

LAW REVIEW 17081¹

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DOJ Sues City of Glendale for Violating USERRA

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1.1.1.7—USERRA applies to state and local governments

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On August 14, 2017, the United States Department of Justice (DOJ) filed suit against the City of Glendale in the United States District Court for the District of Arizona, alleging that Glendale violated the Uniformed Services Employment and Reemployment Rights Act (USERRA) when it fired Captain Rebecca Cruz, a member of the Arizona Air National Guard (ANG) since 2007. The facts in this article come directly from the complaint that DOJ filed on behalf of Ms. Cruz and from the DOJ press release. I have no personal knowledge of the 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.

Facts and applicable law

Ms. Cruz was hired by the City of Glendale as a Management Analyst in the Public Works Department on March 28, 2016, and she notified the City during the hiring process of her military affiliation and obligations. Glendale officials were apparently unaware of the extent of utilization of Reserve Component (RC)³ after September 11, 2001, the “date which will live in infamy” for our time, and continuing. When Ms. Cruz notified her supervisor, Mr. Manginell,⁴ that she had been called to two months of ANG training, he said: “I thought Guard service was only one weekend a month, like in the commercials.”⁵

Under section 4311 of USERRA, it is unlawful for an employer (federal, state, local, or private sector) to discriminate in initial employment (hiring), retention in employment (firing), or promotions or benefits of employment on the basis of membership in a uniformed service, application to join a uniformed service, performance of uniformed service, or application or obligation to perform such service. Section 4311 provides:

- (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

³ Our nation has seven Reserve Components. In order of size, they are the Coast Guard Reserve (USCGR), the Marine Corps Reserve (USMCR), the Navy Reserve (USNR), the Air Force Reserve (USAFR), the Air National Guard (ANG), the Army Reserve (USAR), and the Army National Guard (ARNG). The ARNG and ANG have a hybrid federal-state status, while the other five components are purely federal entities. For a detailed discussion of the critical role of the RC in the 16 years since 9/11/2001, and the critical importance of civilian employers supporting RC members in the workforce, please see Law Review 17055 (June 2017).

⁴ Mr. Manginell was and still is the Public Works Administrator for the City of Glendale.

⁵ As I have explained in footnote 2, I am retired from the Navy Reserve Judge Advocate General’s Corps. After completing my initial three-year active duty commitment, in 1980, I affiliated with the Navy Reserve, and I continued serving for the next 27 years, until I reached my mandatory retirement date (30 years of commissioned service) in 2007. That part-time Navy Reserve career was interrupted by 13 periods of full-time active duty, usually for six months at a time. My final active duty period, in 2002-03, was on the staff of the Reserve Forces Policy Board (RFPB). I recall that during my final active duty assignment I participated in the drafting of RFPB advice to the Secretary of Defense, to the effect that the services should remove from their recruiting pamphlets and television, radio, and print advertisements any statements implying that RC service was limited to “one weekend per month.” I believe that it has been many years since any service aired a commercial with the now-misleading “one weekend per month” claim.

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.⁶

To prevail in her claim that firing her violated section 4311, Ms. Cruz is not required to prove that the firing was motivated *solely* by her ANG service. She is only required to prove that her ANG service was *a motivating factor* in the employer's decision to terminate her employment.⁷ If she proves motivating factor, the firing was unlawful unless the employer can *prove* (not just say) that she would have been fired anyway, for lawful reasons unrelated to her service.⁸

As a new public employee in March 2016, Ms. Cruz was considered a "probationary" employee during her first year of employment. Her probationary status in no way detracts from her rights and protections under USERRA. The pertinent section of the Department of Labor (DOL) USERRA Regulation is as follows:

Does an employee have rights under USERRA even though he or she holds a temporary, part-time, probationary, or seasonal employment position?

USERRA rights are not diminished because an employee holds a temporary, part-time, probationary, or seasonal employment position. However, an employer is not required

⁶ 38 U.S.C. 4311 (emphasis supplied).

⁷ Please see the italicized language in section 4311(c)(1), above.

⁸ Id.

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

In May 2016, just weeks after she began her Glendale job, Ms. Cruz learned that the Air Force had called her to 67 days of training, from July 11 until September 16, 2016, and she promptly notified her supervisor, Mr. Manginell, in person at a meeting with him on May 31, 2016.¹⁰ He responded with a sarcastic remark to the effect that “I hope that you don’t come back with some kind of PTSD or whatever people call it” as well as his remark that “I thought that Guard service was only one weekend per month, like in the commercials.” Ms. Cruz has reported that Mr. Manginell seemed “visibly upset” by the prospect that Ms. Cruz would be repeatedly absent from her civilian job for military duty and he said that other employees in the department “would have to bend over backwards” to cover for Ms. Cruz during times that she was away from work for service.¹¹

On June 8, 2016, Mr. Manginell met with two representatives of Glendale’s Human Relations office to discuss the city’s policy about military service by employees. He told them that Ms. Cruz leaving for two months of military duty “is an issue for me.” The decision to fire Ms. Cruz was made that day, and on June 16 she was summarily escorted out of the building. During her three months of City of Glendale employment, there were no complaints about the quality of her work and no problems until she notified her supervisor of the upcoming ANG training obligation.

