

## LAW REVIEW 16123<sup>1</sup>

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### In a USERRA Case, the Veteran Plaintiff Cannot Be Required To Pay the Defendant's Court Costs

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

Update on Sam Wright

***Hance v. BNSF Railway Corp., Case No. 2:13-cv-02656-STA-tmp (United States District Court for the Western District of Tennessee November 30, 2016).***

1.2—USERRA forbids discrimination

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

As I explained in Law Review 16031 (April 2016), Kent Hance was (until he retired recently) a noncommissioned officer in the Tennessee Army National Guard. While employed by Norfolk Southern Railway Company (NSRC), he had a very difficult relationship with his civilian supervisors relating to his National Guard service and his absences from his civilian job necessitated by that service. In January 2001 NSRC suspended him without pay for alleged “insubordination” and fired him in August 2001.

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<sup>1</sup> I invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find more than 1500 “Law Review” articles about military voting rights, reemployment rights, and other military-legal topics, 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.

<sup>2</sup> 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 (June 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.

Hance sued NSRC and won in the District Court, which held that the suspension and firing were motivated at least in part by his National Guard service and thus violated section 4311 of the Uniformed Services Employment and Reemployment Rights Act (USERRA).<sup>3</sup> NSRC appealed to the United States Court of Appeals for the 6<sup>th</sup> Circuit.<sup>4</sup> The 6<sup>th</sup> Circuit largely affirmed the district court's judgment for Hance but reversed on two minor points relating to the computation of damages. The 6<sup>th</sup> Circuit remanded the case to the district court for a recomputation of damages.

On remand, Hance and NSRC settled. Under the settlement, Hance received more than \$500,000 in back pay and attorney fees, but he did not receive reinstatement to the NSRC job.

Several years later, Hance applied to Burlington Northern Santa Fe Railway Company (BNSF) for a job like the job that he had held at NSRC. He was interviewed but was not offered a job. He sued BNSF, contending that the company had denied him initial employment based on his continuing National Guard service and based on the successful lawsuit that he had brought against another company in the same industry.

As I explained in detail in Law Review 16031, Hance lost his lawsuit against BNSF. The district court held that BNSF had denied him initial employment because of his misrepresentations and lack of candor in the BNSF application process, not because of his National Guard service or his having asserted his USERRA rights against another railroad.

Hance appealed to the 6<sup>th</sup> Circuit and lost. The appellate court affirmed the district court's judgment that BNSF had not violated USERRA. As I predicted in Law Review 16031, the 6<sup>th</sup> Circuit denied rehearing and rehearing en banc. Hance's lawsuit ended just recently (November 30) when the district court entered a final judgment for the defendant (BNSF) but denied the company's motion to be awarded court costs.<sup>5</sup>

As I explained in detail in Law Review 16099 (September 2016), in a federal civil case each party incurs court costs in the lead-up to and conduct of the trial, for things like the costs of conducting and recording depositions during the discovery process. Under the Federal Rules of Civil Procedure (FRCP), at the end of the case the court ordinarily orders the losing party to pay the prevailing party's court costs.

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<sup>3</sup> 38 U.S.C. 4311.

<sup>4</sup> The 6<sup>th</sup> Circuit is the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee.

<sup>5</sup> Please see the case citation at the start of this article.

USERRA cases are exempted from this automatic allocation of court costs against the losing plaintiff. USERRA provides: “No fees or court costs may be charged or taxed against any person claiming rights under this chapter.”<sup>6</sup>

In accordance with the FRCP, BNSF asked the court to order Hance to pay the railroad’s court costs in the case. The district court correctly held that section 4323(h)(1) supersedes the FRCP. Accordingly, the district court denied BNSF’s motion to order Hance to pay the defendant’s court costs. This case is now over.

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<sup>6</sup> 38 U.S.C. 4323(h)(1).