LAW REVIEW 17075[1]
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Recent 5th Circuit Case on Rights of Reservist after Returning from Drill Weekend

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

Update on Sam Wright

1.1.2.5—USERRA applies to executive employees
1.3.1.3—Timely application for reemployment
1.4—USERRA enforcement

Hernandez v. Results Staffing, Inc., **2015 U.S. Dist. LEXIS 43452 (N.D. Tex. April 2, 2015).**[3]

Hernandez v. Results Staffing, Inc., **677 Fed. App'x 902, 2017 U.S. App. LEXIS 1603 (5th Cir. January 30, 2017).**[4]

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[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 2015 decision by Judge John H. McBryde of the United States District Court for the Northern District of Texas, Fort Worth division. Judge McBryde was appointed by President George H.W. Bush and confirmed by the Senate in 1990. Although he is 85 years old, he has not taken senior status.

[4] This is a recent decision of the United States Court of Appeals for the 5th Circuit, on appeal from the above district court decision. The 5th Circuit is the federal appellate court that sits in New Orleans and hears appeals from district courts in Louisiana, Mississippi, and Texas. As is always the case in federal appellate cases, the case was decided by a panel of three judges. In this case, the three judges were Judge Jennifer Walker Elrod (an active status judge of the 5th Circuit, appointed by President George W. Bush and confirmed by the Senate in 2007), Senior Judge Patrick Higginbotham (appointed by President Ronald Reagan to the 5th Circuit and confirmed by the Senate I 1982, and

Jose Luis Hernandez is an Army Reserve officer. He was hired by Results Staffing, Inc., as a branch manager.[5] As is succinctly explained in the below lengthy quotation from the appellate court decision, he was fired when he was unable to return to his civilian job at 5 a.m. on Monday, after a drill weekend held 4.5 hours away from his home in Fort Worth, Texas.

Hernandez sued the company in the United States District Court for the Northern District of Texas, Fort Worth division. After a bench trial,[6] the District Judge ruled against him. Hernandez appealed to the 5th Circuit, which reversed the district court's judgment and remanded the case to the district court to fashion appropriate relief. Here is the entire text of the 5th Circuit decision:

> Jose Luis Hernandez, a member of the United States Army Reserves, was terminated by his employer, Results Staffing, Inc., after he failed to appear for work following a brief absence for military duty. Hernandez claims his termination violated his rights under the United States Employment and Reemployment Rights Act of 1994. Hernandez appeals the district court's judgment and award of costs in favor of his employer. Because we conclude that Hernandez was entitled to reemployment under the Act's convalescence provision, we REVERSE the district court's judgment, VACATE the award of costs, and RENDER judgment in favor of Hernandez on his reemployment claim. We REMAND this case to the district court to determine Hernandez's damages and for other proceedings consistent with this opinion.
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> I.
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> Defendant-Appellee Results Staffing, Inc. (Results) is a staffing company that is retained by third parties to provide daily workers for unskilled labor positions. Plaintiff-Appellant Jose Luis Hernandez was employed by Results for approximately six months before Results terminated his employment. Before he began working for Results and throughout the course of his employment with the company, Hernandez was an officer in the United States Army Reserves. This case arises out of Results's termination of Hernandez's employment following a weekend during which Hernandez was on military reserve duty.
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> On Tuesday, July 9, 2013, Hernandez informed Results that he needed the upcoming Friday off to travel to his weekend military service training. Results provided Hernandez with the day off and also informed him of an important meeting to be held the following

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who took senior status in 2006), and Judge Stephen Andrew Higginson (appointed by President Barack Obama and confirmed by the Senate in 2011). This was a per curiam decision, meaning that no one judge is recorded as the author.

[5] Hernandez's status as a managerial employee in no way detracts from his USERRA rights. *See* 20 C.F.R. 1002.43.

[6] A bench trial is a trial without a jury. Although Hernandez had the right to a jury trial, he apparently did not request one.

