LAW REVIEW 17023[1]
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Pro Bono Attorney Does Great Job for USERRA Claimant

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Update on Sam Wright

In our Law Review Subject Index, these are the codes that apply to this article:

1.1.1.2—USERRA applies to small employers
1.2—USERRA forbids discrimination
1.3.2.12—Special protection against discharge, except for cause
1.4—USERRA enforcement
1.8—Relationship between USERRA and other laws/policies

These are the three court decisions discussed in this article:

Wescher v. Chem-Tech International,* 2014 U.S. Dist. LEXIS 194803 (E.D. Wis. August 19, 2014) (*Wescher I.)
Wescher v. Chem-Tech International,* 2016 U.S. Dist. LEXIS 178770 (E.D. Wis. December 27, 2016) (*Wescher II).

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1700 "Law Review" articles about military voting rights, reemployment rights, and other military-legal topics, along with a detailed Subject Index, 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 1500 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.

Wescher v. Chem-Tech International,* 2017 U.S. Dist. LEXIS 259 (E.D. Wis. Jan. 3, 2017) (*Wescher III).

The facts

Roger Wescher, an Air Force Reservist, was employed for several years by Chem-Tech International, a small company in Random Lake, Wisconsin. The owner-operators of Chem-Tech became quite frustrated with Wescher concerning his frequent and sometimes lengthy absences from work for Air Force Reserve training and service, although those absences were clearly protected by the Uniformed Services Employment and Reemployment Rights Act (USERRA).[3]

Chem-Tech retained a personnel consultant to advise the company as to how it might rid itself of the inconvenience imposed by Wescher's absences from work for military service. The consultant advised the company of its obligations under USERRA and advised the company to proceed carefully. The consultant also gave the company a road map as to how it might patiently build a case for firing Wescher for reasons unrelated to his military service, while disguising the fact that the motivation for the firing was irritation with his service.

As part of that plan, the company surreptitiously installed Global Positioning System (GPS) tracking devices on the company vehicles used by Wescher and other employees to do their company work. The tracking device installed on the vehicle assigned to Wescher showed that he frequently drove the vehicle faster than posted speed limits and that he used the vehicle to drive his children to and from school, in violation of company policy. Chem-Tech fired Wescher and insisted that the firing was motivated by Wescher's driving practices, not by his Air Force Reserve service.

Practical advice for Reserve Component members

In Law Review 12106 (November 2012), I wrote:

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[3] Almost one million Reserve Component (RC) personnel have been called to the colors since the terrorist attacks of 9/11/2001, and many of them have been called up more than once. The RC has been transformed from a strategic reserve (available only for World War III, which thankfully never happened) to an operational reserve (routinely called for intermediate military operations like Iraq and Afghanistan). RC service is no longer limited to "one weekend per month and two weeks in the summer." USERRA requires employers to give employees unpaid military leave for all such service, voluntary or involuntary, and USERRA makes it unlawful for an employer (federal, state, local, or private sector) to discriminate against RC members with respect to initial employment, retention in employment, benefits, and promotions. Congress fully recognized that USERRA imposes a burden on civilian employers, but that burden is tiny compared to the much greater burdens (sometimes the ultimate sacrifice) voluntarily undertaken by those who serve our country in uniform, in the RC or the Active Component (AC). Without a law like USERRA, the services would be unable to recruit and retain a sufficient quality and quantity of military personnel to defend our country. Please see Law Review 14080 (July 2014).

> Perhaps your employer is annoyed with you because you have been called to the colors five times since the terrorist attacks of September 11, 2001, and may be called up again. Perhaps the employer is looking for an excuse to fire you. If that is the case, the last thing that you should do is to give the employer such an excuse.

I have given the same advice in several other articles. I regret that Wescher did not read my articles and that I did not have the opportunity to advise him in person or by telephone. I certainly would have advised him to comply punctiliously with company policies concerning safe driving and not using the company's vehicles for personal errands.

Wescher's legal theories

Having said that, let me quickly add that the fact Wescher disobeyed company rules did not give the company a license to fire him because it was annoyed with him about his USERRA-protected absences from work for military service. Under section 4311 of USERRA, the firing was unlawful if Wescher's military service was *a motivating factor* (not necessarily the sole reason) in the company's decision to terminate his employment. If Wescher proves motivating factor, the company is liable for violating USERRA unless it can *prove* (not just say) that it would have fired Wescher anyway, for lawful reasons unrelated to his military service.[4] When this case finally got to a jury, the jury found that Wescher's military service was a motivating factor in the employer's decision to fire him and that the company had not proved that it would have fired him anyway.