If the facts are as alleged by DOJ in the complaint, Ms. Cruz has a very strong case. She can prove “motivating factor” by the proximity in time between her notice to the employer of her 67-day training period and the decision to terminate her employment and by the supervisor’s statements expressing irritation about her military obligations and tying his dissatisfaction with her work to her military obligations.

If DOJ prevails, on behalf of Ms. Cruz, the court will order the City of Glendale to reinstate Ms. Cruz in the position from which she was unlawfully fired and to compensate her for the pay and benefits that she lost because of the unlawful firing.¹² If the court finds that the City of Glendale

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

¹⁰ She provided Mr. Manginell a copy of her military orders the next day, June 1.

¹¹ Congress fully recognized that USERRA puts a burden on civilian employers and sometimes on the civilian co-workers of those who serve. That burden is neither unreasonable nor unconstitutional. The burdens imposed on employers and co-workers are tiny as compared to the much greater burdens (sometimes the ultimate sacrifice) voluntarily undertaken by those who volunteer to serve our country in uniform. Please see Law Review 17055 (June 2017).

¹² 38 U.S.C. 4323(d)(1).

violated USERRA willfully, it will double the monetary damages.¹³ In its complaint, DOJ has asked for this relief. We will keep the readers informed of developments in this important case.

Why is DOJ representing Ms. Cruz in this lawsuit?

A person who claims that his or her USERRA rights have been violated by any employer (federal, state, local, or private sector) is permitted to file a formal, written USERRA complaint with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS).¹⁴ That agency then investigates the complaint.¹⁵ DOL-VETS has subpoena authority for USERRA investigations.¹⁶

The DOL-VETS investigation may result in resolution, in that the employer may see the error of its ways and come into compliance. If the investigation does not result in resolution, DOL-VETS then notifies the complainant of the results of the investigation.¹⁷ The agency is expected to complete its investigation within 90 days after receipt of the written complaint.¹⁸

Upon receiving the report of the results of the investigation, the complainant can request (in effect insist upon) the referral of his or her case file to DOJ.¹⁹ If DOJ is reasonably satisfied that the complainant is entitled to the benefits that he or she seeks, it "may appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action for relief under this chapter [USERRA] for such person."²⁰

If DOJ decides not to provide representation, it must so notify the complainant, in writing, within 60 days after receiving the referral from DOL-VETS.²¹ Upon receiving such a notice of non-representation, the complainant is permitted to file suit against the employer with private counsel.²²

Upon receiving the report of the results of the investigation, from DOL-VETS, the complainant can retain private counsel and sue the employer, instead of requesting referral of the case file to DOJ.²³ It is also possible for a person claiming USERRA rights to bypass DOL-VETS altogether

¹³ 38 U.S.C. 4323(d)(1)(C).

¹⁴ 38 U.S.C. 4322(a)(1).

¹⁵ 38 U.S.C. 4322(d).

¹⁶ 38 U.S.C. 4326.

¹⁷ 38 U.S.C. 4322(e).

¹⁸ 38 U.S.C. 4322(f).

¹⁹ 38 U.S.C. 4323(a)(1). The case is referred to DOJ if the employer is a state or local government or a private employer. If the employer alleged to have violated USERRA is a federal executive agency, DOL-VETS refers the case file to the United States Office of Special Counsel (OSC). 38 U.S.C. 4324(a)(1).

²⁰ 38 U.S.C. 4323(a)(1).

²¹ 38 U.S.C. 4323(a)(2).

²² 38 U.S.C. 4323(a)(3)(C).

²³ 38 U.S.C. 4323(a)(3)(B).

and file suit with private counsel.²⁴ If the USERRA plaintiff represented by private counsel prevails in the action, the court may order the defendant employer to pay reasonable attorney fees and costs.²⁵

Ms. Cruz made a formal written complaint to DOL-VETS immediately after she was fired in June 2016. DOL-VETS made its opening contact to the City of Glendale on June 24, 2016. The agency investigated and found her complaint to have merit and so advised Ms. Cruz. Ms. Cruz requested referral to DOJ, and the case was referred. DOJ agreed that the case had merit, and it filed this lawsuit on August 14, 2017, just 14 months after the firing. In the operations of the Federal Government, that is remarkable speed. This is the way the system is supposed to operate.²⁶

Within DOJ, who is responsible for enforcing USERRA against state and local governments and private employers?

Until October 2004, responsibility within DOJ for USERRA cases was assigned to the Commercial Litigation Branch (CLB) of the Civil Division, and the CLB never took USERRA enforcement seriously. CLB's role was simply as a conduit. DOL-VETS referred cases to DOJ, and CLB passed them along to the appropriate United States Attorneys.²⁷ Within the office of a United States Attorney, a USERRA case referred from the Washington DOJ headquarters will generally get a low priority.

