LAW REVIEW 16126[1]
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Great New Third Circuit USERRA Precedent

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

1.2—USERRA forbids discrimination
1.4—USERRA enforcement
1.8—Relationship between USERRA and other laws/policies

Carroll v. Delaware River Port Authority, **No. 16-2492 (3rd Cir. December 12, 2016).**[3]

Anthony J. Carroll was hired as a police officer for the Delaware River Port Authority (DRPA)[4] in 1989. He was promoted to Corporal in the police department in 2004.

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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 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.

[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 (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.

[3] This is a very recent decision of the United States Court of Appeals for the 3rd Circuit, the federal appellate court that sits in Philadelphia and hears appeals from district courts in Delaware, New Jersey, and Pennsylvania. As in federal appellate courts generally, the case was heard by a panel of three appellate judges. In this case, the three judges were Thomas L. Ambro, Julio M. Fuentes, and Patty Shwartz. Judge Fuentes wrote the decision, and the other two judges joined in a unanimous decision.

[4] Per its website, www.drpa.org, the DRPA is a regional transportation agency that serves a steward of four bridges, a ferry, and a mass transit line across the Delaware River between Pennsylvania and New Jersey. The DRPA was created in 1919 by a congressionally approved interstate compact between the two states. Contrary to the argument that they sometimes try to make, interstate compact organizations are not exempt from USERRA and other federal employment laws.

Carroll has served as a member of Reserve Components of the armed forces for the entire time that he has been employed by the DRPA. He was a corpsman (enlisted medical specialist) in the Navy Reserve for six years, and then a member of the Pennsylvania National Guard for ten years and continuing. In early 2009, he was called to active duty and deployed to Iraq, where he was wounded in action.

Because of his wounds, he suffered from cervical spondylosis, degenerative disk disease, bilateral torn rotator cuffs, high frequency hearing loss, and brain injury. He returned to the United States in late 2009 but was retained on active duty until late 2013, when he was honorably discharged. While on active duty, he received a great deal of medical treatment and rehabilitation. He has not worked for the DRPA since early 2009, just before he deployed to Iraq.

In October 2010 and again in October 2012, while on active duty and in rehabilitation, he applied for promotion to the rank of Sergeant in the DRPA police force, but he was not promoted. He sued the DRPA in the United States District Court for the District of New Jersey. The case was assigned to Judge Noel L. Hillman. In his lawsuit, Carroll asserted that the denial of promotion to Sergeant violated section 4311 of the Uniformed Services Employment and Reemployment Rights Act (USERRA). That section provides as follows:

> § 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited
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> - **(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 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.
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> - **(b)** 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, (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 with respect to a person regardless of whether that person has performed service in the uniformed services.
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> - **(c)** 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 services 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.

- **(d)** The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.[5]

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA[6] and President Bill Clinton signed it on October 13, 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA's legislative history includes the following statement about the allocation of the burden of proof in section 4311 cases:

> Section 4311(b) [later renumbered 4311(c)] would reaffirm that the standard of proof in a discrimination or retaliation case is the so-called "but for" test and that the burden of proof is on the employer, once a prima facie case is established. This provision is simply a reaffirmation of the original intent of Congress when it enacted current section 2021(b)(3) of title 38, in 1968. *See* Hearings of H.R. 11509 Before Subcommittee No. 3 of the House Committee on Armed Services, 89th Cong., 1st Sess., at 5320 (Feb. 23, 1966). In 1986, when Congress amended section 2021(b)(3) to prohibit initial hiring discrimination against Reserve and National Guard members, Congressman G.V. Montgomery (sponsor of the legislation and Chairman of the House Committee on Veterans' Affairs) explained that, in accordance with the 1968 legislative intent cited above, the courts in these discrimination cases should use the burden of proof analysis adopted by the National Labor Relations Board and approved by the Supreme Court under the National Labor Relations Act. *See* 132 Cong. Rec. 29226 (Oct. 7, 1986) (statement of Cong. Montgomery) citing *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983).[7]

There was a lengthy period of discovery in Carroll's lawsuit against the DRPA. At the end of discovery, Carroll filed a motion for partial summary judgment on his section 4311 claim and the DRPA filed a motion for summary judgment for the case as a whole. Under the Federal Rules of Civil Procedure, the judge should grant a motion for summary judgment if he or she can say, after a careful review of the evidence, that there is no evidence (beyond a mere scintilla) in support of the non-moving party's claim or defense and that no reasonable jury could find for the non-moving party. Judge Hillman denied the cross motions for summary judgment and set the case for trial.

The DRPA argued that the plaintiff in a section 4311 case involving non-promotion is required to plead specifically and to prove that he or she is "objectively qualified" for the higher position. Carroll strenuously opposed this argument, and Judge Hillman did not accept it.

The DRPA asked for leave of court to file an interlocutory appeal on this important question of law. Normally, a party is permitted to appeal from the trial court to the appellate court only after the party has lost on a dispositive decision by the trial court. In unusual circumstances, and with leave of court, a party is permitted to appeal on an important legal issue that is not dispositive. The judge will grant leave

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[5] 38 U.S.C. 4311 (emphasis supplied).
[6] Public Law 103-353.
[7] House Committee Report, April 28, 1993 (H.R. Rep. No. 103-65, Part 1. This committee report is reprinted in its entirety in Appendix B-1 of *The USERRA Manual* by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found at pages 665-66 of the 2016 edition of the *Manual.*

to file an interlocutory appeal if the judge finds that permitting such an appeal serves the interest of judicial economy. Judge Hillman granted the DRPA leave to file such an interlocutory appeal.

Judge Hillman then drafted a question for the appellate court and certified the case to the 3rd Circuit. He drafted the question as follows: "In a failure-to-promote discrimination suit under USERRA, must a plaintiff plead and prove that he or she was objectively qualified for the position sought?"

The 3rd Circuit panel answered the question in the negative, relying on the legislative history cited and on the leading Federal Circuit precedent on this question.[8] In a scholarly opinion joined by his two colleagues, Judge Fuentes got it right and cited appropriate legal authority. This helpful precedent will make it easier for USERRA plaintiffs to prevail in section 4311 cases, especially in the 3rd Circuit (Delaware, New Jersey, and Pennsylvania).

We will keep the readers informed of future developments in this interesting and important case.

[8] *See Sheehan v. Department of the Navy,* 240 F.3d 1009, 1013 (Fed. Cir 2001). The Federal Circuit is the federal appellate court that sits in our nation's capital and has nationwide jurisdiction, but only as to certain kinds of cases, including appeals from the Merit Systems Protection Board (MSPB). Under section 4324 of USERRA, a person claiming that his or her USERRA rights have been violated by a federal executive agency, as employer, can file such a claim with the MSPB, and the decision of the MSPB can be appealed by the plaintiff service member or veteran (but not by the agency) to the Federal Circuit.