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If You Are Claiming a USERRA Violation, the MSPB Has Jurisdiction To Review Your Firing even if You Have Not Completed the Initial Year of Federal Employment

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

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Q: I am a Major in the Army 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 am particularly interested in two very recent articles, Law Review 18114 (January 2018) and Law Review 18117 (February 2018). Those articles discuss how one can enforce USERRA against a federal executive agency (as employer) by means of an action in the Merit Systems Protection Board (MSPB).

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1600 "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 1400 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.

I started a new federal job on 10/1/2016, and I have never been a federal civilian employee before that date. Almost a year later, in September 2017, the agency fired me, and I believe that the firing was motivated by my Army Reserve service.

During my 11.5 months of federal civilian employment, I was continually harassed by my direct supervisor and his supervisor about my Army Reserve service and about my absences from work for service and training in the Army Reserve. I was told at least 15 times that "you must choose between working for this agency and playing soldier—you cannot do both." Whenever North Korea or some other potential hot spot was in the news, my supervisor or his supervisor asked me, "When are you going to get called up?"

During my September 2017 Army Reserve drill weekend, I was notified by my commanding officer that it was likely that the unit would be called to active duty in early 2018. As instructed by my commanding officer, I notified my civilian supervisor of the likelihood of 2018 mobilization on the Monday following the drill weekend. Just one week later, I was told that I was fired from my civilian job.

I protested to the agency's personnel office and general counsel immediately after I was notified that I was being fired. Both told me that the firing is unreviewable because I did not have one year of federal civilian employment under my belt when I was fired. Is that assertion correct?

A: No, that assertion is wrong. If you are claiming that the firing violated USERRA, you have the right to appeal to the MSPB and that board has the duty to hear evidence and adjudicate your claim.

Congress created the MSPB in 1978, when it enacted the Civil Service Reform Act (CSRA). That statute split the former Civil Service Commission (CSC) into three separate agencies. The Office of Personnel Management (OPM) inherited the CSC's headquarters building, most of the staff and resources, and the functions as the personnel office of the Executive Branch of the Federal Government. The MSPB inherited the adjudicatory functions of the CSC. The Office of Special Counsel (OSC) inherited the CSC's investigatory and prosecutorial functions.

A federal employee *who has completed the initial year of federal civilian employment* and who has been fired or suspended without pay for 15 days or more can appeal the firing or suspension to the MSPB.[3] Hearing appeals of firings and suspensions, from federal employees or former employees who have completed the initial year of federal employment, constitutes the bulk of the work of the MSPB. Prior to 1978, the bulk of the adjudicatory work of the CSC

[3] 5 U.S.C. 7511(a)(1)(A).

was adjudicating appeals of firings and suspensions of federal employees who had completed their initial probationary periods.

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA[4] and President Bill Clinton signed it on 10/13/1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. The VRRA applied to the Federal Government, as an employer, but the VRRA lacked a specific enforcement mechanism with respect to federal agencies as employers. If a federal employee could otherwise bring his or her claim to the MSPB or the CSC (prior to 1978), but MSPB or CSC would adjudicate the VRRA claim, but if the VRRA claimant had no appeal right to the MSPB or CSC there was no remedy for a VRRA violation by a federal agency as employer.

One of the big improvements made in 1994 was to provide a specific enforcement mechanism for USERRA claims against federal executive agencies as employers. Section 4324 of USERRA provides:

§ 4324. Enforcement of rights with respect to Federal executive agencies

- **(a)**
  - **(1)** A person who receives from the Secretary a notification pursuant to section 4322(e) may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board. Not later than 60 days after the date the Secretary receives such a request, the Secretary shall refer the complaint to the Office of Special Counsel established by section 1211 of title 5.
  - **(2)**
    - **(A)** If the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred under paragraph (1) is entitled to the rights or benefits sought, the Special Counsel (upon the request of the person submitting the complaint) may appear on behalf of, and act as attorney for, the person and initiate an action regarding such complaint before the Merit Systems Protection Board.
    - **(B)** Not later than 60 days after the date the Special Counsel receives a referral under paragraph (1), the Special Counsel shall--
      - **(i)** make a decision whether to represent a person before the Merit Systems Protection Board under subparagraph (A); and
      - **(ii)** notify such person in writing of such decision.

