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Proving a Violation of Section 4311 of USERRA: A Case Study

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Update on Sam Wright

[1] I invite the reader's attention to www.roa.org/lawcenter. 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. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me at (800) 809-9448, extension 730, or by e-mail at SWright@roa.org. Please understand that I am a volunteer, so I may not be able to respond to you the same day.

[3] Thomas's practice is focused on serving Veterans. He represents individuals and class actions in USERRA litigation and individuals and organizations in state and federal civil appeals. Thomas received his JD from Gonzaga University School of Law in 2007 and a MBA from the Columbia College School of Business in 2000. During law school he served as an associate editor for the Gonzaga Journal of International Law and as a Thomas More Scholar. Following law School, Thomas served in a two year clerkship at the Washington State Court of Appeals Div. III. Thomas is admitted to practice in Washington State; the Federal District Courts of Washington, Colorado and Wisconsin; the 5th, 7th, 8th, 9th, 10th, 11th and the Federal Circuit Court of Appeals; the Merit System Protection Board; and the United States Supreme Court. Thomas currently serves on the steering committee, and as the E. Washington Director, for the Washington State Veterans Bar Association. He is an accredited attorney by the U.S. Department of Veterans Affairs and his law firm is certified by the Washington State DAV as a Veteran Owned Business. Thomas has a 10/10 "Superb" rating from the AVVO legal rating forum and is "AV" rated, a "Preeminent" rating from both peers and clients through Martindale-Hubbell.

Thomas retired following 25 years of service in the United States Marine Corps and Reserve, including two combat tours in Iraq. He is active in his state and local Veterans communities and a life member of both the Reserve Officers Association and Disabled American Veterans. He is the current chair of the Washington State Veterans Bar Association. His pro bono work consists of representing Veterans and survivors in benefits and appeal cases. Thomas resides in Spokane, WA with his wife and three children.

1.2—USERRA forbids discrimination
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USERRA text and legislative history

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 "any obligation as a member of a Reserve Component of the Armed Forces." In 1986, Congress amended this provision to forbid discrimination in hiring.

The VRRA only forbade discrimination based on "any obligation 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]

Just prior to the enactment of USERRA in 1994, the pertinent section of the VRRA read as follows:

> Any person who seeks or holds a position described in clause (A) [a position with the United States Government, any territory or possession of the United States or a political subdivision of a territory or possession, or the Government of the District of Columbia] or (B) [a state, a political subdivision of a state, or a private employer] of subsection (a) of this section shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment *because of any obligation as a member of a Reserve component of the Armed Forces.*[5]

[4] 38 U.S.C. 4311(a).
[5] 38 U.S.C. 4321(b)(3) (1988 edition of the United States Code) (emphasis supplied).

USERRA (enacted in 1994) contains a much broader and stronger anti-discrimination provision, as follows:

> § 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

- **(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.

- **(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.

- **(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.[6]

[6] 38 U.S.C. 4311 (emphasis supplied).

Section 4321(b)(3) of the VRRA forbade discrimination by employers only if such discrimination was "because of any obligation as a member of a Reserve component of the Armed Forces." Section 4311 of USERRA forbids discrimination based on any one of the following statuses or activities:

a. Membership in a uniformed service.[7]
b. Application to join a uniformed service.
c. Performing uniformed service.
d. Having performed uniformed service in the past.
e. Application to perform uniformed service.
f. Obligation to perform uniformed service.
g. Having taken an action to enforce a USERRA protection for any person.
h. Having testified or otherwise made a statement in or in connection with a USERRA proceeding.
i. Having assisted or otherwise participated in a USERRA investigation.
j. Having exercised a USERRA right.

Under section 4311(c) of USERRA,[8] it is not necessary to prove that one of the protected statuses or activities was *the reason* for the firing, denial of initial employment, or denial of a promotion or a benefit of employment. It is sufficient to prove that one of the protected activities or statuses was *a motivating factor* in the employer's decision. If the plaintiff proves motivating factor, the *burden of proof shifts to the employer to prove (not just say) that it would have made the same decision in the absence of the protected status or activity.*

USERRA's legislative history explains section 4311 as follows:

> Current law [the VRRA] protects Reserve and National Guard personnel from termination from their civilian employment or other forms of discrimination based on their military obligations. Section 4311(a) would reenact the current prohibition against discrimination which includes discrimination against applicants for employment (*see Beattie v. The Trump Shuttle, Inc.,* 758 F. Supp. 30 (D.D.C. 1991), current employees who are active or inactive members of Reserve or National Guard units, current employees who seek to join Reserve or National Guard units (*see Boyle v. Burke,* 925 F.2d 497 (1st Cir. 1991), or employees who have a military obligation in the future such as a person who enlists in the Delayed Entry Program which does not require leaving the job for

[7] As defined by USERRA, the uniformed services include the Army, Navy, Marine Corps, Air Force, and Coast Guard, as well as the commissioned corps of the Public Health Service (PHS). 38 U.S.C. 4303(16). The commissioned corps of the National Oceanic and Atmospheric Administration (NOAA) is not a uniformed service for USERRA purposes, although it is a uniformed service as defined in 10 U.S.C. 101(a)(5). Please see Law Review 15002 (January 2015) for an explanation of how it came to pass that USERRA applies to the PHS Corps but not the NOAA Corps. Under more recent amendments, Intermittent Disaster Response Appointees of the National Disaster Medical System under the cognizance of the Department of Health and Human Services and persons who serve in the National Urban Search and Rescue Response System under the cognizance of the Federal Emergency Management Agency in the Department of Homeland Security have reemployment rights under USERRA. Please see Law Review 17011 (February 2017).

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

several months. *See Trulson v. Trane Co.,* 738 F.2d 770, 775 (7th Cir. 1984). The Committee [House Committee on Veterans' Affairs] intends that these anti-discrimination provisions be broadly construed and strictly enforced. The definition of employee, which also includes former employees, would protect those persons who were formerly employed by an employer and who have had adverse action taken against them by the former employer since leaving the former employment.

If the employee is unlawfully discharged under the terms of this section prior to leaving for military service, such as under the Delayed Entry Program, that employee would be entitled to reinstatement for the remainder of the time the employee would have continued to work plus lost wages. Such a claim can be pursued before or during the employee's military service, even if only for lost wages.

Section 4311(b) [now 4311(c), as amended in 1996] 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) [later renumbered 4321(b)(3)] of title 38, in 1968. *See* Hearings on H.R. 11509 Before Subcommittee No. 3 of the House Committee on Armed Services, 89th Cong., 1st Session at 5320 (February 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 (October 7, 1986) (statement of Cong. Montgomery) citing *National Labor Relations Board v. Transportation Management Corp.,* 462 U.S. 393 (1983).

This standard and burden of proof is applicable to all cases brought under this section regardless of the date of accrual of the cause of action. To the extent that courts have relied on dicta from the Supreme Court's decision in *Monroe v. Standard Oil Co.,* 452 U.S. 549, 559 (1981), that a violation can occur only if the military obligation is the sole factor (*see Sawyer v. Swift & Co.,* 836 F.2d 1257, 1261 (10th Cir. 1988), those decisions have misinterpreted the original legislative intent and history of 38 U.S.C. 2021(b)(3) and are rejected on that basis.[9]

USERRA Regulations

Two sections of the Department of Labor (DOL) USERRA Regulations address how to prove a violation of section 4311:

[9] House Committee Report, April 28, 1993 (H.R. Rep. No. 103-65, Part 1), reprinted in Appendix B-1 of *The USERRA Manual* by Kathryn Piscitelli and Edward Still. The quoted paragraphs can be found on pages 665-66 of the 2016 edition of the *Manual.*

§ 1002.22 Who has the burden of proving discrimination or retaliation in violation of USERRA?

The individual has the burden of proving that a status or activity protected by USERRA was one of the reasons that the employer took action against him or her, in order to establish that the action was discrimination or retaliation in violation of USERRA. If the individual succeeds in proving that the status or activity protected by USERRA was one of the reasons the employer took action against him or her, the employer has the burden to prove the affirmative defense that it would have taken the action anyway.[10]

§ 1002.23 What must the individual show to carry the burden of proving that the employer discriminated or retaliated against him or her?