Monday morning. Hernandez attended the military training which began on Friday, July 12, 2013. On Sunday, July 14, 2013, while still at his military training, Hernandez spoke on the phone with his immediate supervisor at Results, Don Thompson, about the meeting to be held the next morning. Thompson informed Hernandez of the meeting's location and that it was scheduled to begin at 5:00 a.m. The district court found that this communication led Thompson to believe that Hernandez would be at work at 5:00 a.m. on Monday, July 15, 2013.

Following his conversation with Thompson, Hernandez went to a military medical staff member to report an aggravation of a pre-existing back injury due to the activities of the drill weekend. After receiving treatment, Hernandez attended a unit senior staff meeting. Following the meeting, at approximately 7:30 p.m., Hernandez was released from service and began the four-and-one-half-hour drive home.

Hernandez arrived home at about 12:00 a.m. on the morning of Monday, July 15, 2013. As he went to sleep, Hernandez set his alarm for 4:30 a.m. and took prescribed pain medication for his back pain. He later awoke at 7:00 a.m. to discover he had slept through his alarm and was in severe pain. Hernandez's wife transported him to the hospital emergency room. At 7:28 a.m., Hernandez sent a text message to Thompson and informed him he would not be reporting to work because he was seeking treatment for back pain. At the hospital, Hernandez received medication to relax his muscles and was eventually released. He returned home and rested for the remainder of the day.

Hernandez reported to work the next morning, Tuesday, July 16, 2013, at 8:00 a.m. at Results's Garland, Texas office. At around 10:00 a.m., Results asked Hernandez to drive to a different office, where the Results human resources manager subsequently terminated Hernandez's employment for violation of the company's "no call/no show" policy, which requires employees to call in four hours before a scheduled start time if they are unable to report to work.

Hernandez subsequently filed this lawsuit against Results, seeking damages for a violation of the United States Employment and Reemployment Rights Act of 1994 ("USERRA"), 38 U.S.C. § 4301 *et seq.*, which protects persons temporarily serving in the United States military from discrimination, retaliation, and adverse employment actions as a result of their absence from work for military service. Hernandez argued in the district court that under 38 U.S.C. § 4312, he qualified for reemployment following his weekend military service, and Results wrongly denied him reemployment. Hernandez argued in the alternative that, to the extent he was reemployed and then terminated, such termination violated 38 U.S.C. § 4311, which protects against discrimination.

Following a bench trial, the district court found that Results did not violate § 4312 because Hernandez did not report as required on Monday, July 15, 2013. The district court also found that Results did not violate § 4311 because it did not consider Hernandez's military service in terminating his employment and would have terminated

his employment regardless of such service. The district court entered an order and final judgment with costs in favor of Results. Hernandez timely filed a notice of appeal.

II.

"The standard of review for a bench trial is well established: findings of fact are reviewed for clear error and legal issues are reviewed de novo." *Bd. of Trs. New Orleans Emplrs. Int'l Longshoremen's Ass'n v. Gabriel*, 529 F.3d 506, 509 (5th Cir. 2008) (quoting *Water Craft Mgmt., LLC v. Mercury Marine*, 457 F.3d 484, 488 (5th Cir. 2006)). "A finding is clearly erroneous if it is without substantial evidence to support it, the court misinterpreted the effect of the evidence, or this court is convinced that the findings are against the preponderance of credible testimony." *Id.*

III.

Section 4312 of USERRA states that an employee "whose absence from a position ofemployment is necessitated by reason of service in the uniformed services" is entitled to reemployment rights and benefits if he "reports to" his employer "in accordance with the provisions of subsection (e)." 38 U.S.C. § 4312(a). For most employees whose period of service was less than thirty-one days, subsection (e) requires the employee, "upon the completion" of his service, to "notify [his] employer" of his "intent to return" by "reporting to the employer," either

(i) not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person's residence; or

(ii) as soon as possible after the expiration of the eight-hour period referred to in clause (i), if reporting within the period referred to in such clause is impossible or unreasonable through no fault of the person.

Id. at § 4312(e)(1)(A). However, subsection (e) also contains a provision which extends the reporting period for employees who sustain injuries during their military service:

A person who is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service in the uniformed services shall, at the end of the period that is necessary for the person to recover from such illness or injury, report to the person's employer . . . .