Wescher asserted that the firing violated section 4311 of USERRA, which provides 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

[4] 38 U.S.C. 4311(c).

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.[5]

I invite the reader's attention to Law Review 17016 (March 2017). In that article, attorney Thomas Jarrard and I discuss in detail the text and legislative history of section 4311 and the Department of Labor (DOL) USERRA Regulations on this section and the case law, including a very important 2011 Supreme Court precedent.

Wescher also asserted that the firing violated section 4316(c), which provides:

> A person who is reemployed by an employer under this chapter [USERRA] shall not be discharged from such employment, except for cause—
> (1)within one year after the date of such reemployment, if the person's period of service before reemployment was more than 180 days, or
> (2)within 180 days after the date of such reemployment, if the person's period of service was more than 30 days but less than 181 days.[6]

[5] 38 U.S.C. 4311 (emphasis supplied).
[6] 38 U.S.C. 4316(c).

Section 4316(c) is intended to protect the returning service member or veteran from a bad-faith reinstatement. If the employer discharges the returned employee during the special protection period,[7] the employer must prove that the discharge was for cause. Wescher met the five USERRA conditions[8] for each of the periods when he was away from his Chem-Tech job for military training or service. Chem-Tech fired Wescher about four months after he returned from a period of service. The firing occurred during the special protection period, so the employer must show that the firing was for cause.

Wescher complains to DOL-VETS

Shortly after he was fired, Wescher filed a formal, written USERRA complaint against Chem-Tech with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), in accordance with section 4322 of USERRA[9] and the agency was then required to investigate his complaint.[10] As happens far too frequently, the DOL-VETS "investigation" of Wescher's USERRA complaint was half-hearted, and the investigator essentially accepted at face value the legal and factual assertions of the employer's attorney and found "no merit" in a case that really did have merit.[11]

The DOL-VETS "no merit" determination is not binding on Wescher, but it meant that Wescher would not receive free legal representation by the United States Department of Justice (DOJ). Wescher sought to find private counsel willing to represent him on a contingent fee basis, but he was unable to find a lawyer willing to represent him.

Wescher files suit, representing himself.

On March 1, 2013, Wescher filed suit against Chem-Tech in the United States District Court for the Eastern District of Wisconsin. He represented himself in filing the lawsuit and in the discovery process. At the end of the discovery process, Chem-Tech filed a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. [12]

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[7] The special protection period is one year if the period of service was 181 days or more, or 180 days if the period of service was 31-180 days. In either case, the special protection period begins on the date that the person is properly reemployed, after returning from a period of service of at least 31 days.

[8] Please see Law Review 15116 (December 2015).

[9] 38 U.S.C. 4322.

[10] Id.

[11] There has been some recent improvement at DOL-VETS with respect to conducting quality USERRA investigations. Please see Law Review 16099 (September 2016).

[12] Under Rule 56, the judge should grant a motion for summary judgment only if he or she concludes, 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. In granting a motion for summary judgment, the judge is saying that no reasonable jury could find for the non-moving party.

The court denied Chem-Tech's motion for summary judgment.

Although Wescher did not have any help from a lawyer, he adduced sufficient evidence during the discovery process to defeat the defendant's summary judgment motion. In *Wescher I,* Magistrate Judge Aaron E. Goodstein denied the defendant's summary judgment motion. In his scholarly opinion, Judge Goodstein wrote:

