

LAW REVIEW¹ 17017

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Case Study in Proving a Violation of Section 4311 of USERRA

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1.1.2.1—USERRA applies to part-time, temporary, probationary, and at-will employment

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Angiuoni v. Town of Billerica, 2012 U.S. Dist. LEXIS 139058 (D. Mass. July 16, 2012).

Angiuoni v. Town of Billerica, 2012 U.S. Dist. LEXIS 139474 (D. Mass. September 27, 2012).

Angiuoni v. Town of Billerica, 2013 U.S. Dist. LEXIS 165643 (D. Mass. September 20, 2013).

Angiuoni v. Town of Billerica, 2013 U.S. Dist. LEXIS 167164 (D. Mass. November 19, 2013)

¹I invite the reader's attention to <https://www.roa.org/page/LawCenter>. You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

²BA 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. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also 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 36 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 by e-mail at SWright@roa.org.

Angiuoni v. Town of Billerica, 999 F. Supp. 2d 318 (D. Mass. 2014).

Angiuoni v. Town of Billerica, 838 F.3d 34 (1st Cir. 2016).

The law

The Uniformed Services Employment and Reemployment Rights Act (USERRA) is the federal statute that protects the civilian jobs of the brave men and women who serve our country in uniform, including but not limited to those who serve in the Reserve Components (RC).³

USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335.⁴ USERRA applies to almost all employers in our country, including the Federal Government, the states, the political subdivisions of states,⁵ and private employers, regardless of size.⁶

Under USERRA, a person who leaves a civilian job (federal, state, local, or private sector) for voluntary or involuntary service in the uniformed services is entitled to reemployment in the pre-service job if he or she gave the employer prior oral or written notice, did not exceed the cumulative five-year limit on the duration of the period or periods of uniformed service relating to that employer,⁷ was released from the period of service without having received a disqualifying bad discharge from the military, and was timely in reporting back to work or applying for reemployment.⁸

In 1973, Congress abolished the draft and established the All-Volunteer Military (AVM). To make the AVM work, Congress has established many entitlements, to encourage qualified men and women to enlist in the armed forces (Active Component and Reserve Component) and to serve to defend our country. An employer could substantially mitigate USERRA's value as an incentive to serve if it could fire military personnel because of their service or deny them hiring. Accordingly, USERRA forbids employer discrimination against those who serve, have served, apply to serve, or have an obligation to serve. The pertinent USERRA section is as follows:

³Our nation has seven Reserve Components. In order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. These Reserve Components are made up primarily (more than 90%) of part-timers who are paid only when they serve (voluntarily or involuntarily) and when they are training to serve. The number of persons actively participating in the RC is almost equal to the number serving on full-time active duty in the Active Components of the armed forces, so RC personnel make up almost half of our nation's available military manpower pool. RC personnel are a good deal for the taxpayer, because the annual cost of an individual RC service member is a small fraction of the cost of a full-time service member.

⁴38 U.S.C. 4301-35.

⁵Political subdivisions include counties, cities, towns, school districts, and other units of local government.

⁶You only need one employee to be an employer for purposes of the federal reemployment statute. See *Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992).

⁷There are nine exemptions to the five-year limit (kinds of service that do not count toward exhausting the limit). Please see Law Review 16043 (May 2016).

⁸Please see Law Review 15116 (December 2015) for a detailed discussion of these five conditions.

§ 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.⁹

Section 4311 of USERRA forbids discrimination based on any one of the following statuses or activities:

- a. Membership in a uniformed service.¹⁰

⁹38 U.S.C. 4311 (emphasis supplied).

¹⁰As 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,

- 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,¹¹ 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 applies to regular military service as well as Reserve Component service.¹² 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.

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).

¹¹38 U.S.C. 4311(c).

¹²Please see Law Review 16111 (October 2016).

The facts

Joseph Anguoni served in the Army Reserve, but he was honorably discharged *before he began his employment* with the Town of Billerica in 2009. While in the Army Reserve, he was mobilized and deployed to Southwest Asia, and he suffered a back injury in the line of duty. Under Massachusetts law, a service-connected disabled veteran is entitled to preference over all non-veteran employees of a town in layoffs, if layoffs become necessary. Thus, if Anguoni had successfully completed the probationary period as a rookie police officer he would have been entitled to a preference over other police officers in the Town of Billerica in layoffs, and that includes the more senior police officers who were responsible for training him and evaluating his performance.

After he was honorably discharged from the Army Reserve, Anguoni applied for a position as a police officer and was hired. He attended a police academy operated by the Commonwealth of Massachusetts. He was then required (like all rookies) to complete a training and probationary period. The town's police chief determined that he had not successfully completed the training and gave him additional time to qualify. After he failed to improve, the town fired him.

Applying the law to the facts

After he was fired, Anguoni sued the Town of Billerica and its police chief in the United States District Court for the District of Massachusetts. He claimed that the firing was motivated by his past military service and that the firing violated section 4311 of USERRA.