Id. at § 4312(e)(2)(A).

Hernandez contends that due to his back injury, he was not required to report to work until Tuesday, July 16, 2013, under § 4312(e)(2)(A)'s convalescence provision. He argues

that when he reported to work on July 16, he was entitled to reemployment rights and that his subsequent termination by Results later that day for failure to comply with the company's "no call/no show" policy violated § 4312. We conclude that Hernandez timely reported to Results under the convalescence provision of § 4312(e)(2)(A) and that Results violated Hernandez's reemployment rights when it terminated him effective July 15, 2013.

The undisputed facts in this case demonstrate that Hernandez aggravated a pre-existing back injury during his military service. Hernandez began to experience discomfort in his back while still on duty and sought medical attention from military medical staff members. When Hernandez awoke at home on the morning of Monday, July 15, 2013, he was in severe pain and was unable to walk. Hernandez was taken to the hospital where he received pain killers and muscle relaxers, and he spent the remainder of the day convalescing at home. A note from Hernandez's physician indicated that, due to the time needed to recover, Hernandez was medically excused from work until Tuesday, July 16, 2013.

On the morning of July 16, after his period of convalescence had ended, Hernandez reported to work at Results' Garland, Texas office. The facts in this case demonstrate that Hernandez could not have reported on July 15 because the service-related aggravation of his injury prevented him from doing so. Even if Results required Hernandez to report to work on July 15, Hernandez was excused from reporting by the plain language of § 4312(e)(2)(A) because he was "convalescing from an . . . injury . . . aggravated during the performance of service" and he was not required to report to work until "the end of the period that [was] necessary for" his recovery. 38 U.S.C. § 4312(e)(2)(A). Results's failure to reemploy Hernandez when he reported after his period of convalescence ended violated § 4312(a). The district court erred by failing to address whether Hernandez satisfied the reemployment requirements of § 4312(e)(2)(A)'s convalescence provision in light of the undisputed evidence pertaining to Hernandez's back injury. *See Bd. of Trs.*, 529 F.3d at 509.

Results argues that the July 14 telephone conversation between Hernandez and Thompson constituted Hernandez "reporting" to Results for purposes of § 4312. Results contends that because Hernandez reported on July 14, Results reemployed him as of that date, and the effect of any convalescence on his reporting requirement is irrelevant. We disagree. Results's position overlooks the plain language of § 4312, which requires an employee to report to his employer and notify them of his intent to return "*upon the completion* of [his] period of service in the uniformed services[.]" 38 U.S.C. § 4312(e)(1) (emphasis added); *see also New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs*, 718 F.3d 384, 393 (5th Cir. 2013) ("[T]he first rule of statutory construction is that we may not ignore the plain language of a statute."). When Hernandez spoke on the telephone with Thompson on July 14, Hernandez's reserve duty had not yet ended—following the telephone conversation, Hernandez attended a senior staff meeting. Hernandez was not formally released from his reserve

duties until approximately 7:30 p.m.—several hours after the telephone conversation took place. Hernandez did not and could not "report to" his employer pursuant to § 4312(e)(1) during the July 14 afternoon telephone conversation because he was not yet released from his service. When that release would occur was up to the military, not Hernandez. While a member of the military might have an expectation of being released at a particular time, that expectation is always subject to the military's right to extend service until it determines that release from service is appropriate.

Results also argues that Hernandez did not qualify for reemployment under § 4312(e)(2)(A)'s convalescence provision because the provision only extends the reporting period until "the end of the period that is necessary for the person to recover," and Hernandez has not provided evidence as to the period that was necessary for his alleged recovery. However, a careful review of the record reveals that this is not the case. At trial, Hernandez offered his own testimony, the testimony of his wife, and a note from his physician to demonstrate that his convalescence lasted until the morning of July 16. Hernandez testified that on July 15, he was admitted to the emergency room and that he received muscle relaxer, pain killers, and an IV as the doctors monitored him to see how long it would take for his muscles to relax. Hernandez's wife testified that after Hernandez was discharged from the hospital, he was "sleepy" and returned home and slept. She also testified that she took the day off of work to care for Hernandez. Finally, Hernandez submitted a note from his physician into evidence, which said, "Jose Hernandez was under my care on July 15, 2013. He will be able to return to work on July 16, 2013." As Results acknowledged at oral argument, none of this evidence is disputed. We therefore conclude that Hernandez did provide evidence that his convalescence lasted until the morning of July 16 such that Hernandez qualified for reemployment under § 4312(e)(2)(A).

