LAW REVIEW 16064[1]
July 2016

The Air Force Must Comply with USERRA

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

1.1.1.8—USERRA applies to the Federal Government
1.2—USERRA forbids discrimination
1.3.2.2—Continuous accumulation of seniority-escalator principle
1.4—USERRA enforcement

Hayden v. Department of the Air Force, 812 F.3d 1351 (Fed. Cir. 2016).[3]

Facts

Carl D. Hayden is a member of the Air Force Reserve (USAFR) and a civilian employee of the Air Force, at Wright Patterson Air Force Base (WPAFB) in Dayton, Ohio. He was hired in 2002 as a GS-9 protocol officer. He was promoted to GS-11 in 2010. In late 2011 and early 2012, Hayden's supervisor believed that much of the work that Hayden was doing was above his GS-11 pay

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[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1500 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), 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 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. I have dealt with USERRA and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) 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 USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. 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 the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (May 2015), concerning the accomplishments of the SMLC. 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.

[3] This is a recent (February 12, 2016) decision of the United States Court of Appeals for the Federal Circuit, the specialized federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from the Merit Systems Protection Board (MSPB). The citation means that you can find this decision in Volume 812 of *Federal Reporter Third Series,* starting on page 1351.

grade. Accordingly, on March 26, 2012, the supervisor submitted a form to the personnel office requesting that Hayden be promoted from GS-11 to GS-12 based on a "desk audit."[4]

A few days later, Hayden went on active duty in his USAFR capacity, and he was on active duty from April to December 2012. The personnel officer said that it was "impossible" to conduct the desk audit without the presence and participation of Hayden, so the audit was not conducted. Hayden's supervisor communicated with Hayden (apparently by e-mail) and informed him that the desk audit could not be conducted while he was away from work for service. The supervisor promised that the personnel office would proceed with the audit and promote Hayden upon his return to work.

Hayden was released from active duty and returned to work at WPAFB in December 2012. He met the five conditions for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA)[5] and he returned to work promptly as a GS-11.

Although Hayden's supervisor had promised him that the desk audit would be conducted upon his return to work, the personnel office refused to conduct such an audit at that time because in July 2012 (while Hayden was away from work for service) the Protocol Office was reorganized and certain responsibilities that had been assigned to the component where Hayden worked were reassigned to other components. As a result, the component where Hayden worked had a lesser need for protocol officers at the GS-12 level. The bottom line is that Hayden lost out on a very likely promotion from GS-11 to GS-12, *because of his military service* from April to December of 2012.

Hayden complains to the Merit Systems Protection Board

When Hayden learned that the desk audit had been postponed because of his absence from work for military service, he contacted Employer Support of the Guard and Reserve (ESGR).[6]

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[4] In the federal civilian personnel system, a desk audit is a procedure whereby a personnel officer reviews the work that an employee has been doing and, if the personnel officer finds that the employee has been doing a considerable amount of work that is above the employee's pay grade, the personnel officer causes the employee to be promoted. The desk audit is usually performed with the presence and active participation of the employee being considered for promotion, but the Federal Circuit found that the presence of the employee is not essential to the conduct of the desk audit.

[5] As I have explained in Law Review 15116 (December 2015) and other articles, USERRA applies to the Federal Government, the states, the political subdivisions of states, and private employers small and large. To have the right to reemployment under USERRA, a person must have left a civilian job for the purpose of performing voluntary or involuntary uniformed service and must have given the employer prior oral or written notice. The person 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, but certain kinds of service do not count toward exhausting the five-year limit. The person must have been released from the period of service without having received a disqualifying bad discharge from the military. After release, the person must have made a timely application for reemployment. Hayden met these conditions in December 2012.

Hayden's supervisor and other civilian Air Force officials at WPAFB refused to meet with the ESGR ombudsman, and they may have been annoyed with Hayden for taking his personnel matter "outside the family."

When Hayden returned to work and was not promoted to GS-12, he made further efforts to persuade the Air Force to comply with USERRA, without result.[7] On May 28, 2013, Hayden initiated this enforcement action in the Merit Systems Protection Board (MSPB). He alleged that the Department of the Air Force (DAF) violated USERRA in three ways:

a. DAF violated section 4311(a) of USERRA[8] by denying him promotion from GS-11 to GS-12 on the basis of his performance of uniformed service from April to December 2012.
b. DAF violated section 4311(b) of USERRA[9] by denying him the promotion on the basis of his efforts to enforce his USERRA rights, including by contacting ESGR.
c. DAF violated section 4313(a)(2)(A)[10] of USERRA by refusing to reinstate him, upon his return from military service, into the GS-12 position that (Hayden contended) he would have been promoted into but for his absence from work for uniformed service from April to December of 2012.

The MSPB found against Hayden on each of these three complaints. This appeal to the Federal Circuit resulted.