- **(b)** A person may submit a complaint against a Federal executive agency or the Office of Personnel Management under this subchapter directly to the Merit Systems Protection Board if that person--

[4] See footnote 2.

- **(1)** has chosen not to apply to the Secretary for assistance under section 4322(a);
- **(2)** has received a notification from the Secretary under section 4322(e);
- **(3)** has chosen not to be represented before the Board by the Special Counsel pursuant to subsection (a)(2)(A); or
- **(4)** has received a notification of a decision from the Special Counsel under subsection (a)(2)(B) declining to initiate an action and represent the person before the Merit Systems Protection Board.

- **(c)**
  - **(1)** The Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to subsection (a)(2)(A) or (b), without regard as to whether the complaint accrued before, on, or after October 13, 1994. A person who seeks a hearing or adjudication by submitting such a complaint under this paragraph may be represented at such hearing or adjudication in accordance with the rules of the Board.
  - **(2)** If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.
  - **(3)** Any compensation received by a person pursuant to an order under paragraph (2) shall be in addition to any other right or benefit provided for by this chapter and shall not diminish any such right or benefit.
  - **(4)** If the Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that such person is entitled to an order referred to in paragraph (2), the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.

- **(d)**
  - **(1)** A person adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board under subsection (c) may petition the United States Court of Appeals for the Federal Circuit to review the final order or decision. Such petition and review shall be in accordance with the procedures set forth in section 7703 of title 5.
  - **(2)** Such person may be represented in the Federal Circuit proceeding by the Special Counsel unless the person was not represented by the Special Counsel before the Merit Systems Protection Board regarding such order or decision.[5]

[5] 38 U.S.C. 4324.

USERRA (enacted in 1994) did not create the MSPB—that agency was created 16 years earlier (1978) by the CSRA. But USERRA greatly expanded the jurisdiction, authority, and responsibility of the MSPB, to include adjudicating claims that federal executive agencies (as employers) have violated USERRA and awarding appropriate relief in cases where violations have been found.

The MSPB's jurisdiction under section 4324 of USERRA is not limited to cases that are otherwise appealable to the MSPB, because the fired employee had completed the initial year of federal civilian employment before the firing. USERRA provides a workable enforcement mechanism for all persons who claim and can establish that a federal executive agency has violated USERRA. This includes persons (like you) who cannot otherwise get to the MSPB because they have not completed the initial year of federal civilian employment. This also includes employees, former employees, and unsuccessful applicants for employment with non-appropriated fund instrumentalities (NAFIs) of the Federal Government.[6]

The MSPB also has jurisdiction in a case where a federal executive agency is the joint employer of a person who is directly employed by a federal contractor and where the federal agency as joint employer has violated USERRA.[7]

Brigadier General (BG) Michael J. Silva, USAR (a life member of ROA and later ROA's National President) was the named appellant in the case of *Silva v. Department of Homeland Security*.[8] From June 2005 to May 2006, Mr. Silva worked for SPS Consulting LLC (SPS) on a contract with the United States Department of Homeland Security (DHS). SPS provided DHS with financial support services through two positions, one of which was titled Financial Manager (FM). SPS put Mr. Silva in the FM position, but under the contract DHS retained the right to approve or disapprove any substitutions of the person serving as FM.

In February 2006, BG Silva was selected to command the 411th Engineers and immediately prepare for mobilization and deployment to Iraq. He immediately notified SPS and DHS. Mr. Silva suggested a particular person to fill his job, and she was hired, with DHS' approval.
In May 2006, BG Silva was called to active duty and deployed to Iraq. He was released from active duty in August 2007, and he made a timely application for reemployment with SPS and DHS. Although he met the eligibility criteria for reemployment under USERRA,[9] he was not

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[6] By far the largest NAFI is the Army & Air Force Exchange Service (AAFES). Prior to the enactment of USERRA in 1994, AAFES routinely flouted the VRRA, knowing that there was no remedy available for persons whose VRRA rights were violated by AAFES. Please see Law Review 15064 (July 2015).

[7] *See Silva v. Department of Homeland Security,* 2009 MSPB 189 (Merit Systems Protection Board September 23, 2009). I discuss this case in detail in Law Review 0953 (October 2009).

