employment]?

The jury answered “yes” to this question.

USERRA provides:

The court shall use, in any case in which the court determines that it is appropriate, its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter.⁹

⁵ Thirty years ago, the Supreme Court recognized “hostile work environment” in the context of sexual harassment as a violation of Title VII of the Civil Rights Act of 1964. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63-66 (1986). Five years ago, the 5th Circuit held that section 4311 of USERRA does not create a cause of action for hostile work environment, based on harassment motivated by military service or obligations, because USERRA’s definition of “benefit of employment” was not word-for-word identical to the Title VII definition applied by the Supreme Court in *Meritor*. *Carder v. Continental Airlines, Inc.*, 636 F.3d 172, 175 (5th Cir.), cert. denied, 132 S. Ct. 369 (2011). Later in 2011, as part of the Vow to Hire Heroes Act, Congress amended section 4303(2) of USERRA to incorporate the precise Title VII definition of “benefit of employment.” The purpose of the 2011 amendment was to clarify that hostile work environment was and always had been a violation of section 4311, not to change the law. OCSD argued that the 2011 amendment should not be applied retroactively to Montoya, who was fired in 2010. Judge Bernal held that the 2011 amendment was a clarification, not a change in the law, and that it did apply to Montoya’s situation.

⁶ 38 U.S.C. 4311.

⁷ Under section 4323(d)(1)(B) of USERRA, 38 U.S.C. 4323(d)(1)(B), “The court may require the employer to compensate the person [plaintiff] for any loss of wages or benefits suffered by reason of such employer’s failure to comply with the provisions of this chapter [USERRA].”

⁸ “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.” 38 U.S.C. 4323(d)(1)(C).

⁹ 38 U.S.C. 4323(e).

In what Judge Bernal referred to as “Stage 3” of the *Montoya* case, he considered the facts carefully in using his equity powers to craft an appropriate remedy.¹⁰ He determined that ordering OCSD to reinstate Montoya as a deputy sheriff was not feasible, because of the “bad blood” between Montoya and the department, bad blood for which the department was responsible. In lieu of ordering reinstatement, he awarded Montoya an additional \$98,629 in front pay.

OCSD was also likely required to pay a substantial amount in attorney fees for Montoya, but the amount is not mentioned in the decision. USERRA provides:

In any action or proceeding to enforce a provision of this chapter by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses.¹¹

Spoliation of evidence

In *Montoya II*, Judge Bernal considered Montoya’s motion for sanctions for spoliation of evidence and awarded sanctions, but not the fully dispositive sanction that Montoya sought. Judge Bernal’s scholarly opinion includes the following two paragraphs:

Spoliation is “the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence, in pending or future litigation. [Case citations omitted.]

Sanctions that a federal court may impose for spoliation include assessing the attorney’s fees and costs, giving the jury an adverse inference instruction, precluding evidence, or imposing the harsh, case-dispositive sanction of dismissal or judgment. [Case citations omitted.]

Judge Bernal found OCSD liable for spoliation of evidence but found that the spoliation was not sufficiently willful or egregious to preclude OCSD from presenting certain evidence or to impose judgment against OCSD for spoliation alone. The judge crafted an appropriate adverse inference instruction for the jury, as follows:

OCSD has failed to prevent the destruction of relevant evidence for Montoya’s use in this litigation after it had a duty to do so. Whether this finding is important to you in reaching a verdict in this case is for you to decide.

¹⁰ Judge Bernal considered not utilizing equity powers because Montoya had not specifically requested equitable relief in his complaint, but the judge ultimately decided that Montoya had sufficiently put OCSD on notice that equitable relief was sought. As a practice pointer, I suggest that the USERRA plaintiff should *always* specifically request equitable relief in the complaint.

¹¹ 38 U.S.C. 4323(h)(2).

Judge Bernal read this instruction to the jury and he also awarded Montoya \$8,000 in attorney's fees for the cost of preparing the sanctions motion relating to spoliation.

Spoliation of evidence is an issue that arises frequently in USERRA litigation and employment litigation generally. Judge Bernal's scholarly opinion and the case law that he cites will be very valuable to other judges and to lawyers in dealing with spoliation issues.

This case is over.

LEXIS (a computerized legal research service) shows no further action in this case after *Montoya III*. OCSD did not appeal to the United States Court of Appeals for the 9th Circuit, and the deadline for doing so has passed. This case is over.

Kudos to Montoya's attorneys

I congratulate attorneys Craig S. Newton, Jennifer Bogue, Peter Dahlquist, Shannon Sorrells, and John S. Kyle for their imaginative, diligent, and successful representation of Scott Montoya.