

Firing you Probably Violated USERRA

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

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1.2—USERRA forbids discrimination

1.4—USERRA enforcement

Q: I am a Lieutenant (O-3) in the Coast Guard Reserve and a member of the Reserve Officers Association (ROA). I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I joined ROA recently because I am impressed with the support that your organization has provided to Reserve Component (RC)³ members in understanding and enforcing their legal rights with respect to their civilian employers.

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 1500 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find 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 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.

³ Our nation has seven Reserve Components. In order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, and the Army National Guard. The number of actively participating RC members is almost equal to the number of service members on regular full-time active duty. Thus, RC members make up almost half of our nation’s pool of trained and available military personnel. In the 27 years since August 1990, when Saddam Hussein’s Iraq occupied Kuwait and President George H.W. Bush called up RC units as part of his forceful response, the Reserve Components have been transformed from a “strategic reserve” (available only for World War III, which thankfully never happened) to an “operational reserve” (routinely called to the colors for intermediate military operations like Iraq and Afghanistan).

In March 2017, I was hired by a large New York bank—let's call it Big New York Bank or BNYB. Almost immediately after I started work, I had problems with my first-level supervisor and my second-level supervisor about the days I needed to miss work for Coast Guard Reserve training and service. I told my second-level supervisor that USERRA gives me the right to an unpaid but job-protected military leave of absence, and he said: "Those stupid Army laws don't apply to me and to this company."

In late May 2017, I notified my supervisor and BNYB's personnel office that I would need to be away from work for Coast Guard duty for three weeks, from mid-June to early July. Four days after I gave this notice, the bank fired me. I complained that the firing violated USERRA. The bank's director insisted:

- a. The firing is unreviewable because I was an "at will" employee.
- b. The decision to fire me was based on my substandard work, not my Coast Guard service.

I filed a formal, written USERRA complaint against BNYB with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). The investigator did a very cursory investigation and basically accepted as "gospel" the factual and legal assertions that BNYB's high-priced attorney made. The investigator told me that my case will be closed as "no merit" unless I can come up with "direct evidence" that the firing was motivated by my Coast Guard service.

The anti-military statements by my first-level supervisor and his supervisor were made to me alone, behind closed doors. No recording was made—I did not wear a wire. There were anti-military statements made in e-mails, but as a former employee I no longer have access to the company's e-mail system. I think that it is wrong that the DOL-VETS investigator is putting the burden on me to investigate my own case. What do you think?

A: I think that you are exactly right that it was egregiously wrong for the DOL-VETS investigator to put the burden on you to investigate your own complaint and produce evidence. DOL-VETS has subpoena authority to obtain documents, testimony and other evidence in USERRA investigations.⁴ It is most unfortunate that DOL-VETS is shy about using the authority that it has. If DOL complainants could investigate their own cases, there would be no need for DOL-VETS. All too many DOL-VETS investigators think that conducting an "investigation" consists of sending a letter to the employer, reading the response prepared by the employer's attorney, sending the attorney's letter to the complainant and giving him or her 15 days to respond, and then closing the case as "no merit."

In the "Law Review" column, I have not hesitated to criticize DOL-VETS when they do poorly.⁵ I have also praised DOL-VETS when they have done well.⁶ It really depends upon the luck of the draw. You

⁴ 38 U.S.C. 4326.

⁵ Please see Law Review 16099 (September 2016).

⁶ Please see Law Review 17081 (August 2017).

may get lucky, and your case may be assigned to one of the DOL-VETS investigators who take their job seriously, but don't count on it.

How to prove USERRA discrimination

The DOL-VETS investigator who told you that you need "direct evidence" or a "smoking gun" to win a discrimination case under section 4311 of USERRA⁷ is just flat wrong. The United States Court of Appeals for the Federal Circuit⁸ has held:

The factual question of discriminatory motivation or intent may be proven either direct or circumstantial evidence. ... Circumstantial evidence will often be a factor in these cases, for discrimination is seldom open or notorious. Discriminatory motivation under USERRA may be reasonably inferred from a variety of factors, including proximity in time between the employee's military activity and the adverse personnel action, inconsistencies between the proffered reason [cited by the employer for the adverse personnel action] and other actions of the employer, an employer's expressed hostility towards members protected by the statute, together with knowledge of the employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records of offenses.⁹

The pertinent USERRA section is as follows:

§ 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--*

⁷ 38 U.S.C. 4311.

⁸ The Federal Circuit is the federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from the Merit Systems Protection Board (MSPB).

⁹ *Sheehan v. Department of the Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001) (case citations omitted).

- (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.¹⁰

As is shown section 4311(c)(1), italicized above, you need not prove that the bank's decision to fire you was based solely on your military service. You only need to prove that your military service was a *motivating factor* in the employer's decision. If you prove motivating factor, you win, unless the employer *proves* (not just says) that you would have been fired anyway even if you had not been a Coast Guard Reservist.

Your "at will" status in no way detracts from your rights under section 4311. The Department of Labor (DOL) USERRA Regulation provides:

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 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.¹¹

Q: Who runs DOL-VETS?

A: DOL-VETS is a small part of the large Department of Labor (DOL), and it has an annual budget of about \$226 million and a staff of about 300. Enforcing USERRA is one of several important responsibilities of DOL-VETS.

¹⁰ 38 U.S.C. 4311 (emphasis supplied). For a detailed discussion of the section 4311 case law, please see Law Review 17016 (March 2017), by attorney Thomas Jarrard and myself.

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

This agency is run by the Assistant Secretary of Labor for Veterans' Employment and Training (ASVET). The ASVET is a political appointee, appointed by the President and confirmed by the Senate. The last ASVET was the Honorable Michael Michaud of Maine, a former Member of Congress. He was appointed by President Obama and confirmed by the Senate. Like almost all political appointees in the Executive Branch, he left office on January 20, 2017, when President Trump was inaugurated. President Trump has not yet nominated anyone for the ASVET position. I call upon him to do so as soon as possible.

The ASVET is assisted by the Deputy Assistant Secretary for Policy (a presidential appointee who does not need Senate confirmation) and the Deputy Assistant Secretary for Operations and Management, a career civil servant. The Deputy Assistant Secretary for Policy also left office about the time of the Trump inauguration.

Sam Shellenberger is the Deputy Assistant Secretary for Operations and Management. He is running DOL-VETS on an interim basis, until the new ASVET is appointed and confirmed.

Mr. Shellenberger served on active duty in the Navy for eight years and then transferred to the Navy Reserve. He retired as a Captain (O-6) about a decade ago. I hope that he will take an interest in improving the performance of DOL-VETS in enforcing USERRA, as Secretary Michaud did.¹²

¹² Please see the January 2017 Update of Law Review 16099 (September 2016). In December 2016, ROA Executive Director Jeffrey Phillips and I met with Assistant Secretary Michaud and a member of his staff to discuss the issue of improving USERRA enforcement.