> The Uniformed Services Employment and Reemployment Rights Act prohibits employers from firing or denying any benefit of employment to an employee based upon the employee's membership in the armed services. 38 U.S.C. § 4311(a). An employer violates this prohibition if the employee's membership is a motivating factor for the employer's action "unless the employer can prove that the action would have been taken in the absence of such membership." 38 U.S.C. § 4311(c). Additionally, 38 U.S.C. § 4316(c) bars an employer generally from terminating an a person who is reemployed following a period of military service except for cause within one year of the employee's return. The employer bears the burden of showing "that it is reasonable to discharge the employee for the conduct in question, and that he or she had notice, which was express or could be fairly implied, that the conduct would constitute cause for discharge." 20 C.F.R. § 1002.248(a). Wescher alleges that Chem-Tech violated both of these provisions of the Act. (Docket No. 1, ¶ 26.)
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> Based upon the facts set forth above, the court finds that a reasonable finder of fact could conclude that Wescher's membership in the Air Force Reserves and the resulting absences from work were a motivating factor in Chem-Tech's decision to terminate Wescher.
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> Mari Ann Larsen's email to the human resources consultant reveals immense frustration with Wescher's military obligations and their impact upon Chem-Tech. (Docket No. 52-4 at 1.) Such comments are highly relevant in assessing whether an employee's military service was a motivating factor in the decision to terminate the employee. *Maher v. City of Chicago*, 406 F. Supp. 2d 1006, 1024 (N.D. Ill. 2006) (citing *Diaz-Gandia v. Dapena-Thompson*, 90 F.3d 609, 615-16 (1st Cir. 1996); *Harris v. City of Montgomery*, 322 F.Supp.2d 1319, 1325 (M.D. Ala. 2004); *Mills v. Earthgrains Baking Co.*, 2004 WL 1749500 at 4 (E.D. Tenn.2004); *Smith v. Polk County, Florida*, 205 F.Supp.2d 1308 (M.D. Fla. 2002); *Gillie-Harp v. Cardinal Health, Inc.*, 249 F.Supp.2d 1113 (W.D. Wis. 2003); *Leisek v. Brightwood Corp.*, 278 F.3d 895, 900 (9th Cir. 2002); *see also Johnson v. Village of Brockton*, 04 C 50223, 2007 WL 5720626 (N.D. Ill. Nov. 1, 2007). In an affidavit submitted to this court, Mari Ann Larsen avers, "As far as I was concerned, once I was advised of the law by [the consultant], the matter was behind us and Chem-Tech would comply fully with what we felt the law required." (Docket No. 52, ¶ 14.) Assessing the veracity of Mari Ann Larsen's statement requires a determination of credibility that is not appropriate on summary judgment.

> The fact that Chem-Tech was plainly advised of what the law requires does not create the presumption that it complied with the law. To the contrary, a reasonable finder of fact could conclude that being provided with information on the law simply motived Chem-Tech to provide better cover for its true motivations. In fact, the human resources consultant's response could be seen as a roadmap outlining how Chem-Tech could best hide its true motivations if it wanted to fire Wescher because of his military service. The tips are straightforward: do not fire him right after he returns from military duty and thoroughly document any other performance issues that might be able to be utilized as a pretext for termination. (Docket No. 52-4 at 2.)
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> Significantly, being informed of what the law required did not end the matter for Chem-Tech. On March 31, 2011, during a period that Wescher was deployed, a Chem-Tech employee acting on behalf of Wescher's supervisor asking if Wescher could return because his absence was a creating a "hardship on small business." (Docket No. 52-6 at 2.) The email stated that Chem-Tech was not "looking to interfere with Rogers [sic] desire and need to serve but, we need to do something." (Docket No. 52-6 at 2.)
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> Chem-Tech's statement that it "need[s] to do something" could be understood by a reasonable finder of fact as indicating that after it was not able to obtain the "hardship on small business" exception it sought, it would be willing to resort to searching out reasons to terminate Wescher that could serve as cover for its actual motivation—terminating Wescher because of how his military obligations were impacting Chem-Tech—and take its chances it might be sued.
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> The suggestion that Chem-Tech was actively seeking out grounds that could serve as a basis to terminate Wescher is bolstered by the fact that shortly after Wescher's return from a six-month deployment it started monitoring employee vehicles via GPS. This was not something it had done in the past. (Docket No. 55, ¶ 13.) The only instance the defendant identifies where it ever even looked at the GPS data was an instance in 2010 where Robert Larsen had reason to believe that one of Chem-Tech's field representatives had misrepresented to him that the representative was at a customer's business. (Docket No. 55, ¶ 13.) Although Chem-Tech proffers a general explanation as to why it chose to begin monitoring Wescher's movements, (Docket No. 55, ¶ 15), it shall be up to the finder of fact to determine whether this explanation is credible.

The court appoints counsel for Wescher.

Denying Chem-Tech’s motion for summary judgment meant that the case would go to trial, before a jury. At that point, the court addressed Wescher’s request that an attorney be

represented to represent him.[13] The court searched for an attorney or law firm to represent Wescher on a pro bono (no fee) basis, and the Cross Law Firm volunteered. From October 2014 forward, Wescher was very ably represented by Nola Hitchcock Cross and other attorneys with that firm.

The court reopened the discovery process.

When Ms. Cross took over as Wescher's attorney, she asked the court to reopen discovery, which the court did. During the reopened discovery period, Ms. Cross obtained from the company some most probative e-mails showing that the company was deeply annoyed with Wescher concerning his military service and that this annoyance explained the attempts to fire him.

The jury ruled for Wescher.

