LAW REVIEW[1] 18076
August 2018

Army Reservist Prevails in Important USERRA Case

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

1.2—USERRA forbids discrimination
1.3.1.1—Left job for service and gave prior notice
1.3.1.2—Character and duration of service
1.3.1.3—Timely application for reemployment
1.3.2.7—Adequate rest before and after service
1.4—USERRA enforcement

***Arroyo v. Volvo Group North America, LLC,* 805 F.3d 278 (7th Cir. 2015).[3]**

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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. For 42 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also 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 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.

[3] This is a decision of the United States Court of Appeals for the 7th Circuit, the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin. The citation means that you can find this decision in Volume 805 of *Federal Reporter Third Series,* and the decision starts on page 278.

***Arroyo v. Volvo Group North America, LLC,* 2017 U.S. Dist. LEXIS 108507 (N.D. Ill. July 13, 2017).[4]**

LuzMaria Arroyo is an enlisted Army Reservist who worked for Volvo Group North America (Volvo) from June 2005 until November 2011, when she was fired. She alleged that the firing violated both the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Americans with Disabilities Act (ADA).[5] Arroyo worked for Volvo as a materials handler at Volvo's Parts Distribution Center in Joliet, Illinois. She was the only actively serving Reserve Component member working at the Joliet facility.

While employed by Volvo, Arroyo was deployed twice to Kuwait and Iraq, from April 2006 until May 2007 and from April 2009 until August 2010.[6] She was also away from her job for multiple short and some longer periods of training in the Army Reserve. Altogether, Arroyo was away from her Volvo employment for more than 600 days during her 6.5 years of Volvo employment.[7]

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[4] This is a 2017 decision of Judge Robert M. Dow, Jr. of the United States District Court for the Northern District of Illinois. This decision shows the outcome of this case, after it was remanded to the District Court and tried to a jury.

[5] As I have explained in Law Review 15116 (December 2015) and other articles, Arroyo could have filed a formal written USERRA complaint with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), and after that agency completed its investigation she could have insisted that DOL-VETS refer the case file to the United States Department of Justice (DOJ). If DOJ found merit to Arroyo's complaint, it could have filed suit on Arroyo's behalf and represented her in the litigation, at no cost to Arroyo. Instead, Arroyo chose to retain private counsel at her own expense and to sue Volvo in the United States District Court for the Northern District of Illinois. In this case, as is usually the case, Arroyo was much better served by private counsel than she would have been by DOL-VETS and DOJ. DOJ and DOL-VETS would only have considered and investigated Arroyo's USERRA complaint. The private counsel considered both the USERRA cause of action and the ADA cause of action and made both integral parts of her lawsuit against Volvo.

[6] She was also called to the colors and deployed to Southwest Asia once before she began her employment at Volvo.

[7] As I have explained in detail in Law Review 10019 (March 2010), there is *no rule of reason* limiting the frequency or duration of military-related absences from work. After the terrorist attacks of 9/11/2001, the RC has been transformed from a "strategic reserve" available only for World War III (which thankfully never happened) to an "operational reserve" that is routinely relied upon in intermediate military operations like Iraq and Afghanistan. I have no patience with unpatriotic employers and supervisors, like Arroyo's supervisors, who complain about the "burden" that military service puts on civilian employers like Volvo. Yes, USERRA puts a burden on employers, supervisors, and co-workers of those who serve, but that burden is tiny as compared to the much greater burden (sometimes the ultimate sacrifice) voluntarily undertaken by those who serve our country in uniform. The cost of freedom is paid almost exclusively by that tiny fraction of our population (3/4 of one percent of the population) who have volunteered to serve. The remainder of the population contributes nothing to national defense, beyond the payment of taxes. In 1973, Congress abolished the draft and established the All-Volunteer Military (AVM). No one has been drafted in 45 years, but someone must defend this country. To employers who complain about the "burden" on them, I say: We are not drafting you, and we are not drafting your children and grandchildren. When you find Reserve Component service members in your workforce or among job applicants, you should cheerfully comply with USERRA and you should go over and above USERRA in supporting those who serve in your place and in place of your offspring. Please see Law Review 17055 (June 2017).