Among other kinds of cases that CLB is responsible for, CLB represents federal agencies, on appeal from the Merit Systems Protection Board (MSPB). This includes MSPB USERRA cases involving federal executive agencies that violated USERRA with respect to federal employees. It is unreasonable to expect the same federal attorneys who routinely argue for a stingy interpretation of USERRA in cases involving federal agencies as employers to argue for a liberal interpretation of USERRA in cases involving state and local governments and private employers.

²⁴ 38 U.S.C. 4323(a)(3)(A).

²⁵ 38 U.S.C. 4323(h)(2).

²⁶ The system does not always work as intended. In some of my "Law Review" articles I have criticized DOL-VETS for going through the motions and closing meritorious USERRA cases as "no merit." Please see Law Review 16099 (September 2016) and the January 2017 update to that article. I have also praised DOL-VETS when it has done well in enforcing USERRA. Please see Law Review 17045 (May 2017). I believe that DOL-VETS is improving, and the timely action in this case may be evidence of that improvement.

²⁷ There are 93 United States Attorneys, one for each judicial district. Each state has at least one judicial district, and some of the larger states have up to four districts. Each United States Attorney is appointed by the President with Senate confirmation, and each United States Attorney has a staff of Assistant United States Attorneys (career federal employees). The United States Attorneys are part of DOJ, but they have a lot of autonomy.

In October 2004, responsibility for USERRA cases, within DOJ, was transferred from the CLB in the Civil Division to the Employment Litigation Section (ELS) in the Civil Rights Division. I urged this change and applauded it when it was made.²⁸

The ELS takes USERRA enforcement seriously and handles these cases from Washington, not relying upon the 93 United States Attorneys and their staffs. The attorney who filed the *Cruz* case works for ELS in Washington and files and prosecutes USERRA cases all over the country.

The overall focus of the Civil Rights Division is on enforcing the rights of Americans, and USERRA is a good fit for that Division. The overall focus of the Civil Division is on protecting the federal treasury against claims made by Americans, under laws like the Federal Tort Claims Act. Moving USERRA enforcement responsibility from the Civil Division to the Civil Rights Division was a big improvement.

Who is the named plaintiff in a USERRA case brought by DOJ?

When DOJ brings a USERRA lawsuit against a state government agency, as employer, the named plaintiff is the United States of America.²⁹ In cases brought by DOJ against private employers, the named plaintiff is the individual service member or veteran.

The final subsection of section 4323 provides: “In this section [for purposes of USERRA enforcement], the term ‘private employer’ includes a political subdivision of a State.”³⁰ The City of Glendale is a political subdivision of the State of Arizona. In accordance with section 4323(i), the named plaintiff in this lawsuit is Rebecca Cruz, not the United States of America.

In 2011, DOJ asked Congress to amend USERRA to provide that the named plaintiff would be the United States of America in any USERRA case brought by DOJ, but Congress has not acted upon this DOJ request. I have endorsed the DOJ request for two reasons:

- When the United States is the named plaintiff, DOJ has standing to demand systemic relief for all affected service members and veterans who are employed by that employer. When the named plaintiff is an individual, DOJ can only demand relief for that individual.
- When the United States is the named plaintiff, DOJ can get around the employer argument that the employee is bound by an arbitration “agreement” that he or she was forced to sign as a condition of hiring. DOJ can point out that Uncle Sam is the named plaintiff, and Uncle Sam never agreed to binding arbitration.³¹

²⁸ Please see Law Review 148 (November 2004).

²⁹ 38 U.S.C. 4323(a)(1) (final sentence).

³⁰ 38 U.S.C. 4323(i).

³¹ Please see Law Review 17045 (May 2017).

Rebecca Cruz may be entitled to *paid* military leave under Arizona state law or a city ordinance of the City of Glendale.

USERRA gives Rebecca Cruz the right to an *unpaid but job-protected* military leave of absence. USERRA is a floor and not a ceiling on the rights of those who serve or have served our country in uniform. USERRA does not supersede a state law or a local ordinance that provides *greater or additional rights*.³²

Ms. Cruz may be entitled, under Arizona state law and/or under a city ordinance of the City of Glendale, to *paid* military leave for her 67-day training duty from July to September 2016. If Ms. Cruz were represented by private counsel, she could assert her state law claim to paid military leave, along with her federal USERRA claim, in federal court, but DOJ is limited to representing Ms. Cruz with respect to her USERRA claims. Despite this limitation, it appears that Ms. Cruz is being well served by DOJ representation.

Here is a link to the DOJ press release announcing the filing of this lawsuit:

<https://www.justice.gov/opa/pr/justice-department-sues-glendale-az-violating-employment-rights-arizona-air-national-guard>

UPDATE APRIL 2019

The lawsuit filed by the United States Department of Justice (DOJ) for Captain Cruz was resolved favorably to her. Here is the DOJ press release announcing the favorable resolution:

<https://www.justice.gov/opa/pr/justice-department-settles-lawsuit-against-glendale-arizona-violating-userra-rights-arizona>

³² 38 U.S.C. 4302(a).