[8] See footnote 7.

[9] As I have explained in Law Review 15116 (December 2015) and other articles, a person must meet five simple conditions to have the right to reemployment under USERRA. The person must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary service in the uniformed services and must have given the employer prior oral or written notice. The person must not have exceeded USERRA's five-year cumulative limit on the duration of the period or periods of uniformed service relating to the employer relationship for which the person seeks reemployment. There are nine exemptions—kinds of service that do not count toward exhausting the person's limit. Please see Law Review 16043 (May 2016). The person must have been

reemployed.

SPS initially told Mr. Silva that it would reemploy him in the FM position that he had left, but the company changed its position and told him that it would not reemploy him because DHS had disapproved his reemployment. The new employee apparently did a fine job during Mr. Silva's absence, and the DHS contract administrator did not want her to be displaced.

The lack of a current vacancy in the FM position, at the time Mr. Silva applied for reemployment, in no way excused SPS from its obligation to reemploy Mr. Silva.[10] In some circumstances, reemploying the returning veteran necessarily means displacing another employee, and this was apparently one of those cases. If an employer could defeat the reemployment rights of the employee called to the colors simply by filling the position, USERRA would be of little value.

As I explained in Law Review 154 (December 2004), and as the Department of Labor (DOL) USERRA regulations provide,[11] it is possible for an individual employee to have two employers, in the same job, at the same time. This is called the "joint employer" situation, and Mr. Silva's situation is a good example.

SPS and DHS were Mr. Silva's joint employers at the time he was called to the colors, in that each entity had control over certain aspects of his employment situation. Both SPS and DHS had responsibilities under USERRA. By standing in the way of the reemployment of the returning veteran, DHS violated USERRA, even though Mr. Silva never worked for DHS in the traditional sense-he was not a federal civilian employee.

In accordance with MSPB rules, Mr. Silva's case was presented to an Administrative Judge (AJ) of the MSPB. The AJ conducted a hearing on the merits of Mr. Silva's claim but then granted the DHS motion to dismiss based on an asserted lack of MSPB jurisdiction over cases of this nature (involving "joint employees" who are not federal employees in the traditional sense).

The OSC appealed, on behalf of Mr. Silva, to the MSPB itself. The MSPB consists of three members, each of whom is appointed by the President with Senate confirmation. On September 23, 2009, the MSPB agreed with OSC and found that it had jurisdiction to hear Mr. Silva's case against DHS. The MSPB remanded the case to the AJ to make findings on the merits of Mr. Silva's claim. On remand, the case settled. DHS made a substantial payment (of an undisclosed amount) to Mr. Silva to settle his claim against DHS.

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released from the period of service without having received a disqualifying bad discharge from the military and must have made a timely application for reemployment after release from service. It is clear beyond any question that Mr. Silva met these five conditions in August 2007.

[10] *See Nichols v. Department of Veterans Affairs,* 11 F.3d 160, 163 (Fed. Cir. 1993).

[11] 20 C.F.R. 1002.37.

Q: What do I need to prove to show that firing me violated USERRA?

A: The pertinent section of USERRA is section 4311, which forbids discrimination in employment based on past, present, or projected future service in a uniformed service.

USERRA text and legislative history

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA in 1994 as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. Under the VRRA, a person who was drafted or who voluntarily enlisted in the armed forces was entitled to reemployment in the pre-service civilian job after honorable service. In 1955 and 1960, Congress expanded the VRRA to apply also to initial active duty training, active duty for training, and inactive duty training performed by Reserve and National Guard members.

When leaving a job for service and returning to the job became a recurring phenomenon rather than a once-in-a-lifetime experience, Congress amended the VRRA in 1968, adding a provision making it unlawful for an employer to fire a Reserve Component service member or to deny such a person promotion or "incidents or advantages of employment" based on "any obligation as a member of a Reserve Component of the Armed Forces." In 1986, Congress amended this provision to forbid discrimination in hiring.