- **(a)** In order to prove that the employer discriminated or retaliated against the individual, he or she must first show that the employer's action was motivated by one or more of the following:
    - **(1)** Membership or application for membership in a uniformed service;
    - **(2)** Performance of service, application for service, or obligation for service in a uniformed service;
    - **(3)** Action taken to enforce a protection afforded any person under USERRA;
    - **(4)** Testimony or statement made in or in connection with a USERRA proceeding;
    - **(5)** Assistance or participation in a USERRA investigation; or,
    - **(6)** Exercise of a right provided for by USERRA.

- **(b)** If the individual proves that the employer's action was based on one of the prohibited motives listed in paragraph (a) of this section, the employer has the burden to prove the affirmative defense that the action would have been taken anyway absent the USERRA-protected status or activity.[11]

Case law under section 4311 of USERRA

***Staub v. Proctor Hospital*[12]**

While employed by Proctor Hospital as an angiography technician, Vincent Staub (a noncommissioned officer in the Army Reserve) was required to attend one drill weekend per month and two or three weeks of full-time training per year. Because the angiography department of the hospital required weekend staffing, Staub's military obligations imposed some burden on the hospital.

[10] 20 C.F.R. 1002.22 (bold question in original).
[11] 20 C.F.R. 1002.23 (bold question in original).
[12] 562 U.S. 411 (2011). This is a 2011 decision of the United States Supreme Court. The citation means that you can find the decision in Volume 562 of *United States Reports* (where Supreme Court decisions are published), and the decision starts on page 411. I discuss this case in detail in Law Review 1122 (March 2011).

Both Janice Mulally, Staub's immediate supervisor, and Michael Korenchuk, Mulally's supervisor, were hostile to Staub's military obligations. Mulally scheduled Staub for additional shifts without notice so that he would have to "pay back the department for everyone else having to bend over backward to cover his schedule for the Reserves." She also informed Staub's co-worker (Leslie Swedeborg) that Staub's "military duty has been a strain on the department" and she asked Swedeborg to help her "get rid of" Staub. Korenchuk referred to Staub's military obligations as "a bunch of smoking and joking and a waste of the taxpayers' money" and he stated that he was aware that Mulally was "out to get" Staub.[13]

In January 2004, Proctor Hospital issued Staub a "corrective action" disciplinary warning for purportedly violating a company rule requiring him to stay in his work area whenever he was not working with a patient. In April 2004, Proctor Hospital fired Staub for allegedly violating the corrective action. Staub contended that both the corrective action and the allegation that he had violated it were invented by Mulally and Korenchuk based on their animus against him because of his Army Reserve service.

Proctor Hospital contended that the decision to fire Staub was made by Linda Buck, the hospital's human relations director, and that Buck was not infected by any of the anti-military animus that Korenchuk and Mulally had exhibited. But Korenchuk and Mulally clearly initiated the process that led to the firing of Staub, and Buck must have relied primarily on adverse reports about Staub's work performance that she received from Korenchuk and Mulally.

Staub sued the hospital in the United States District Court for the Central District of Illinois, claiming that the firing violated section 4311 of USERRA, 38 U.S.C. 4311. The case was tried before a jury, and Staub prevailed. After hearing the evidence in multi-day trial, and after hearing the District Judge's instructions, the jury found that Staub had proved, by a preponderance of the evidence, that his Army Reserve service was a motivating factor in Proctor Hospital's decision to terminate his employment, and that the hospital had not proved that it would have fired him anyway, for lawful reasons, in the absence of his membership in the Army Reserve, his performance of uniformed service, and his obligation to perform future service.

The District Judge denied Proctor's motion for new trial and motion for judgment notwithstanding the verdict. Proctor then appealed to the United States Court of Appeals for the 7th Circuit.[14] A three-judge panel of the 7th Circuit reversed the District Court verdict for Staub, holding that under the "cat's paw doctrine"[15] Proctor Hospital could not be held liable

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[13] These facts come directly from the majority opinion, written by Justice Antonin Scalia. At the outset, Justice Scalia wrote: "Staub and Proctor hotly dispute the facts surrounding the firing, but because the jury found for Staub in his claim of employment discrimination against Proctor, we describe the facts in the light most favorable to him."

[14] The 7th Circuit is the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.

[15] The "cat's paw" reference is to a fable written by Aesop about 25 centuries ago and put into verse by LaFontaine in 1679. In the fable, a clever monkey induces a cat by flattery to extract roasting chestnuts from the fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing. See footnote 1 of the majority opinion.

for discrimination by Korenchuk and Mulally unless Staub proved that Buck was "singularly influenced" by the two direct supervisors.

