

The State of Washington Pays out \$13 Million for Violating USERRA and Washington's Veterans' Preference Law

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

Update on Sam Wright

1.1.1.7—USERRA applies to state and local governments

1.2—USERRA forbids discrimination

1.4—USERRA enforcement

1.6—USERRA has no statute of limitations

1.8—Relationship between USERRA and other laws/policies

8.0—Veterans' preference

On January 3, 2014, Christina Martin, an Iraq war veteran and police officer for the Washington State Patrol (WSP), filed a class action lawsuit against the WSP. Because Ms. Martin's lawsuit was against a state agency, she was required to bring the action in the Superior Court of the

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. Mr. Crotty and Mr. Jarrard are among the attorneys to whom I have referred USERRA cases, but I did not refer this case.

State of Washington, Spokane County, rather than in federal court.³ Ms. Martin was (and still is) represented by two Reserve Officers Association (ROA) life members, Matthew Crotty and Thomas Jarrard, both of whom are attorneys in Spokane, Washington.

Ms. Martin's lawsuit alleged, in part, that the WSP's repeated and decades-long failures to give qualified veterans initial entry and promotion preference as required under state law⁴ violated section 4311 of the Uniformed Services Employment and Reemployment Rights Act (USERRA).⁵ Specifically, Ms. Martin alleged that the WSP's failure to provide veterans' preference (a "benefit of employment" as defined under USERRA) to Ms. Martin and her fellow class members⁶ for their military service constituted impermissible discrimination as outlawed by USERRA. As an alternative theory, Ms. Martin alleged that the WSP's failure to provide veterans' preference violated section 1983 of title 42 of the United States Code⁷ as the state's failure to accord the statutorily-mandated preference constituted an unconstitutional deprivation of a property right, the property right being the legislatively mandated veterans' preference points as required under RCW 41.04.010.

The State of Washington unsuccessfully tried to get the case dismissed in February 2014. The State brought its motion under Washington Civil Rule 12. Under that rule, like Rule 12(b)(6) of the Federal Rules of Civil Procedure, a defendant asserts that no relief is available under the law even if the facts are as pleaded by the plaintiff. The trial court correctly denied the State's motion to dismiss. In ruling against the State, the trial court found that USERRA has no statute of limitations⁸ and that Ms. Martin properly stated a discrimination claim under section 4311 of USERRA.

Thereafter, the parties engaged in substantial discovery and a pre-class certification notice campaign. Ultimately, the parties' discovery and notice campaign revealed that the state's actions may have affected nearly 900 individuals, and the court agreed to adjudicate the case as a class action.

³ The 11th Amendment of the United States Constitution precludes individuals from suing state government agencies in federal court. Accordingly, USERRA provides for USERRA claims against state government employers to be litigated in state court. Please see Law Review 17032 (April 2017).

⁴ Section 41.04.010 of the Revised Code of Washington (RCW).

⁵ 38 U.S.C. 4311(a). That subsection makes it unlawful for an employer (federal, state, local, or private sector) to deny a person initial employment, retention in employment, promotion, or a benefit of employment because of the person's membership in a uniformed service, application to join a uniformed service, performance of uniformed service, or application or obligation to perform future service.

⁶ In both state and federal court, it is possible to bring a class action lawsuit, if the court approves, when the same claim or legal theory applies to many individuals and the named plaintiff who initiated the lawsuit is a suitable representative of the class. The court approved the adjudication of this case as a class action.

⁷ 42 U.S.C. 1983.

⁸ 38 U.S.C. 4327.

On May 5, 2017, the State of Washington agreed to settle the case for \$13,000,000.00. The settlement will also add approximately an additional \$2,000,000.00 to select class members' pension accounts. This is the largest settlement or verdict in USERRA's history.

I congratulate Matthew Crotty and Thomas Jarrard for their imaginative, diligent, and effective representation of Ms. Martin and all her fellow veterans employed by the Washington State Patrol.