Finally, Results argues that even if Hernandez's arrival on July 16 constituted timely "reporting" under § 4312, Results complied with USERRA by reemploying Hernandez on July 16 and then subsequently terminating him that same day. It is true that "§ 4312 'only entitles a service person to immediate reemployment and does not prevent the employer from terminating him the next day or even later the same day.'" *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 304 (4th Cir. 2006) (quoting *Jordan v. Air Prods. & Chems., Inc.*, 225 F. Supp. 2d 1206, 1208 (C.D. Cal 2002)). However, in order to comply with § 4312, an employer must actually reemploy the service person in good faith. *See Petty*, 687 F.3d at 718 (asking whether the defendant employer "*truly* reemployed" the plaintiff service member) (emphasis added); *see also Vahey v. Gen. Motors Co.*, 985 F. Supp. 2d 51, 60 (D.D.C. 2013) (collecting § 4312 cases and emphasizing that the cases "anticipate a situation where the veteran was *actually reemployed* in good faith, with at least the *possibility* of continued employment of indefinite length").

Results contends that it terminated Hernandez's employment on July 16 because Hernandez had reported to the wrong location that morning. But the record evidence

> clearly contradicts Results's position. As the district court found and as evidenced by the termination letter dated July 15, 2013, the decision to terminate Hernandez was made on July 15. Thus, Results made its decision to terminate Hernandez before the date on which Results claims to have reemployed him. Allowing an employer to engage in a sham reemployment so that it can terminate an employee that it never intended to reemploy would stand in stark contradiction with the reemployment protections that USERRA provides to service members. *See Petty*, 687 F.3d at 718. We therefore conclude that Results did not reemploy Hernandez on July 16 in a manner that satisfied its obligation under § 4312.
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> IV.
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> In sum, we conclude that Hernandez qualified for reemployment under the plain language of § 4312(e)(2)(A)'s convalescence provision when he aggravated a pre-existing back injury during military service and when he reported to work on Tuesday, July 16, 2013, at the end of his period of convalescence. Results's failure to reemploy Hernandez after his period of convalescence violated § 4312. We therefore REVERSE the district court's judgment and VACATE the award of costs in favor of Results and RENDER judgment in favor of Hernandez on his reemployment claim. We REMAND this case to the district court to determine Hernandez's damages and for other proceedings consistent with this opinion.[7]

The 5th Circuit cited and relied upon section 4312(e)(2)(A) of USERRA.[8] That subsection is certainly relevant, and the appellate court reached the correct result, but there are two other subsections that are more directly relevant—section 4312(e)(1)(A)(i)[9] and section 4312(e)(1)(A)(ii).[10] I will discuss each of those subsections.

Section 4312(e)(1)(A)(i)

After a period of uniformed service lasting fewer than 31 days, like the two-day drill weekend in this case, the service member is required to report back to his or her civilian employer as follows:

> … not later than the beginning of the first full regularly scheduled work period *on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person's residence.*[11]

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[7] *Hernandez,* 677 Fed. App'x at 903-08 (footnotes, headnotes, and page numbers omitted).
[8] 38 U.S.C. 4312(e)(2)(A).
[9] 38 U.S.C. 4312(e)(1)(A)(i).
[10] 38 U.S.C. 4312(e)(1)(A)(ii).
[11] 38 U.S.C. 4312(e)(1)(A)(ii).

Hernandez performed his weekend drill at Ellington Field in Houston and at a separate training facility at Bastrop, Texas. He and the unit he commanded traveled from Ellington Field to Bastrop for training and then back to Ellington Field for the conclusion of the weekend drill. Hernandez was not released from his drill weekend until 7:30 pm Sunday evening, at which time he left Ellington for a 4.5-hour drive to his home in Fort Worth. He arrived home at midnight.