Staub applied to the 7th Circuit for rehearing *en banc*, but that motion was denied. Staub applied to the Supreme Court for discretionary review, which was granted. Briefs for the parties and friends of the court (including ROA) were filed in July and August 2010. The oral argument was held on November 2, 2010, and the decision came down March 1, 2011.

Justice Antonin Scalia wrote the majority decision, and his opinion was joined by Chief Justice John Roberts, Justice Anthony Kennedy, Justice Ruth Bader Ginsburg, Justice Stephen Breyer, and Justice Sonia Sotomayor. The majority decision relied on principles of agency law and tort law and found that the employer (Proctor Hospital) was liable for the discriminatory actions of supervisory employees Korenchuk and Mulally and that requiring Staub to prove that Buck was "singularly influenced" by the two immediate supervisors was inconsistent with those principles.

Near the end of the majority opinion, Justice Scalia summarized the Court's holding as follows:

> We therefore hold that if a supervisor performs an act motivated by anti-military animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA.[16]

Justice Samuel Alito, joined by Justice Clarence Thomas, wrote a concurring decision, agreeing with the result (reversal of the 7th Circuit) but relying on the text of USERRA rather than general principles of agency law and tort law. Justice Elena Kagan did not participate.

***Sheehan v. Department of the Navy*[17]**

In an important precedential decision, the Federal Circuit set forth the mode of proving a violation of section 4311, as follows:

> Discriminatory motivation under USERRA may be reasonably inferred from a variety of factors, including (1) proximity in time between an employee's military activity and the adverse employment action, (2) inconsistencies between the proffered reasons [the reasons the employer asserts were the reasons for the adverse employment action] and other actions of the employer, (3) an employer's expressed hostility towards members

[16] *Staub,* 562 U.S. at 422 (emphasis in original).

[17] 240 F.3d 1008 (Fed. Cir. 2001). This is a 2001 decision of the United States Court of Appeals for the Federal Circuit, the 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. The citation means that you can find this decision in Volume 240 of *Federal Reporter, Third Series,* and this decision starts on page 1008.

> protected by the statute, and (4) disparate treatment of certain employees compared to other employees with similar work records or offenses.[18]

***Erickson v. United States Postal Service*[19]**

Some employers argue: We did not fire Joe Smith because of his military service. We fired him because he was *absent from work* while performing that service. In an important USERRA case, the United States Postal Service made that argument, and the MSPB accepted it. On appeal, the Federal Circuit firmly rejected this nonsensical argument, holding:

> We reject that argument. An employer cannot escape liability under USERRA by claiming that it was merely discriminating on the basis of absence when the 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.[20]

***Bobo v. United Parcel Service*[21]**

Walleon Bobo is a Lieutenant Colonel in the Army Reserve (now retired) and was employed by United Parcel Service (UPS) as a supervisor of drivers, until the company fired him. UPS supervisors like Bobo were required to conduct "safety rides" for each driver on an annual basis and after an accident. Because of a shortage of supervisors, Bobo and other supervisors frequently conducted safety rides that did not fully comply with written UPS standards. UPS fired Bobo for allegedly falsifying reports on safety rides.

Bobo alleged that he was being treated more harshly than other supervisors guilty of the same offense because of his Army Reserve service (in violation of section 4311 of USERRA) and because of his African American race (in violation of Title VII of the Civil Rights Act of 1964).[22] Bobo sought to prove his case by showing evidence about "comparators"—other UPS supervisors who were Caucasian and who were not participants in the Reserve or National Guard.

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[18] *Sheehan,* 240 F.3d at 1014.

[19] 571 F.3d 1364 (Fed. Cir. 2009). Lieutenant Colonel Mathew Tully and I discuss this case in detail in Law Review 14090 (December 2014).

[20] *Erickson,* 571 F.3d at 1368.

[21] 665 F.3d 741 (6th Cir. 2012). I discuss this case in detail in Law Review 13036 (March 2013).

[22] If you choose to be represented by private counsel, rather than relying on the Department of Labor (DOL) and the Department of Justice (DOJ), you can combine your USERRA claim with other claims about why an unfavorable personnel action may have been unlawful.

