

LAW REVIEW 17048¹

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Important New USERRA Case from the 6th Circuit—Part 2

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Update on Sam Wright

1.2—USERRA forbids discrimination

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

Savage v. Federal Express Corp., 2017 U.S. App. LEXIS 8267 (6th Cir. May 10, 2017).

This is a follow-up to the immediately preceding “Law Review” article, concerning the very recent decision of the United States Court of Appeals for the 6th Circuit.

Kenneth E. Savage is a Lieutenant (O-3) in the Navy Reserve and serves as an Aviation Maintenance Officer. On the civilian side, he worked for FedEx as a Senior Aircraft Mechanic at FedEx’s Memphis hub from August 2001 (when he was hired) until September 2012 (when he was fired). The September 11 terrorist attacks occurred one month after Savage began his

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 by e-mail at SWright@roa.org or by telephone at 800-809-9448, ext. 730. I will provide up to one hour of information without charge. If you need more than that, I will charge a very reasonable hourly rate. If you need a lawyer, I can suggest several well-qualified USERRA lawyers.

FedEx job, and his civilian job was interrupted by multiple periods of military training and service in the Navy Reserve.³

In the immediately preceding article, I discussed Savage's claims under section 4318⁴ of the Uniformed Services Employment and Reemployment Rights Act (USERRA), regarding the civilian pension credit to which Savage was entitled for the periods when he was away from his FedEx job for Navy Reserve service. In this article, I discuss Savage's claim that the September 2012 firing violated section 4311⁵ of USERRA because the firing was motivated (Savage claimed) by his absences from work because of uniformed service and by his actions to enforce his USERRA rights.

Section 4311 of USERRA provides as follows:

- (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

³ In this case, it was clear and not contested that Savage met the USERRA conditions for reemployment after each period when he was absent from his FedEx job for uniformed service. Please see Law Review 15116 (December 2015) for a detailed discussion of the five conditions.

⁴ 38 U.S.C. 4318.

⁵ 38 U.S.C. 4311.

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

FedEx offers its employees, their spouses, and dependents the privilege of using the company's shipping services at a reduced rate. Under the company's rules, the reduced-rate shipping was not to be used for any type of commercial benefit or for any commercial enterprise or business, profit or non-profit. On September 2, 2012, the company issued a rules clarification, to the effect that it was not permissible to use the reduced-rate shipping service to ship any item that the employee or family member had sold on EBay. Savage claimed that he did not receive notice of this clarification.⁷

FedEx routinely monitors its employees' use of the reduced-rate shipping privilege. Savage's name showed up on a tracking system because he and his family used the reduced-rate privilege 90 times between March and August of 2012. Savage and his wife repeatedly bought items at on-line auctions and then resold them via services like EBay, and used the reduced-rate shipping privilege to send the items to the purchasers. After an investigation, FedEx fired Savage for misusing the shipping privilege.

Savage claimed that FedEx singled him out for firing because of his absences from work for Navy Reserve service, protected by USERRA, and because he had asserted that FedEx had violated section 4318 of USERRA with respect to crediting him and other FedEx employees for military-related absences from work, in the FedEx pension system. One way to prove a section 4311 violation is by showing a proximity in time between the exercise and/or assertion of USERRA rights and the adverse personnel action.

In this case, the adverse personnel action closely followed Savage's last military-related absence from his FedEx job and his assertion that the company had violated section 4318, but the proximity in time was apparently coincidental. Savage's name showed up in the FedEx tracking system because he and his spouse used the reduced-rate shipping privilege 90 times in five months, and the FedEx employees who investigated the shipping privilege abuse issue were unaware of Savage's Navy Reserve service or his claim that the company had violated USERRA.

⁶ 38 U.S.C. 4311 (emphasis supplied). Please see Law Review 17016 and Law Review 17023, both published in March 2017, for a detailed discussion of the legislative history of section 4311, the case law under that section, and the sections of the Department of Labor USERRA Regulations that pertain to section 4311.

⁷ The facts stated in this article are as found by the District Judge, when he granted FedEx's motion for summary judgment, and as affirmed by the Court of Appeals. I have no underlying knowledge of the facts.

At the end of discovery, FedEx filed a motion for summary judgment on Savage's section 4311 claim, and the district judge granted the motion, finding that there was no evidence (beyond a mere scintilla) to support Savage's claim and that FedEx was entitled to judgment as a matter of law. Savage appealed to the 6th Circuit, but the three-judge appellate panel affirmed the grant of summary judgment. On this issue, unlike the section 4318 issue addressed in the immediately preceding article, the three judges were unanimous.

Savage can ask the 6th Circuit for rehearing en banc. If that motion is granted, there will be new briefs and a new oral argument before all the active judges of the 6th Circuit.⁸ If Savage chooses not to apply for rehearing en banc, or if his motion for rehearing en banc is denied, or if the 6th Circuit grants rehearing en banc and then affirms the panel decision, Savage's last step would be to apply to the United States Supreme Court for a writ of certiorari. At least four of the nine Justices must vote for certiorari, or it is denied, and certiorari is denied more than 99% of the time. The denial of certiorari means that the decision of the Court of Appeals is final.

We will keep the readers informed of further developments in this interesting and important case, if there are any further developments.

⁸ The active judges are those who have not taken senior status.