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Recent Case on Section 4311 of USERRA

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Update on Sam Wright

1.1.1.7—USERRA applies to state and local governments
1.1.2.1—USERRA applies to part-time, temporary, probationary and at-will jobs
1.2—USERRA forbids discrimination
1.4—USERRA enforcement
1.6—USERRA regulations
1.8—Relationship between USERRA and other laws/policies

Gipson v. Cochran, 90 F. Supp. 3d 1285 (S.D. Ala. 2015).[3]

Facts

[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1500 "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 1300 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 35 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.

[3] This is a March 15, 2015 decision by Judge Kristi K. DuBose of the United States District Court for the Southern District of Alabama (Mobile). The citation means that you can find this decision in Volume 90 of *Federal Supplement Third Series,* starting on page 1285. Judge DuBose was appointed by President George W. Bush and confirmed by the Senate in 2005. She recently (after writing this decision) became the Chief Judge of the United States District Court for the Southern District of Alabama.

Dorothy M. Gipson, a black female Air Force Reservist, filed this lawsuit on October 30, 2013, against Sam Cochran, the Sheriff of Mobile County, Alabama. Ms. Gipson alleged that Sheriff Cochran violated the Uniformed Services Employment and Reemployment Rights Act (USERRA)[4] and Title VII of the Civil Rights Act of 1964.[5]

Ms. Gipson was hired as a deputy sheriff on March 29, 2011.[6] Before that, she was employed as a police officer in Prichard, Alabama. Like all new deputy sheriffs in that county, including those who had previously worked in law enforcement, Ms. Gipson was required to undergo a Working Test Period (WTP).[7] Her one-year WTP was interrupted by Air Force Reserve training, and the Sheriff extended the WTP to account for the interruption.

According to Sheriff Cochran, Ms. Gipson did not successfully complete the WTP, and he terminated her employment. In this lawsuit, she claimed that the Sheriff violated USERRA by extending her WTP and later by firing her. She also claimed that the firing violated Title VII because it was motivated by animus against her based on her sex.

Q: Ms. Gipson held a probationary job when she was fired. Does that detract from her USERRA rights?

A: No.

Section 4331 of USERRA[8] gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL published draft USERRA regulations in the *Federal Register*, for notice and comment, in September 2004. After considering the comments received and making a few adjustments, DOL published the final USERRA regulations in the *Federal Register in December 2005.* The regulations are published in title 20 of the Code of Federal Regulations (C.F.R.). The pertinent section makes clear that a person's "probationary" or "at will" status does not detract from his or her rights under USERRA:

> **§ 1002.41 Does an employee have rights under USERRA even though he or she holds a temporary, part-time, probationary, or seasonal employment position?**
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> USERRA rights are not diminished because an employee holds a temporary, part-time, probationary, or seasonal employment position. However, an employer is not required

[4] Please see footnote 2.
[5] Public Law 88-352, 78 Stat. 241, signed into law by President Lyndon Johnson on July 2, 1964. Title VII of this massive law forbids discrimination in employment on the basis of race, color, sex, religion, or national origin.
[6] These facts come from Judge DuBose's published decision. I have no personal knowledge of the facts.
[7] The one-year WTP was essentially a probationary period, combined with a closely supervised training program.
[8] 38 U.S.C. 4331.

> 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.[9]

Similarly, Title VII applies to probationary, temporary, part-time, and seasonal jobs.

Q: Did extending Ms. Gipson's Working Test Period because she performed Air Force Reserve duty during the period violate USERRA?

A: No.

In its eighth case construing the 1940 reemployment statute, the Supreme Court held:

> A returning veteran cannot claim a promotion that depends solely upon satisfactory completion of a prerequisite period of employment training unless he first works that period. But upon satisfactorily completing that period, as petitioners did here, he can insist upon a seniority date reflecting the delay caused by military service. Any lesser protection would deny him the benefit of the salutary provisions of sections 9(c)(1) and 9(c)(2) of the Universal Military Training and Service Act.[10]

Extending Ms. Gipson's WTP to account for the interruption caused by her military duty during the WTP did not violate USERRA. If she had satisfactorily completed the WTP, she would have then been entitled to an adjustment of her seniority date as a deputy who has completed the WTP, back to the date when she would have completed the WTP but for the military interruption.

Q: What is the standard for granting or denying a motion for summary judgment?

A: Under Rule 56 of the Federal Rules of Civil Procedure (FRCP), the judge is to grant a motion for summary judgment only if he or she 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. By granting a motion for summary judgment, the judge is saying that no reasonable jury could find for the non-moving party on that specific claim or defense. A motion for summary judgment is usually but not always made by the defendant, because the plaintiff generally has the burden of proof.