After discovery, UPS filed a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. The District Judge granted the motion, both as to Bobo's USERRA claim and his Title VII claim. Bobo appealed to the United States Court of Appeals for the Sixth Circuit.[23]

Under Rule 56, the district judge is to grant a motion for summary judgment (thus ending the case before trial) only if the judge 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 the moving party is entitled to judgment as a matter of law. By granting a motion for summary judgment, the judge is saying that no reasonable jury could find for the non-moving party, based on the evidence adduced during the discovery process. In considering a motion for summary judgment, the judge should not weigh conflicting evidence, because weighing evidence is the province of the jury.

On appeal, the 6th Circuit reversed the grant of summary judgment on two grounds. First, the appellate court held that the district court had improperly constrained the plaintiff's discovery and had thus prevented him from obtaining evidence to support his case. Second, the appellate court held that even with the constrained discovery there was enough evidence in support of Bobo's case to preclude granting summary judgment for UPS. The 6th Circuit held:

> In resolving this appeal, we first consider Bobo's argument that the actions of UPS and the district court during litigation of the case unfairly precluded him from presenting additional facts in support of his claims. We agree with Bobo that the district court improperly restricted the scope of discovery when it allowed UPS to determine unilaterally that the only Caucasian, non-military supervisor who was similarly situated to Bobo was Ronnie Wallace. We also conclude that the district court unduly delayed its ruling on Bobo's discovery motions until after the court had already granted summary judgment for UPS. The discovery errors alone convince us that the summary judgment in favor of UPS cannot stand, but we also conclude that the record demonstrates genuine issues of material fact for trial. As explained in more detail below, we reverse the grant of summary judgment in favor of UPS on most of Bobo's claims and remand the case to the district court with instructions.[24]
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> USERRA was enacted to prohibit discrimination against individuals because of their military service. *Hance v. Norfolk S. Ry. Co.*, 571 F.3d 511, 517 (6th Cir. 2009) (per curiam); *Curby v. Archon*, 216 F.3d 549, 556 (6th Cir. 2000). USERRA provides, among other things, that "[a] person who is a member of . . . a uniformed service shall not be denied . . . retention in employment, . . . or any benefit of employment by an employer on the basis of that membership, . . . performance of service, . . . or obligation." 38 U.S.C. § 4311(c)(1).

[23] The 6th Circuit is the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee.
[24] *Bobo,* 665 F.3d at 748.

An adverse employment action is prohibited under USERRA if the person's obligation for military service "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 . . . obligation for service." *Id*. "Protected status is a motivating factor if a truthful employer would list it, if asked, as one of the reasons for its decision." *Escher v. BWXT Y-12, LLC*, 627 F.3d 1020, 1026 (6th Cir. 2010). Discriminatory motivation may be inferred from a variety of considerations, including proximity in time between the employee's military activity and the adverse employment action, inconsistencies between the employer's conduct and the proffered reason for its actions, the employer's expressed hostility toward military members together with knowledge of the employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses. *Id*. If Bobo carries the initial burden to show by a preponderance that his protected status was a motivating factor in his discharge from employment, the burden shifts to UPS to prove affirmatively that it would have taken the same employment action in the absence of Bobo's protected status. *See* *Hance*, 571 F.3d at 518 (quoting *Sheehan v. Dep't of Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001)); *Escher*, 627 F.3d at 1026; *Petty v. Metro. Gov't of Nashville-Davidson Cnty.*, 538 F.3d 431, 446 (6th Cir. 2008).

Taking all of the evidence in a light most favorable to Bobo, we conclude that there are genuine issues of material fact for trial concerning whether Bobo's military service was a motivating factor in his discharge and whether UPS would have taken the same employment action in the absence of Bobo's protected status. The district court ruled that Morton's comment, "I did not want Walleon volunteering for additional military duty when he was needed at UPS[,]" might have satisfied Bobo's *prima facie* case under USERRA if the statement had been made by someone responsible for the decision to fire Bobo. But, the court reasoned, Bobo did not present admissible evidence to tie Morton to the termination decision, nor did he establish that Morton poisoned the minds of the ultimate decision-makers against Bobo.