The VRRA only forbade discrimination based on "any obligation as a member of a Reserve Component of the armed forces." USERRA's anti-discrimination provision is much broader. It forbids the denial of initial employment, retention in employment, promotion, or a benefit of employment based on membership in a uniformed service, application to join a uniformed service, performance of service, or application or obligation to perform service.[12]

Just prior to the enactment of USERRA in 1994, the pertinent section of the VRRA read as follows:

> Any person who seeks or holds a position described in clause (A) [a position with the United States Government, any territory or possession of the United States or a political subdivision of a territory or possession, or the Government of the District of Columbia] or (B) [a state, a political subdivision of a state, or a private employer] of subsection (a) of this section shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment *because of any obligation as a member of a Reserve component of the Armed Forces.*[13]

[12] 38 U.S.C. 4311(a).
[13] 38 U.S.C. 4321(b)(3) (1988 edition of the United States Code) (emphasis supplied).

USERRA (enacted in 1994) contains a much broader and stronger anti-discrimination provision, 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--
    - **(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.[14]

Section 4321(b)(3) of the VRRA forbade discrimination by employers only if such discrimination was "because of any obligation as a member of a Reserve component of the Armed Forces." Section 4311 of USERRA forbids discrimination based on any one of the following statuses or activities:

a. Membership in a uniformed service.[15]
b. Application to join a uniformed service.
c. Performing uniformed service.
d. Having performed uniformed service in the past.
e. Application to perform uniformed service.
f. Obligation to perform uniformed service.
g. Having taken an action to enforce a USERRA protection for any person.
h. Having testified or otherwise made a statement in or in connection with a USERRA proceeding.
i. Having assisted or otherwise participated in a USERRA investigation.
j. Having exercised a USERRA right.

Under section 4311(c) of USERRA,[16] it is not necessary to prove that one of the protected statuses or activities was *the reason* for the firing, denial of initial employment, or denial of a promotion or a benefit of employment. It is sufficient to prove that one of the protected activities or statuses was *a motivating factor* in the employer's decision. If the plaintiff proves motivating factor, the *burden of proof shifts to the employer to prove (not just say) that it would have made the same decision in the absence of the protected status or activity.*

USERRA's legislative history explains section 4311 as follows:

> Current law [the VRRA] protects Reserve and National Guard personnel from termination from their civilian employment or other forms of discrimination based on their military obligations. Section 4311(a) would reenact the current prohibition against discrimination which includes discrimination against applicants for employment (*see*

[14] 38 U.S.C. 4311 (emphasis supplied).
[15] As defined by USERRA, the uniformed services include the Army, Navy, Marine Corps, Air Force, and Coast Guard, as well as the commissioned corps of the Public Health Service (PHS). 38 U.S.C. 4303(16). The commissioned corps of the National Oceanic and Atmospheric Administration (NOAA) is not a uniformed service for USERRA purposes, although it is a uniformed service as defined in 10 U.S.C. 101(a)(5). Please see Law Review 15002 (January 2015) for an explanation of how it came to pass that USERRA applies to the PHS Corps but not the NOAA Corps. Under more recent amendments, Intermittent Disaster Response Appointees of the National Disaster Medical System under the cognizance of the Department of Health and Human Services and persons who serve in the National Urban Search and Rescue Response System under the cognizance of the Federal Emergency Management Agency in the Department of Homeland Security have reemployment rights under USERRA. Please see Law Review 17011 (February 2017).
[16] 38 U.S.C. 4311(c).

Beattie v. The Trump Shuttle, Inc., 758 F. Supp. 30 (D.D.C. 1991), current employees who are active or inactive members of Reserve or National Guard units, current employees who seek to join Reserve or National Guard units (*see Boyle v. Burke,* 925 F.2d 497 (1st Cir. 1991), or employees who have a military obligation in the future such as a person who enlists in the Delayed Entry Program which does not require leaving the job for several months. *See Trulson v. Trane Co.,* 738 F.2d 770, 775 (7th Cir. 1984). The Committee [House Committee on Veterans' Affairs] intends that these anti-discrimination provisions be broadly construed and strictly enforced. The definition of employee, which also includes former employees, would protect those persons who were formerly employed by an employer and who have had adverse action taken against them by the former employer since leaving the former employment.

If the employee is unlawfully discharged under the terms of this section prior to leaving for military service, such as under the Delayed Entry Program, that employee would be entitled to reinstatement for the remainder of the time the employee would have continued to work plus lost wages. Such a claim can be pursued before or during the employee's military service, even if only for lost wages.

