LAW REVIEW 17015[1]
February 2017

USERRA Makes It Unlawful for an Employer To Discriminate Against You Based on Regular or Reserve Military Service, Recently or Long Ago.

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Update on Sam Wright

1.1.3.2—USERRA applies to regular military service
1.2—USERRA forbids discrimination

Q: I am a Vietnam veteran. I was born in 1947, so I turn 70 this year, but I am not ready to retire. I was drafted in 1966 and honorably discharged in 1968. I spent one year with "boots on the ground" in South Vietnam and saw several buddies killed in action.

I have read with great interest several of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). Recently, I was fired by the company where I have worked for many years. I am a veteran. I was fired. Firing me violated USERRA, right?

Answer, bottom line up front:

Not necessarily. You can sue, but to prevail you need *evidence* that your military service almost half a century ago was *a motivating factor* in the employer's decision to fire you. Without such evidence, you are wasting your time and money, and the court's time, bringing such a lawsuit.

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[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1600 "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 1400 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 the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for more than 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, 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.

USERRA applies to regular military service as well as Reserve Component service.[3] Section 4311 of USERRA forbids discrimination based on past service (as well as current service and the obligation to perform future service). This includes service in the distant past and service prior to the enactment of USERRA in 1994. But more than 99% of *meritorious* section 4311 cases involve persons who are *currently serving* in the Reserve Components of the armed forces.

A currently serving Reserve Component member will need time off from work for drill weekends, annual training, and other voluntary or involuntary military service. Almost one million Reserve Component members have been called to the colors since the terrorist attacks of 9/11/2001. This voluntary and involuntary service is protected by USERRA, but it is not difficult to believe that an employer would be annoyed by the inconvenience and expense that such service causes to the civilian employer, and that the employer would seek to eliminate or avoid such inconvenience and expense by firing the Reserve Component service member or by discriminating in hiring against such service members.

You completed your military service decades ago. Your service imposes no inconvenience or expense on your civilian employer. Thus, it seems unlikely that the employer's decision to fire you was motivated by your military service. To find evidence of anti-military animus, you need to start with a credible theory as to how or why your employer had an animus against you *based on your military service.*

If you want to challenge the lawfulness of the firing, you need to consult with an attorney and to consider other possible legal theories. It may be that the firing violated the Age Discrimination in Employment Act.

Explanation:

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA in 1994 as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. Under the VRRA, a person who was drafted or who voluntarily enlisted in the armed forces was entitled to reemployment in the pre-service civilian job after honorable service. In 1955 and 1960, Congress expanded the VRRA to apply also to initial active duty training, active duty for training, and inactive duty training performed by Reserve and National Guard members.

When leaving a job for service and returning to the job became a recurring phenomenon rather than a once-in-a-lifetime experience, Congress amended the VRRA in 1968, adding a provision making it unlawful for an employer to fire a Reserve Component service member or to deny such a person promotions or "incidents or advantages of employment" based on "obligations as a member of a Reserve Component of the armed forces." In 1986, Congress amended this provision to forbid discrimination in hiring.

[3] Please see Law Review 16111 (October 2016).

The VRRA only forbade discrimination based on "obligations as a member of a Reserve Component of the armed forces." USERRA's anti-discrimination provision is much broader. It forbids the denial of initial employment, retention in employment, promotion, or a benefit of employment based on membership in a uniformed service, application to join a uniformed service, *performance of service,* or application or obligation to perform service.[4]

If you prove that your *performance of service* from 1966 to 1968 was a motivating factor in the employer's decision to deny you retention in employment (fire you), you win, unless the employer can *prove* (not just say) that it would have fired you anyway for lawful reasons unrelated to your military service. In other words, the *burden of proof* shifts to the employer, but only *after* you prove that your military service was a motivating factor in the employer's decision to terminate your employment.[5]

Because your service ended long before you began working for this employer, and because your service imposed no expense or inconvenience on this employer, it will probably be most difficult for you to prove motivating factor. Your 1966-68 service was likely a matter of total indifference to the employer, and the employer may not have known that you are a veteran.

I am aware of one case involving a successful section 4311 claim by a person who was not a serving RC member when he or she was fired. The case is *Carter v. Siemens Business Services LLC.*[6]

Thomas J. Carter, the plaintiff in that case, is a retired Army Reserve Captain and a life member of the Reserve Officers Association (ROA). He served on active duty in the Army for ten years, as an enlisted member. After he left active duty, he was commissioned as a junior officer and served another ten years in the Army Reserve. He became a "gray area retiree" in 1996.[7]

Carter was hired by Siemens Business Services (SBS) almost nine years later, in February 2005. While he worked for SBS, Carter did not participate in drill weekends or annual training or other military duties. He was subject to recall to active duty, but only in a truly extreme national emergency. His military activities were entirely in the past, and those activities imposed no burdens on SBS. Nonetheless, he was proud of his military service and made no secret of it. His SBS colleagues and supervisors were aware that he had served in the Army.

Carter was a member of a ten-member SBS work team. He reported to work daily at an SBS facility in northern Illinois, while the other nine members worked at a facility in Ohio, several

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[4] 38 U.S.C. 4311(a).
[5] 38 U.S.C. 4311(c).
[6] 2010 U.S. Dist. LEXIS 92354 (N.D. Ill. September 2, 2010). I discuss this case in detail in Law Review 15016 (February 2015).
[7] A "gray area retiree" is a person who has met all the requirements for a Reserve Component retirement except having attained his or her 60th birthday.

hundred miles away. Another member of the SBS team awoke before 4 am, at her home in Ohio, and sent herself an e-mail in which she alleged that Carter, in a telephone conversation the day before, had threatened to "gather my blahblah troops" and travel to Ohio to kill the acting supervisor of the group. She later shared the e-mail with SBS management, and managers gave credence to the report despite Carter's vehement denial of having said any such thing and despite several indicia of unreliability of the report.

When she alleged that Carter had made a threat to kill the acting manager, the fellow employee also provided a photograph of Carter in his Army dress uniform, claiming that the photograph proved that Carter was "an assassin." An e-mail thread within SBS showed that managers took the alleged threat seriously because Carter "served in a military unit that specialized in killing."[8]

By crediting an otherwise incredible allegation simply because Carter had served in the Army, and by acting on the allegation by terminating Carter's employment, SBS violated section 4311 of USERRA, Carter alleged in his lawsuit. SBS strenuously sought to avoid trial, by making a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure (FRCP) and a motion for summary judgment under Rule 56. In a scholarly decision, Judge Matthew F. Kennelly of the United States District Court for the Northern District of Illinois denied the company's motion to dismiss and its motion for summary judgment.

After failing to avoid trial, SBS settled, paying Carter an undisclosed amount of money to dismiss his case. The company has not admitted liability, but defendants do not normally settle unless they believe that they can lose.

The *Carter* case is "the exception that proves the rule" that only serving Reserve Component members are likely to succeed when claiming that their firing was motivated by their uniformed service. The *Carter* case involved very unusual circumstances that may never recur. Absent such unusual circumstances, the employer has no tangible reason to be annoyed with an employee based on military service that is entirely in the past and does not impinge on the employer's interests.

[8] The fellow employee making the allegation and the SBS managers apparently believed that Carter had been a Special Forces soldier. Ironically, Carter was never Special Forces, but as an Army Reserve soldier he had served as the finance officer and had on occasion assisted a Special Forces unit with travel claims and other administrative details, and the unit had invited him to the Special Forces Ball.