At trial, the jury found for Wescher, that his firing was motivated by his military service and that Chem-Tech had not proved that it would have fired him anyway, in the absence of the military service. The jury awarded Wescher $90,000 in back pay, to compensate him for what he lost due to the unlawful firing.

Wescher applies to the court for additional equitable relief, and the court grants some of the relief that Wescher requested.

USERRA provides:

> The court [the Federal District Court hearing a USERRA case against a private employer or a state or local government] shall use, in any case in which the court determines that it is appropriate, its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter.[14]

The jury awarded Wescher $90,000 in back pay to compensate him for the unlawful firing. Wescher received or will receive the entire amount in a single year. If he had not been fired, he would have received the $90,000 spread out over several years. Because the federal income tax rate is progressive (persons receiving more income pay a higher percentage of that income as tax), receiving all the money in a single year means that Wescher will be required to pay significantly more in federal income tax than he would have paid if he had received the money

[13] Federal law provides: "The court may request an attorney to represent any person unable to afford counsel." 28 U.S.C. 1915(e)(1).
[14] 38 U.S.C. 4323(e).

spread out over several years. Wescher asked the court to use its equity powers to require Chem-Tech to compensate him for this "tax bump" effect.

In *Wescher II,* Judge Pamela Popper of the United States District Court for the Eastern District of Wisconsin awarded Wescher an equitable adjustment for the tax bump. In her scholarly opinion, Judge Popper wrote:

> The plaintiff also asks the court to compensate him for the additional tax liability he will face as a result of the back-pay award. Docket Number 126 at 14. The defendant argues that courts should reserve the remedy of tax offsets for extreme circumstances, and that the plaintiff's circumstance is not so extreme. Docket Number 132 at 11.
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> *Equal Employment Opportunity Commission v. Northern Star Hospitality, Inc.*, 777 F.3d 898, 904 (7th Cir. 2015), the Seventh Circuit joined "the Third and Tenth Circuits in affirming a tax-component award in the Title VII context." Specifically, the Seventh Circuit affirmed the district court's award of $6,495.00 to offset the plaintiff's tax liability on a $43,300.50 back-pay award for a Title VII retaliation claim. *Northern Star Hospitality*, 777 F.3d at 901. The back-pay award placed the plaintiff in a higher tax bracket than if he had received the pay on a regular, scheduled basis. *Id.* at 903-04. Without the tax offset, the plaintiff would not have been made whole, and the court found that that result "offends Title VII's remedial scheme. *Id.* Although *Northern Star* was a Title VII case, USERRA's remedial scheme also aims to make the plaintiff whole. *See* 38 U.S.C. 4323(d)(1)(B). ("The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.").
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> The back-pay award here will push the plaintiff's tax bracket from 15% to 28%. Docket Number 126 at 14. He calculates that this bump will result in an additional $5,440.76 tax liability. *Id.* at 15. The court does not agree that a plaintiff should receive a tax offset only in extreme circumstances. *Northern Star* set a clear standard. *Northern Star Hospitality*, 777 F.3d at 903-04. A tax offset is necessary to make the plaintiff whole. *Id.* The court will add $5,440.76 to the plaintiff's award to accomplish that goal.[15]

Wescher also asked the court to use its equity powers to order Chem-Tech to reinstate him to his job. In view of the "bad blood" between Wescher and the owner-operators of Chem-Tech, Judge Popper declined to order reinstatement. In lieu of reinstatement, she ordered the company to pay "front pay" to compensate Wescher for the continuing loss of income caused by the unlawful firing.

Wescher applies for attorney fees, and the court awards them.

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[15] *Wescher v. Chem-Tech International,* 2016 U.S. Dist. LEXIS 178770, 2016 WL 7441655 (E.D. Wis. December 27, 2016).

USERRA provides:

> In any action or proceeding to enforce a provision of this chapter by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses.[16]

On behalf of Wescher, attorney Nola Hitchcock Cross of the Cross Law Firm applied for attorney fees. Judge Popper approved such fees, in the amount of $157,662.50. Judge Popper held that the fact that the firm originally undertook this case on a pro bono basis did not preclude the firm from receiving court-ordered attorney fees.

Is this case over?

It is unclear if Chem-Tech has filed or will file a timely appeal to the United States Court of Appeals for the 7th Circuit, the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin. We will keep the readers informed of future developments in this interesting and important case, if there are any more developments.

Congratulations to Wescher's attorney

I congratulate attorney Nola Hitchcock Cross of the Cross Law Firm in Milwaukee, for her imaginative, diligent, and successful representation of this Air Force Reservist (Wescher).

[16] 38 U.S.C. 4323(h)(2).