Section 4311(b) [now 4311(c), as amended in 1996] would reaffirm that the standard of proof in a discrimination or retaliation case is the so-called "but for" test and that the burden of proof is on the employer, once a prima facie case is established. This provision is simply a reaffirmation of the original intent of Congress when it enacted current section 2021(b)(3) [later renumbered 4321(b)(3)] of title 38, in 1968. *See* Hearings on H.R. 11509 Before Subcommittee No. 3 of the House Committee on Armed Services, 89th Cong., 1st Session at 5320 (February 23, 1966). In 1986, when Congress amended section 2021(b)(3) to prohibit initial hiring discrimination against Reserve and National Guard members, Congressman G.V. Montgomery (sponsor of the legislation and Chairman of the House Committee on Veterans' Affairs) explained that, in accordance with the 1968 legislative intent cited above, the courts in these discrimination cases should use the burden of proof analysis adopted by the National Labor Relations Board and approved by the Supreme Court under the National Labor Relations Act. *See* 132 Cong. Rec. 29226 (October 7, 1986) (statement of Cong. Montgomery) citing *National Labor Relations Board v. Transportation Management Corp.,* 462 U.S. 393 (1983).

This standard and burden of proof is applicable to all cases brought under this section regardless of the date of accrual of the cause of action. To the extent that courts have relied on dicta from the Supreme Court's decision in *Monroe v. Standard Oil Co.,* 452 U.S. 549, 559 (1981), that a violation can occur only if the military obligation is the sole factor (*see Sawyer v. Swift & Co.,* 836 F.2d 1257, 1261 (10th Cir. 1988), those decisions

have misinterpreted the original legislative intent and history of 38 U.S.C. 2021(b)(3) and are rejected on that basis.[17]

USERRA Regulations

Two sections of the Department of Labor (DOL) USERRA Regulations address how to prove a violation of section 4311:

§ 1002.22 Who has the burden of proving discrimination or retaliation in violation of USERRA?

The individual has the burden of proving that a status or activity protected by USERRA was one of the reasons that the employer took action against him or her, in order to establish that the action was discrimination or retaliation in violation of USERRA. If the individual succeeds in proving that the status or activity protected by USERRA was one of the reasons the employer took action against him or her, the employer has the burden to prove the affirmative defense that it would have taken the action anyway.[18]

§ 1002.23 What must the individual show to carry the burden of proving that the employer discriminated or retaliated against him or her?

- **(a)** In order to prove that the employer discriminated or retaliated against the individual, he or she must first show that the employer's action was motivated by one or more of the following:
  - **(1)** Membership or application for membership in a uniformed service;
  - **(2)** Performance of service, application for service, or obligation for service in a uniformed service;
  - **(3)** Action taken to enforce a protection afforded any person under USERRA;
  - **(4)** Testimony or statement made in or in connection with a USERRA proceeding;
  - **(5)** Assistance or participation in a USERRA investigation; or,
  - **(6)** Exercise of a right provided for by USERRA.

- **(b)** If the individual proves that the employer's action was based on one of the prohibited motives listed in paragraph (a) of this section, the employer has the burden to prove the affirmative defense that the action would have been taken anyway absent the USERRA-protected status or activity.[19]

[17] 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 paragraphs can be found on pages 689-90 of the 2017 edition of the *Manual.*

[18] 20 C.F.R. 1002.22 (bold question in original).

[19] 20 C.F.R. 1002.23 (bold question in original).

Case law under section 4311 of USERRA

***Staub v. Proctor Hospital*[20]**

While employed by Proctor Hospital as an angiography technician, Vincent Staub (a noncommissioned officer in the Army Reserve) was required to attend one drill weekend per month and two or three weeks of full-time training per year. Because the angiography department of the hospital required weekend staffing, Staub's military obligations imposed some burden on the hospital.