Arroyo's USERRA claim

From the beginning of her Volvo employment, Arroyo was given a hard time by several supervisors about her Army Reserve service and the absences from her Volvo employment that were necessitated by that service. Her Army Reserve unit conducted weekend training a considerable distance from Arroyo's home and civilian job in Joliet, Illinois. As a result, she needed time off from work on Fridays (to travel to the drill location and arrive in a reasonably rested and fit-for-duty condition) and on Mondays (to return safely from the drill location and have some rest before returning to the civilian job). Volvo denied that Arroyo was entitled to unpaid military leave for those travel days before and after her drill weekends, but she clearly was entitled to that.[8] In March 2008, she reluctantly transferred to an Army Reserve unit considerably closer to her home and work in Joliet.

During a lengthy and contentious discovery period, Arroyo and her lawyer found ample evidence that Volvo's decision to fire her in November 2011 was motivated, at least in part, by the company's frustration with her concerning her frequent and sometimes lengthy periods of military service that interrupted her Volvo employment. The strongest evidence was contained in multiple e-mails among Volvo supervisors and personnel officials, not only expressing frustration about Arroyo's multiple military-related absences from work but also contemplating, in the same e-mails, firing Arroyo to rid themselves of the "burden" presented by Arroyo's military obligations.

After discovery had been completed, Volvo filed a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. A judge is to grant a motion for summary judgment only if he or she can say, after a careful review of the evidence, that there is *no evidence* (beyond a "mere scintilla") in support of the non-moving party's claim or defense and that no reasonable jury could find for the non-moving party.

Surprisingly, Judge Robert M. Dow, Jr. granted Volvo's motion for summary judgment and dismissed all of Arroyo's claims. Arroyo appealed to the 7th Circuit, which reversed the summary judgment and remanded the case back to the district court for a trial on the merits. In reversing the summary judgment for Volvo, the 7th Circuit opinion included the following instructive paragraphs:

> To meet the "motivating factor" standard, a plaintiff does not necessarily need a direct admission from the employer. She may rely instead on circumstantial evidence that creates a "convincing mosaic" from which a reasonable jury could infer discriminatory motive. *See Adams v. Wal-Mart Stores, Inc.,* 324 F.3d 935, 939 (7th Cir. 2003) (discussing

[8] Please see Law Review 12112 (November 2012), Law Review 13058 (May 2013), and Law Review 15030 (March 2015).

the "convincing mosaic" route to proving discrimination); *Troupe v. May Department Stores Co.,* 20 F.3d 734, 736-37 (7th Cir. 1994) (same). Such evidence could include, for example, suspicious timing, statements, or behavior. In the aggregate, these individual pieces might be enough to prove-or at least to create a genuine issue about-the employer's ill motive. *See Hobgood v. Illinois Gaming Board,* 731 F.3d 635, 643-44 (7th Cir. 2013).[9]

Taking all the evidence as a whole, a reasonable jury could infer that Volvo was motivated, at least in part, by anti-military animus toward Arroyo. There is evidence that from the beginning of her employment, her supervisors disliked the burden that her frequent military leave placed on the company. They repeatedly discussed disciplining her and denied her rights, such as travel time, to which she was entitled. Some of the emails came close to a direct admission of management's frustration. For example, Schroeder [a supervisor] discussed his "dilemma" of "disciplining a person for taking too much time off for military reserve duty." He later reportedly told Arroyo that accommodating her orders placed an undue burden on Volvo; Jarvis repeated the same sentiment. Temko complained about Arroyo's lack of communication while she was deployed in Iraq.[10] A jury could understandably detect in these communications animus toward Arroyo's military service.

Animus or frustration alone, however, does not support a claim of discrimination. It must be linked, as a motivating factor, to an adverse employment action. … Again, we think a jury could reasonably conclude that there was such a link here. The emails expressing management's frustration often transitioned directly to a discussion about disciplining Arroyo under the local attendance policy for her tardiness and absences. In the end, she was not disciplined directly for her military leave. But she was disciplined for other instances of tardiness, often of a relatively minor nature-only one or a few minutes late. A jury could infer that Arroyo's punishment for such infractions was actually motivated by her supervisors' long-standing frustration about her frequent absences.[11]

Based on these facts and these considerations, the three-judge panel of the 7th Circuit unanimously reversed the summary judgment for Volvo and remanded the case back to the Northern District of Illinois for trial.