Anguoni's probationary status at the time of the firing does not shield the town from liability under section 4311. The Department of Labor (DOL) USERRA Regulation provides, in pertinent part, as follows:

Does an employee have rights under USERRA even though he or she holds a temporary, part-time, probationary, or seasonal employment position?

USERRA rights are not diminished because an employee holds a temporary, part-time, *probationary*, or seasonal employment position. However, an employer is not required to reemploy an employee if the employment he or she left to serve in the uniformed services was for a brief, nonrecurrent period and there is no reasonable expectation that the employment would have continued indefinitely or for a significant period. The employer bears the burden of proving this affirmative defense.¹³

As I explained in Law Review 17015 (February 2017), successful section 4311 cases normally involve employees or applicants for employment normally involve persons who are *currently serving* in Reserve Components of the armed forces at the time of the unfavorable personnel action (firing, denial of hiring or promotion, etc.). It is not difficult to believe that an employer

¹³20 C.F.R. 1002.41 (bold question in original, emphasis by italics supplied).

would be tempted to discriminate against a currently serving RC member, to avoid the inconvenience and expense of accommodating the individual's possibly frequent and lengthy absences from work for military training and service. If the plaintiff's military service is in the past, it does not ordinarily impose cost or inconvenience on the civilian employer, and thus it seems unlikely that the employer would be tempted to discriminate in those circumstances.

Angiuoni was not a participating RC member during his employment by the Town of Billerica, because he was honorably discharged before he was hired. Angiuoni had an unusual theory as to why the employer would be tempted to discriminate against him based on his service. Under Massachusetts law, Angiuoni would be entitled to preference in avoiding layoffs of police officers, without regard to seniority. Because layoffs were considered possible or even likely during the time that Angiuoni worked for the town, more senior police officers who were responsible for training and evaluating him had an incentive to evaluate him unfairly because they were annoyed that he might have preference over them in layoffs, if he successfully completed the probationary period.

Angiuoni offered a plausible explanation for the alleged discrimination and he had enough evidence to defeat the employer's motion for summary judgment, but not enough to convince the jury to rule for him. After a multi-day trial, the jury found that Angiuoni had not proved that his past Army service was *a motivating factor* in the employer's decision to fire him.

It appears that Angiuoni had an unfortunate propensity to argue with his instructors rather than learning from them. He was apparently unwilling to accept constructive criticism and use it to improve his performance. The Town of Billerica alleged and offered proof of multiple deficiencies in Angiuoni's performance, including:

- a. Backing a patrol car into a wall.
- b. Lack of self-initiative on patrol.
- c. Poor radio communications.
- d. Lack of knowledge of the town's streets.
- e. Failure to follow safety protocols.
- f. Lack of situational awareness.
- g. Poor quality of reports.
- h. At least one citizen complaint of rudeness during a traffic stop.
- i. Failure to pass the rifle test.¹⁴

¹⁴I did not participate in or attend the trial, and I have not read the transcript. These facts are as determined by the jury, and those are the facts that count.

Angiuoni appeals to the First Circuit¹⁵

Angiuoni filed a timely appeal with the First Circuit Court of Appeals. He was precluded from appealing the jury's finding against him on the facts, because the determination of facts is the province of the jury.¹⁶

Angiuoni made several complaints about the way the judge conducted the trial. For example, Angiuoni sought to introduce evidence that he had passed a rifle test after the town fired him. The judge held (I believe correctly) that evidence of passing the test later, after the firing, was not relevant, and the judge did not permit Angiuoni's attorney to offer that evidence.

The three-judge panel of the 1st Circuit found no merit to Angiuoni's complaints about the conduct of the trial, and the 1st Circuit affirmed the judgment for the Town of Billerica.

Angiuoni applies to the Supreme Court for certiorari

The final step in the federal appellate process is to apply to the United States Supreme Court for certiorari (discretionary review). At least four of the nine (currently eight) Justices must affirmatively vote for certiorari, or it is denied. The denial of certiorari means that the decision of the Court of Appeals stands and the case is over. Certiorari is denied more than 99% of the time.

The Supreme Court will soon deny certiorari, and this case will then be over.

Update – May 2022

On February 17, 2017, the Supreme Court of the United States denied the petition for writ of certiorari.¹⁷ The case is now over.

Please join or support ROA

This article is one of 1800-plus "Law Review" articles available at www.roa.org/page/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to

¹⁵The 1st Circuit is the federal appellate court that sits in Boston and hears appeals from district courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.

¹⁶The Seventh Amendment of the United States Constitution provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

¹⁷Angiuoni v. Town of Billerica, 137 S.Ct. 1206 (2017) (mem. op.).

advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Indeed, ROA is the *only* national military organization that exclusively supports America's Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation's seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve.

If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

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