Both Janice Mulally, Staub's immediate supervisor, and Michael Korenchuk, Mulally's supervisor, were hostile to Staub's military obligations. Mulally scheduled Staub for additional shifts without notice so that he would have to "pay back the department for everyone else having to bend over backward to cover his schedule for the Reserves." She also informed Staub's co-worker (Leslie Swedeborg) that Staub's "military duty has been a strain on the department" and she asked Swedeborg to help her "get rid of" Staub. Korenchuk referred to Staub's military obligations as "a bunch of smoking and joking and a waste of the taxpayers' money" and he stated that he was aware that Mulally was "out to get" Staub.[21]

In January 2004, Proctor Hospital issued Staub a "corrective action" disciplinary warning for purportedly violating a company rule requiring him to stay in his work area whenever he was not working with a patient. In April 2004, Proctor Hospital fired Staub for allegedly violating the corrective action. Staub contended that both the corrective action and the allegation that he had violated it were invented by Mulally and Korenchuk based on their animus against him because of his Army Reserve service.

Proctor Hospital contended that the decision to fire Staub was made by Linda Buck, the hospital's human relations director, and that Buck was not infected by any of the anti-military animus that Korenchuk and Mulally had exhibited. But Korenchuk and Mulally clearly initiated the process that led to the firing of Staub, and Buck must have relied primarily on adverse reports about Staub's work performance that she received from Korenchuk and Mulally.

Staub sued the hospital in the United States District Court for the Central District of Illinois, claiming that the firing violated section 4311 of USERRA, 38 U.S.C. 4311. The case was tried before a jury, and Staub prevailed. After hearing the evidence in multi-day trial, and after hearing the District Judge's instructions, the jury found that Staub had proved, by a preponderance of the evidence, that his Army Reserve service was a motivating factor in

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[20] 562 U.S. 411 (2011). This is a 2011 decision of the United States Supreme Court. The citation means that you can find the decision in Volume 562 of *United States Reports* (where Supreme Court decisions are published), and the decision starts on page 411. I discuss this case in detail in Law Review 1122 (March 2011).

[21] These facts come directly from the majority opinion, written by Justice Antonin Scalia. At the outset, Justice Scalia wrote: "Staub and Proctor hotly dispute the facts surrounding the firing, but because the jury found for Staub in his claim of employment discrimination against Proctor, we describe the facts in the light most favorable to him."

Proctor Hospital's decision to terminate his employment, and that the hospital had not proved that it would have fired him anyway, for lawful reasons, in the absence of his membership in the Army Reserve, his performance of uniformed service, and his obligation to perform future service.

The District Judge denied Proctor's motion for new trial and motion for judgment notwithstanding the verdict. Proctor then appealed to the United States Court of Appeals for the 7th Circuit.[22] A three-judge panel of the 7th Circuit reversed the District Court verdict for Staub, holding that under the "cat's paw doctrine"[23] Proctor Hospital could not be held liable for discrimination by Korenchuk and Mulally unless Staub proved that Buck was "singularly influenced" by the two direct supervisors.

Staub applied to the 7th Circuit for rehearing *en banc*, but that motion was denied. Staub applied to the Supreme Court for discretionary review, which was granted. Briefs for the parties and friends of the court (including ROA) were filed in July and August 2010. The oral argument was held on November 2, 2010, and the decision came down March 1, 2011.

Justice Antonin Scalia wrote the majority decision, and his opinion was joined by Chief Justice John Roberts, Justice Anthony Kennedy, Justice Ruth Bader Ginsburg, Justice Stephen Breyer, and Justice Sonia Sotomayor. The majority decision relied on principles of agency law and tort law and found that the employer (Proctor Hospital) was liable for the discriminatory actions of supervisory employees Korenchuk and Mulally and that requiring Staub to prove that Buck was "singularly influenced" by the two immediate supervisors was inconsistent with those principles.

Near the end of the majority opinion, Justice Scalia summarized the Court's holding as follows:

> We therefore hold that if a supervisor performs an act motivated by anti-military animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA.[24]

Justice Samuel Alito, joined by Justice Clarence Thomas, wrote a concurring decision, agreeing with the result (reversal of the 7th Circuit) but relying on the text of USERRA rather than general principles of agency law and tort law. Justice Elena Kagan did not participate.

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[22] The 7th Circuit is the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.

[23] The "cat's paw" reference is to a fable written by Aesop about 25 centuries ago and put into verse by LaFontaine in 1679. In the fable, a clever monkey induces a cat by flattery to extract roasting chestnuts from the fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing. See footnote 1 of the majority opinion.