Under these facts, *even without the complication caused by the medical problem,* the civilian employer had no right to demand that Hernandez return to work at 5 am on Monday, after only four hours of sleep. The deadline for Hernandez to report back to work was Tuesday morning, not Monday morning, and he did report back to work Tuesday morning, only to learn that he had been fired the day before. The eight-hour period for rest, after safe transportation to his residence, did not expire until 8 am Monday, at which time the Monday work period was already three hours old.

It is not safe for a service member to drive and to work at his or her civilian job with little or no rest, and the provision for the eight-hour rest period, after arriving home and before reporting back to the civilian job, was included to ensure safety. USERRA's legislative history provides:

> With regard to military service of less than 31 days, service members would ordinarily be required to report for work at the beginning of the next regularly scheduled working period on the next working day after release from service. An employee, however, must be allowed a reasonable time to arrive back at his or her residence, a reasonable time to rest, and a reasonable time to travel to the place of employment. For example, an employer could not require a reservist who returns home from weekend duty at 10:00 pm to report to work at 12:30 am that night, even if it is the beginning of the of the next regularly scheduled work period the next day. The Committee [House Committee on Veterans' Affairs] believes that an employee must be in a position to arrive at work rested in order to perform safely at work.[12]

Reporting back to work at one's civilian job shortly after completing a strenuous drill weekend and a long drive can result in fatal consequences.[13] There is a very good reason for the provision for eight hours of rest before reporting back to one's civilian job, after a short period of uniformed service. The employer had no right to demand that Hernandez report back to work at 5 am Monday morning after his strenuous drill weekend and 4.5-hour drive home. Firing Hernandez for failing to meet that unreasonable deadline was an egregious violation of USERRA.

Section 4312(e)(1)(A)(ii)

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[12] House Committee Report, April 28, 1993, H.R. Rep. No. 103-65, Part 1, reprinted in Appendix B-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found on page 697 of the 2017 edition of the *Manual.*

[13] *See, e.g., Gordon v. Wawa Food Markets,* 388 F.3d 78 (3rd Cir. 2004). I discuss this case in detail in Law Review 156 (January 2005).

Section 4312(e)(1)(A)(ii) provides for an extension on the deadline for reporting back to one's civilian job, after a short period of uniformed service, if factors beyond the individual's return make it impossible to return to work on the first day after completion of the period of service, the time required for safe transportation to the person's residence, and eight hours of rest. In this circumstance, the service member is required to report back to the civilian employer "as soon as possible after the expiration of the eight-hour period referred to in clause (i), if reporting within the period referred to in such clause is impossible or unreasonable through no fault of such person."[14] The recurrence of Hernandez's back injury, during his drill weekend, certainly amounted to the sort of unforeseen circumstance that made it "impossible or unreasonable" for him to return to his civilian job at 5 am on Monday morning, and that circumstance was not the fault of Hernandez.

The district court erred in imposing court costs on Hernandez.

The district court ordered Hernandez, as the loser, to pay the defendant's court costs. USERRA explicitly provides that the USERRA claimant may not, under any circumstances, be required to pay court costs: "No fees or court costs may be charged or taxed against any person claiming rights under this chapter."[15]

Need for education about USERRA

There was a lot of confusion in this case about how USERRA applies to a recurring situation. There is a great need to educate Reserve Component personnel, their civilian employers, their attorneys, attorneys for employers, and federal judges (including administrative judges of the Merit Systems Protection Board) about the details of USERRA. This is not a new law—it was enacted almost 23 years ago, on October 13, 1994, and it is a rewrite of a law that was originally enacted in 1940.

I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1000 "Law Review" articles about USERRA, plus a detailed Subject Index, to facilitate finding articles about very specific topics. I suggest that you start with Law Review 15116 (December 2015), a primer on USERRA.

[14] 38 U.S.C. 4312(e)(1)(A)(ii).
[15] 38 U.S.C. 4312(h)(1). Please see Law Review 1082 (October 2010).