To the contrary, Bobo's evidence tied Morton and Morton's direct supervisor, Wagner, directly to the termination decision. A jury could reasonably find that Morton's comment is direct evidence that Bobo's military service was a motivating factor in employment decisions. Wagner was aware of Morton's discriminatory remark because he read, signed, and dated the memorandum in which the comment was made. The evidence also shows Bobo complained to Wagner about supervisor Langford's comment that Bobo needed to choose between UPS and the Army, and that Bobo, Morton, and Wagner engaged in ongoing conversations about Bobo's requests to take leave to attend military training. Bobo felt discouraged from taking such leave, especially when Morton asked him if his military service was voluntary or involuntary. Wagner was present at the meeting when managers of the Mid-South District decided to terminate Bobo's employment.

> Bobo also produced evidence that might permit a jury to find UPS liable for a USERRA violation through the "cat's paw" theory. This phrase refers to a situation in which "a biased subordinate, who lacks decision-making power, influences the unbiased decision-maker to make an adverse [employment] decision, thereby hiding the subordinate's discriminatory intent." *Cobbins v. Tennessee Dep't of Transp.*, 566 F.3d 582, 586 n.5 (6th Cir. 2009). If a direct supervisor performs an act motivated by anti-military animus that is intended to cause an adverse employment action and that act is a proximate cause of the adverse employment action, then the employer may be held liable under USERRA based on the "cat's paw" theory. *See Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1194, 179 L. Ed. 2d 144 (2011).[25]

On remand, the district judge permitted additional discovery and then set the case for trial. After the trial was well under way, the judge learned of discovery misconduct by the UPS attorneys. He then ordered a mistrial and imposed substantial sanctions on UPS.[26] The company finally came to its senses and settled.

Carroll v. Delaware River Port Authority[27]

On December 16, 2016, the Third Circuit Court of Appeals answered a certified question regarding USERRA discrimination claims. A certified question is a question about a controlling issue of law in which a trial court requests a reasoned answer on the matter.

Carroll was hired as a police officer by the Port Authority in 1989. From 1989 to 2009, he was a member of various uniformed services, including service as a corpsman for the United States Navy and ten years of service in the Pennsylvania National Guard.

In late 2008 Carroll was again ordered to active duty and deployed to Iraq. In 2009, he sustained injuries including a brain injury and hearing loss. Carroll returned to the United States later that year and underwent rehabilitation until he was honorably discharged in 2013.

While Carroll was on active duty in 2010 and 2012, he applied and interviewed for two promotions to the rank of police sergeant. He was denied promotion in both occasions.

In 2013, Carroll sued the Port Authority under USERRA, alleging that he was not promoted to sergeant due to unlawful discrimination on the basis of his military service.

The Port Authority moved for summary judgement, argued that Carroll must raise a triable issue of fact on the question of whether he was objectively qualified for a promotion to sergeant. The District Court denied summary judgment and the case was set for trial. The Port Authority then moved the District Court for an interlocutory appeal on the question.

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[25] *Bobo,* 665 F.3d at 754-55.

[26] *See Bobo v. United Parcel Service, Inc.,* 2012 U.S. Dist. LEXIS 166429 (W.D. Tenn. November 12, 2012), affirmed in part and reversed in part, 2013 U.S. Dist. LEXIS 8473 (W.D. Tenn. January 22, 2013).

[27] *Carroll v. Del. River Port Auth.*, 843 F.3d 129 (3d Cir. N.J. 2016).

The certified question presented in *Carroll* asked:

> 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 answer of the Third Circuit was and unequivocal, "no."

This means that Mr. Carroll's case will proceed to trial, and more importantly, he is not required to prove in the first instance that he was qualified for the promotion or that he would have been promoted. This is a significant victory for USERRA discrimination plaintiffs.

Employers, may still raise a plaintiff's lack of qualifications, for example, that it would have taken the same employment actions absent a plaintiff's military service because he or she lacked the necessary qualifications for the position in question. However, that burden of proof is on the employer, not the employee.

Other case law on section 4311 of USERRA

I invite the reader's attention to Category 1.2 ("USERRA forbids discrimination") in our Law Review Subject Index. You will find more than 200 articles about section 4311, and many of them are case notes about specific court cases.

As I explained in Law Review 16044 (May 2016), Thomson Reuters Publishing Company publishes *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The book has been published annually since 2008, and the tenth edition (2017) will come out shortly. This book is the leading treatise on USERRA. Chapter 7 ("Discrimination and Retaliation") accounts for 112 pages in the 2016 edition of the *Manual.*