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[9] 20 C.F.R. 1002.41 (bold question in original).

[10] *Tilton v. Missouri Pacific Railroad Co.,* 376 U.S. 169, 181 (1964). I discuss *Tilton* in detail in Law Review 0846 (October 2008).

At the end of the discovery process, Sheriff Cochran filed a motion for summary judgment on all of Ms. Gipson's claims. Judge DuBose granted the summary judgment motion on the claim that extending her Work Testing Period because of the military interruption violated USERRA. As I have stated, that was an issue of law rather than of fact. Sheriff Cochran did not deny that he had extended the WTP—he insisted that extending the WTP under these circumstances did not violate USERRA, and I believe that Judge DuBose correctly held that the extension did not violate USERRA.

Ms. Gipson also claimed that the decision to terminate her employment violated section 4311 of USERRA. Judge DuBose held that there was no evidence in the record from which a reasonable jury could find for the plaintiff (Gipson) on that claim, so she granted the summary judgment motion.

Judge DuBose denied the Sheriff's motion for summary judgment on the Title VII claim. She found that there was evidence in the record from which a jury could find that the termination was motivated by animus against Ms. Gipson based on her sex. That does not mean that Ms. Gipson won—it means that she had enough evidence to make this a question of fact for the jury. The next step is a trial, unless the parties settle, which often happens.

Q: What was Ms. Gipson's claim under section 4311 of USERRA?

A: Section 4311 provides:

> **§ 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.[11]

Ms. Gipson was *not* required to prove that the decision to terminate her employment was motivated *solely* by her performance of uniformed service, obligation to perform service, or one of the other protected factors mentioned in section 4311(a) or 4311(b). She was only required to prove that one of these protected factors was *a motivating factor* in the decision to terminate her employment. If she had proved motivating factor, the burden of proof would have shifted to the employer, to prove that he would have fired her anyway, for a lawful reason unrelated to her service, in the absence of the protected factor.

Ms. Gipson did not need a "smoking gun" to prove motivating factor. She could prove motivating factor by either direct or circumstantial evidence. One factor often cited in these cases is *proximity in time* between the plaintiff's exercise of USERRA rights (like taking military leave for a period of service) and the employer's unfavorable personnel action (like firing). In this case, it appears that the plaintiff's taking of military leave did not happen particularly close to the employer's decision to fire her.

Q: Do you agree with Judge DuBose's decision to grant the employer's motion for summary judgment on the section 4311 claim?

A: I did not participate in this case, and I have not reviewed the voluminous record. But I think that it is fair to say that Judge DuBose carefully reviewed the evidence before granting the employer's motion for summary judgment on the USERRA count. The fact that she denied the employer's motion for summary judgment on the Title VII count would seem to indicate that she carefully weighed the evidence.

[11] 38 U.S.C. 4311 (emphasis supplied).

Q: Was Ms. Gipson represented by the United States Department of Justice (DOJ) in asserting her USERRA claim against the Sheriff? Or was she represented by private counsel? What are the advantages and disadvantages of retaining private counsel in a case like this?

A: Ms. Gipson was represented by private counsel, not by DOJ.

Ms. Gipson could have filed a USERRA complaint against the Sheriff with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS).[12] It appears that she never filed any such complaint.

If she had filed with DOL-VETS, that agency would have investigated her complaint.[13] If the investigation did not result in a resolution satisfactory to Ms. Gipson, DOL-VETS would then have been required to notify her of the results of the investigation.[14] At that point, she could have requested (in effect insisted) that DOL-VETS refer the case file to DOJ.[15]

If she had requested referral, her case file would have been referred, and then DOJ would have reviewed the file and would have decided, within 60 days, as to whether to represent her in a USERRA case against the employer.[16] If DOJ had been reasonably satisfied that she was entitled to the USERRA benefits that she sought, it could have brought the case on her behalf, and in her name, at no cost to her.[17]

If DOL and DOJ had reviewed this case, they only would have considered USERRA. DOL and DOJ would not have considered other laws that might provide relief for Ms. Gipson. A big advantage of retaining private counsel, as Ms. Gipson did, is that private counsel can consider all possible legal theories, not just USERRA. That flexibility was very important in this case. It appears that Ms. Gipson's Title VII claim is much stronger than her USERRA claim. The big advantage of going with DOL-VETS and DOJ is that you save the cost of paying attorney fees and court costs.

[12] 38 U.S.C. 4322(a).
[13] 38 U.S.C. 4322(d).
[14] 38 U.S.C. 4322(e).
[15] 38 U.S.C. 4323(a)(1).
[16] 38 U.S.C. 4323(a)(2).
[17] 38 U.S.C. 4323(a)(1).