DAF violated section 4311(a) by denying Hayden the promotion from GS-11 to GS-12 on the basis of his performance of uniformed service from April to December 2012.

Section 4311(a) provides:

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[6] ESGR is the Department of Defense (DOD) organization, founded in 1972, that seeks 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. ESGR seeks to educate service members and their civilian employers about their rights and obligations under USERRA, and ESGR asks employers to sign a "Statement of Support" pledging to comply with USERRA. ESGR honors employers who go above and beyond USERRA in supporting employees and potential employees who serve in the National Guard or Reserve. Through hundreds of volunteer ombudsmen around the country, ESGR works to mediate disputes between National Guard and Reserve members and their civilian employers about time off from work for training and service in the National Guard and Reserve. You can reach ESGR at (800) 336-4590. You can find ESGR's website at www.esgr.mil.

[7] It is unclear whether Hayden made a formal USERRA complaint to the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). If he had done so, that agency would have conducted an investigation. Hayden then could have requested referral of his case file to the Office of Special Counsel (OSC). If OSC had found merit to his claim, it could have represented him in presenting his case to the Merit Systems Protection Board (MSPB), but Hayden was not required to file with DOL-VETS or to request referral to OSC as a condition precedent to bringing his case to the MSPB. Hayden was represented by private counsel at the MSPB and the Federal Circuit. Please see Law Review 16055 (June 2016) for a detailed discussion of USERRA's enforcement mechanism with respect to federal executive agencies as employers.

[8] 38 U.S.C. 4311(a).

[9] 38 U.S.C. 4311(b).

[10] 38 U.S.C. 4313(a)(2)(A).

> 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 the uniformed services shall not be denied initial employment, reemployment, retention in employment, *promotion,* or any benefit of employment on the basis of that membership, application for membership, *performance of service,* application for service, or obligation.[11]

Hayden's theory is that he was denied promotion from GS-11 to GS-12 on the basis of his performance of uniformed service from April to December of 2012. Under section 4312(c),[12] Hayden is not required to prove that his performance of service was *the reason* for the denial of promotion. He is only required to prove that his performance of uniformed service was *a motivating factor* in the employer's decision to deny him the promotion. If he proves motivating factor, the *burden of proof* (not just the burden of going forward with the evidence, as under Title VII of the Civil Rights Act of 1964) shifts to the DAF, to prove that it *would have denied him the promotion anyway* even if he had not performed uniformed service from April to December 2012.[13]

Discrimination based on *absence from work* violates section 4311(a) if the absence from work was necessitated by uniformed service. The Federal Circuit has firmly rejected the argument that it is lawful for an employer to discriminate based on absence from work, if the absence was because of service:

> 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.[14]

If Hayden had not been away from work for military service in 2012, the desk audit would have been conducted, and it is very likely that he would have been promoted to GS-12. Although the personnel officer insisted that it was "impossible" to conduct the desk audit without Hayden's presence and active participation, it appears that Hayden could have participated by telephone.[15] It is also possible that the personnel officer could have completed the desk audit by reviewing records with Hayden's supervisor, and that Hayden's personal participation was unnecessary.

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[11] 38 U.S.C. 4311(a) (emphasis supplied).
[12] 38 U.S.C. 4311(c).
[13] For a detailed discussion of section 4311, including the shifting burden of proof, please see Law Review 16055 (June 2016) and Law Review 0753 (October 2007).
[14] *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.
[15] The Federal Circuit decision does not say where Hayden was physically located during his 2012 military service.

It matters not that DAF routinely and lawfully denies desk audit consideration of promotions to employees who are away from work for other reasons, such as vacation, illness, or birth of a child. USERRA gives special rights to employees who are away from work *because of uniformed service* that are not accorded to employees who are away from work for other reasons.

DAF apparently denied Hayden the promotion to GS-12 when he returned from military service in December 2012 because in July of that year, while Hayden was on active duty, a reorganization resulted in a lesser need for GS-12 protocol officers in the component where Hayden worked. The reorganization is not relevant to the question of whether Hayden *would have been promoted* but for his service, because the reorganization was a surprise to the personnel officers making the decisions about Hayden and other protocol officers in the April-May 2012 time period. Because they were not aware that the reorganization was coming, it is unlikely that they would have denied Hayden the promotion, if he had been present.

If Hayden had been present at work, instead of on active duty, in the April-May time period, he very likely would have been promoted to GS-12. If he had been promoted, and then the reorganization had occurred, DAF would have been required to pay Hayden a GS-12 salary to do GS-11 work or to find him another suitable GS-12 position at WPAFB. It is clear that DAF violated section 4311(a) when it considered his performance of uniformed service in deciding to deny him the opportunity to be promoted to GS-12. DAF cannot *prove* that it would have denied him the promotion anyway, even if he had not been away from work for service at the time.

