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Coast Guard Reservist Loses USERRA Case at MSPB and Federal Circuit

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Update on Sam Wright

1.1.1.8—USERRA applies to the Federal Government
1.2—USERRA forbids discrimination
1.4—USERRA enforcement
1.6—USERRA statute of limitations
1.8—Relationship between USERRA and other laws/policies

***Maki v. Department of Justice,* Docket No. SF-4324-15-0591-I-1 (Merit Systems Protection Board September 21, 2016), *affirmed* by United States Court of Appeals for the Federal Circuit March 16, 2018 (unpublished and non-precedential).**

Kyle Maki is a Coast Guard Reservist, perhaps recently retired. His rank is not shown in the Merit Systems Protection Board (MSPB) decision. The Drug Enforcement Administration (DEA) hired him as a GS-7 Special Agent in 1998. DEA is part of the United States Department of Justice (DOJ).

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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 36 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.

Maki was already a Coast Guard Reservist when he was hired by DEA in 1998. Throughout his DEA career, he has needed to be away from his DEA job for drills and annual training in the Coast Guard Reserve (USCGR), and all these periods of absence from DEA are protected by the Uniformed Services Employment and Reemployment Rights Act (USERRA). After the terrorist attacks of 9/11/2001, the demands upon the USCGR and other Reserve Components[3] increased dramatically. Maki was away from his DEA job for long-term periods of active duty from October 2001 to September 2002, January 2003 to November 2003, February 2004 to October 2004, and July 2005 to September 2005. All those periods are also protected by USERRA.

As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. The federal reemployment statute has applied to the Federal Government and to private employers since 1940, and it was amended in 1974 to make it apply to state and local governments as well.

Although the reemployment statute has applied to the Federal Government since 1940, the VRRA lacked an enforcement mechanism with respect to federal agencies as employers. One of the big improvements made by USERRA in 1994 was to establish such an enforcement mechanism, in section 4324, which reads as follows:

> § 4324. Enforcement of rights with respect to Federal executive agencies
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> - **(a)**
>   - **(1)** A person who receives from the Secretary [of Labor] 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--

[3] Our nation has seven Reserve Components. In order of size, they are the 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).

        - **(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--
    - **(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.[4]

Section 4311 of USERRA[5] makes it unlawful for an employer (federal, state, local, or private sector) to deny a person a promotion or benefit of employment (or initial employment or retention in employment) based on the person's membership in a uniformed service, application to join a uniformed service, performance of uniformed service, or application or obligation to perform service. Kyle Maki alleged that DEA discriminated against him, based on his USCGR service, in the following ways:

a. Appointing him as a GS-7 rather than a GS-9 in 1998.
b. Transferring him from San Diego to Carlsbad in 2002.
c. Transferring him to a non-enforcement position in September 2005.
d. Subjecting him to a hostile work environment in 2006-09.
e. Scoring him unduly low in the Special Agent Promotion Program (SAPP) in 2012, making it impossible for him to be promoted.
f. Failing to select him for the position of GS-13 Special Agent Pilot three times in 2007.
g. Failing to select him for the position of GS-13 Special Agent Polygraphist in 2008.
h. Failing to select him for the position of GS-13 Special Agent in the International Training Division in 2014.
i. Failing to select him for the position of GS-14 Group Supervisor twice in 2014.

As Thomas Jarrard and I explained in detail in Law Review 17016 (March 2017), it is necessary for the plaintiff alleging a section 4311 violation to prove that his or her military service or obligation was *a motivating factor* in the employer's decision to take an unfavorable personnel action. Motivating factor can be proved by direct or circumstantial evidence, and it is not necessary to have a "smoking gun" or an admission by the employer that it considered the plaintiff's service or obligation as a negative factor when making the employment 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, for lawful reasons, in the absence of the protected service or obligation.

As with all MSPB cases, Maki's case began before an Administrative Judge (AJ) of the MSPB. The AJ conducted a hearing and made findings of fact and conclusions of law. The AJ concluded that Maki had not presented sufficient evidence to establish that his USCGR service was a motivating factor in any of the unfavorable personnel actions about which Maki complained. Maki appealed to the MSPB itself, which affirmed the AJ's decision on September 21, 2016, in a

[4] 38 U.S.C. 4324.
[5] 38 U.S.C. 4311.

"non-precedential" decision. Maki filed a timely appeal with the United States Court of Appeals for the Federal Circuit.[6] On March 16, 2018, the Federal Circuit affirmed the MSPB, without bothering to write a decision.

I did not participate in or attend the trial or appeal, and I do not have time to read the voluminous record. Accordingly, I cannot say that the AJ, the MSPB, and the Federal Circuit erred in this case.

I can say that Maki probably erred in waiting too long to initiate his USERRA case in the MSPB. There is no statute of limitations under USERRA, and a case can be initiated even years later.[7] But sleeping on your rights is almost always a bad idea. You have the burden of proof when you bring a USERRA case and proving a 1998 violation is much easier in 1999 than it is in 2016. As time passes, memories dim, witnesses die or otherwise become unavailable, and records are lost or destroyed. For this reason, it is prudent to initiate your case sooner rather than later.

Maki and several other Reserve Component members have told me recently that DEA is a serial violator of USERRA. I do not doubt that for one moment. Over the last 35 years, I have heard from scores of DEA employees who have alleged that DEA, as their civilian employer, has flouted USERRA and the VRRA.

I was not called as a witness in Maki's USERRA case, and my testimony would not have been admissible in any case. Evidence about alleged violations with respect to other individuals is not generally admissible in a case, and proof that DEA discriminated against other Reserve Component members does not constitute proof that DEA discriminated against Maki.

[6] The Federal Circuit is the specialized federal appellate court that sits in Washington, DC and has nationwide jurisdiction over certain kinds of cases, including appeals from MSPB decisions.
[7] 38 U.S.C. 4327(b).