[24] *Staub,* 562 U.S. at 422 (emphasis in original).

***Sheehan v. Department of the Navy*[25]**

In an important precedential decision, the Federal Circuit set forth the mode of proving a violation of section 4311, as follows:

> Discriminatory motivation under USERRA may be reasonably inferred from a variety of factors, including (1) proximity in time between an employee's military activity and the adverse employment action, (2) inconsistencies between the proffered reasons [the reasons the employer asserts were the reasons for the adverse employment action] and other actions of the employer, (3) an employer's expressed hostility towards members protected by the statute, and (4) disparate treatment of certain employees compared to other employees with similar work records or offenses.[26]

***Erickson v. United States Postal Service*[27]**

Some employers argue: We did not fire Joe Smith because of his military service. We fired him because he was *absent from work* while performing that service. In an important USERRA case, the United States Postal Service made that argument, and the MSPB accepted it. On appeal, the Federal Circuit firmly rejected this nonsensical argument, holding:

> We reject that argument. An employer cannot escape liability under USERRA by claiming that it was merely discriminating on the basis of absence when the absence was for military service. … The most significant—and predictable—consequence of reserve service with respect to the employer is that the employee is absent to perform that service. To permit an employer to fire an employee because of his military absence would eviscerate the protections afforded by USERRA.[28]

Q: A lawyer that I consulted told me that the firing will be found to violate USERRA only if I can find and prove a "smoking gun" showing that the firing was motivated by my Army Reserve service. Is that true?

A: No, that is not true. You do not need a "smoking gun" to prove a violation of section 4311. The Federal Circuit has held:

> The factual question of discriminatory motivation or intent may be proven by either direct or circumstantial evidence. *See FPC Holdings, Inc.*, 64 F.3d at 942 ("Motive may be

[25] 240 F.3d 1008 (Fed. Cir. 2001). This is a 2001 decision of the United States Court of Appeals for the Federal Circuit, 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. The citation means that you can find this decision in Volume 240 of *Federal Reporter, Third Series,* and this decision starts on page 1008.
[26] *Sheehan,* 240 F.3d at 1014.
[27] 571 F.3d 1364 (Fed. Cir. 2009). Lieutenant Colonel Mathew Tully and I discuss this case in detail in Law Review 14090 (December 2014).
[28] *Erickson,* 571 F.3d at 1368.

> demonstrated by circumstantial as well as direct evidence and is a factual issue which the expertise of the Board [NLRB] is peculiarly suited to determine."); *Matson Terminals*, 114 F.3d at 303-04; *see also Kumferman v. Dep't of Navy*, 785 F.2d 286, 290 (Fed. Cir. 1986) (intent is a question of fact to be found by the MSPB).
>
> *Circumstantial evidence will often be a factor in these cases, for discrimination is seldom open or notorious*. Discriminatory motivation under the USERRA may be reasonably inferred from a variety of factors, including *proximity in time* between the employee's military activity and the adverse employment action, inconsistencies between the proffered reason 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 or offenses. *Cf. W.F. Bolin Co. v. Nat'l Labor Relations Bd.*, 70 F.3d 863, 871 (6th Cir. 1995). In determining whether the employee has proven that his protected status was part of the motivation for the agency's conduct, all record evidence may be considered, including the agency's explanation for the actions taken.[29]

It sounds like you have more than enough evidence to show that your Army Reserve service was *a motivating factor* in the agency's decision to fire you. The strongest evidence that you have is the *proximity in time* between your notification of your supervisor of the likelihood of a 2018 mobilization and the decision to fire you. You also have the "you must choose" remarks by your supervisor and his supervisor. Those remarks may not amount to a smoking gun, but they at least amount to an odor showing that the gun was recently fired.

I think that the MSPB AJ and the MSPB will find that your firing was motivated at least in part by your military service and obligations. Thus, you will prevail unless the employer can *prove* (not just say) that you were fired for demonstrable misconduct or inefficiency and that you would have been fired anyway even if you had not been a member of a Reserve Component of the armed forces.

[29] *Sheehan,* 240 F.3d at 1014.