The MSPB correctly held that DAF denied Hayden the opportunity for promotion because of his service, but the MSPB then failed to *shift the burden of proof to DAF,* the Federal Circuit held. Because Hayden had already established that his performance of uniformed service was a motivating factor in denying him the opportunity for promotion through the desk audit process, DAF can avoid liability under section 4311 only by proving that *it would not have promoted Hayden anyway, even if he had not been away from work for service at the time.* It was not sufficient for DAF to show that it *might have* denied Hayden the promotion anyway. The Federal Circuit vacated the MSPB's adjudication of Hayden's section 4311(a) claim and remanded the case to the MSPB to make more specific findings of fact.

DAF may have violated section 4311(b) by denying him the promotion on the basis of his actions to enforce his USERRA rights.

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 enforce a protection afforded any person under this chapter,* …[16]

Hayden's theory is that DAF denied him the promotion because it was annoyed with him for having contacted ESGR in an attempt to enforce his USERRA rights. I think that both the MSPB and the Federal Circuit gave short shrift to Hayden's 4311(b) claim, but this issue may be moot. The relief that the MSPB could award for the 4311(b) violation probably duplicates the relief that he is likely to receive for the 4311(a) violation.

DAF may have violated section 4313(a)(2)(A) when it denied Hayden reinstatement as a GS-12 when he returned to work, after military service, in December 2012.

Under section 4313(a)(2)(A),[17] Hayden was entitled to reinstatement as a GS-12 (rather than a GS-11) if it can be said with *reasonable certainty* that he would have been promoted to GS-12 if he had remained continuously employed. Hayden need not establish with *absolute certainty* that he would have been promoted—he only needs to establish reasonable certainty.[18]

In the MSPB hearing, there was testimony from a federal civilian personnel officer. She testified that she was familiar with hundreds of cases involving a desk audit being conducted after a federal supervisor suggested that an employee be promoted, and that in only three of those cases was the employee denied the promotion requested by the supervisor. I think that it is likely that, if the MSPB had applied the proper legal standard, Hayden would have been able to establish with reasonable certainty that he would have been promoted to GS-12 if he had not been away from work for service, and that he was therefore entitled to the promotion upon his reemployment.

Here again, I believe that the MSPB and the Federal Circuit gave short shrift to Hayden's claim, but the issue may be moot because the remedy would be duplicative.

Relief that the MSPB is likely to award

USERRA provides:

> If the Board [MSPB] 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

[16] 38 U.S.C. 4311(b) (emphasis supplied).
[17] 38 U.S.C. 4313(a)(2)(A).
[18] Please see Law Review 16060 (July 2016) and Law Review 16054 (June 2016) for a detailed discussion of the reasonable certainty test.

such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.[19]

Hayden was finally promoted to GS-12 in 2015. That promotion obviates the need for an MSPB order requiring that he be promoted to GS-12, but it certainly does not moot this case. Hayden is entitled to compensation for the difference in pay (the GS-12 pay that he should have received minus the GS-11 pay that he did receive) for the interim period. He is also entitled to an MSPB order requiring DAF to amend its records to show that he was promoted to GS-12 in 2012, rather than 2015. The earlier effective date for the promotion is important because it affects the timing of his eligibility for promotion to GS-13 and beyond.

Hayden is also entitled to substantial attorney fees. USERRA provides:

> If the Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted directly to the Board pursuant to subsection (b) that such person is entitled to an order referred to in paragraph (2), the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.[20]

Hayden is entitled to attorney fees, perhaps far in excess of the monetary relief that he receives.[21]

The Air Force must comply with USERRA.

I think that it is unconscionable that the Air Force, as a civilian employer, flouts USERRA. As I explained in Law Review 16055 (June 2016) and Law Review 16036 (April 2016), Congress has stated its expectation that the Federal Government should be a model employer is carrying out the provisions of USERRA.[22] An armed force, when acting as a civilian employer, should be triply the model employer. How do we get the restaurant owner in Dayton to comply with USERRA when she learns that the Air Force, at nearby WPAFB, flouts this law?

Kudos for Hayden's attorney

I congratulate attorney Stephen J. Smith of the law firm Cadwalader, Wickersham & Taft for his imaginative, diligent, and effective representation of Carl D. Hayden.

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[19] 38 U.S.C. 4324(c)(2).
[20] 38 U.S.C. 4324(c)(4).
[21] *See Huhmann v. FedEx Corp.,* 2015 U.S. Dist. LEXIS 141372 (S.D. Cal. October 16, 2015). In that case, the plaintiff received $10,500 in monetary relief and $217,000 in attorney fees. I invite the reader's attention to Law Review 16060 (July 2016), concerning the *Huhmann* case. Unfortunately, Hayden cannot recover attorney fees for the representation in the Federal Circuit. *See Erickson v. United States Postal Service,* 759 F.3d 1341 (Fed. Cir. 2014, *cert. denied,* 135 S. Ct. 2919 (2015).
[22] 38 U.S.C. 4301(b).