Arroyo's ADA claim

[9] *Arroyo,* 805 F.3d at 284-85.
[10] While deployed in Iraq, at the height of the war, Arroyo needed to concentrate her full attention on her military duties and on keeping herself and her colleagues alive. Please see Law Review 134 (August 2004).
[11] *Arroyo,* 805 F.3d at 285-86.

After returning from her second deployment while employed at Volvo, the deployment that involved combat service in Iraq, Arroyo was diagnosed with and treated for Post-Traumatic Stress Disorder (PTSD), and the treatment included hospitalization from 12/23/2010 until 3/22/2011. Supervisors discussed firing Arroyo while she was hospitalized. Supervisor Sherrie Jankowski e-mailed the human relations director complaining that "Arroyo is really becoming a pain with all this" (apparently referring to the absence for treatment of PTSD on top of the frequent absences for Army training and service).

The Americans with Disabilities Act (ADA) requires employers to make reasonable accommodations for employees with disabilities, including but not limited to disabilities resulting from military service in combat. The ADA also makes it unlawful for an employer to discriminate against an employee based on his or her exercise of ADA rights or having made an ADA claim. In her lawsuit, Arroyo asserted that firing her violated the ADA as well as USERRA.

Judge Dow granted Volvo's motion for summary judgment on the ADA claim as well as the USERRA claim, and Arroyo appealed to the 7th Circuit. The appellate panel acknowledged that reversing the summary judgment on the ADA count was a closer question than reversing it on the USERRA count, but the three-judge panel reversed the summary judgment on the ADA count as well.

The issue of charging court costs to Arroyo

In its decision, the three-judge panel of the 7th Circuit wrote:

> The district court awarded Volvo its reasonable costs, amounting to $9,476.30, as the prevailing party under Federal Rules of Civil Procedure 54(d)(1). In light of our decision [to reverse and remand], that award was at the very least premature and should be vacated. The district court may revisit this issue, however, after a final resolution of the case.[12]

Both Judge Dow and the three judges on the appellate panel were apparently unaware that USERRA explicitly makes it unlawful for a court to order a person claiming USERRA rights to pay the employer's costs, *even when the employer prevails.* "No fees or court costs may be charged or taxed against any person claiming rights under this chapter."[13]

Outcome on remand

On remand, the case was tried to a jury, and the jury found for Arroyo on all seven counts of her complaint, including finding that Volvo had violated USERRA *willfully.* The jury awarded

[12] *Arroyo,* 905 F.3d at 288.
[13] 38 U.S.C. 4323(h)(1).

Arroyo $2.6 million in compensatory damages and $5.2 million in punitive damages on her ADA claim. Judge Dow reduced the compensatory damages to $300,000 and vacated the punitive damages award.

On the USERRA counts, Judge Dow awarded Arroyo $141,388.53 in back pay, $84,131.92 in front pay, and $41,348.61 in other employment-related compensation (lost health insurance coverage, etc.). Based on the jury's finding that Volvo violated USERRA willfully, Judge Dow awarded Arroyo $275,415.16 in liquidated damages.[14]

Judge Dow also indicated that Arroyo would be awarded attorney fees, with the amount to be determined later in a mediation proceeding mandated by the local rules of the Northern District of Illinois.[15]

Kudos to Arroyo's attorney

I congratulate attorney John P. DeRose of Hinsdale, Illinois for his imaginative, diligent, and ultimately successful representation of LuzMaria Arroyo.

[14] *Arroyo v. Volvo Group North America, LLC,* 2017 U.S. Dist. LEXIS 108507 (N.D. Ill. July 13, 2017).

[15] USERRA provides: "In any action or proceeding to enforce a provision of this chapter by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses." 38 U.S.C. 4323(h)(2).