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Recent USERRA Case—Summary Judgment Denied

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

1.2—USERRA forbids discrimination
1.3.2.2—Continuous accumulation of seniority-escalator principle
1.4—USERRA enforcement
1.8—Relationship between USERRA and other laws/policies

***Duarte v. Ferman Management Services Corp.,* 2017 U.S. Dist. 163456 (M.D. Fla. October 3, 2017).[3]**

Ross Duarte is an enlisted Air Force Reservist and is employed as a mechanic by Ferman Management Services Corporation, which operates a Harley-Davidson dealership in Tampa,

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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 recent decision by Judge Steven D. Merryday of the United States District Court for the Middle District of Florida.

Florida. He was away from his civilian job for several months for Air Force training, and when he completed the training he was reemployed by the dealership, but he complained that some of his rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) had been violated. He made three specific claims:

a. Upon his reemployment after his military service, he was not given a pay raise that he claims he would have received if he had been continuously employed.
b. The defendants denied him a promotion to the position of "Green Team Leader," and Duarte claimed that the denial of the promotion was motivated, at least in part, by his Air Force Reserve service.
c. The defendants transferred Duarte to a different and less desirable bay, because of his Air Force Reserve service.

After the completion of discovery, the defendants filed a motion for summary judgment, in accordance with Rule 56 of the Federal Rules of Civil Procedure. A judge should 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. Judge Merryday granted the defendants' motion for summary judgment as to Duarte's first count but denied it as to the other two counts.

The pay raise claim

As I have described 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. In its first case construing the VRRA, the Supreme Court enunciated the "escalator principle" when it held: "[The returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war."[4] Congress has codified the escalator principle in sections 4313(a) and 4316(a) of USERRA.[5]

Under the escalator principle, Duarte was entitled to a pay raise upon his reemployment if he can show with *reasonable certainty* that he would have received the pay raise if he had remained continuously employed—if his civilian job had not been interrupted by a call to the colors. Duarte need not prove that it was absolutely certain that he would have received the pay raise, but he must prove that receiving the pay raise was more than a mere possibility.

[4] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946).
[5] 38 U.S.C. 4313(a), 4316(a).

The defendants' employees are not represented by a labor union, and there is no collective bargaining agreement that provides for pay raises based on seniority. USERRA's escalator principle is not limited to "automatic" promotions and pay raises that are based solely on seniority.[6] Duarte could prove that it was "reasonably certain" that he would have received the pay raise if he had been continuously employed by presenting evidence of his record at the dealership and by showing that other employees with similar records received pay raises during the time that Duarte was away from work for service.

Judge Merryday granted the defendants' motion for summary judgment on the pay raise claim of Duarte's complaint. Because I have not reviewed the record, as Judge Merryday did, I cannot say that the judge got it wrong. In a situation like this, it is very difficult but not impossible for an employee to show that it was reasonably certain that he or she would have received a pay raise if he or she had remained continuously employed.

The promotion claim

Duarte claimed that the defendant had promised him a promotion and that the defendant denied him the promotion *because of his Air Force Reserve service.* Duarte asserted that the denial of the promotion violated section 4311 of USERRA, which provides:

> 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited
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> - **(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.
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> **(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.

[6] *Rivera-Melendez v. Pfizer Pharmaceuticals LLC,* 730 F.3d 49 (1st Cir. 2013). I discuss this case in detail in Law Review 13082 (June 2013) and Law Review 13127 (September 2013).

- **(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.[7]

The defendants asserted that summary judgment for the defendants should be granted on this issue because there was no evidence to show that Duarte was *entitled* to the promotion or that he would have received it, with reasonable certainty, if he had not been away from work for service.

Judge Merryday correctly pointed out that the defendants' argument misses the point. The issue is not whether Duarte was entitled to the promotion. The issue is whether the defendants decided not to promote Duarte *because of* his Air Force Reserve service.

As attorney Thomas G. Jarrard and I described in detail in Law Review 17016 (March 2017), a plaintiff claiming a section 4311 violation is not required to prove that the unfavorable personnel action was *motivated solely* by the plaintiff's membership in a uniformed service, application to join a uniformed service, performance of uniformed service, or application or obligation to perform service. If the plaintiff proves that one of these protected activities was *a motivating factor* in the employer's decision to take the unfavorable personnel action, he or she wins, unless the employer can *prove* that it would have taken the same unfavorable personnel action in the absence of the protected activity.

In his sworn declaration, Duarte stated that his supervisors repeatedly "told me that my military duty was hurting the shop." Judge Merryday held that this testimony created a material issue of fact as to whether Duarte's military service wholly or partially motivated the denial of

[7] 38 U.S.C. 4311 (emphasis supplied).

promotion and thus precluded the granting of the defendants' motion for summary judgment on that issue.

Reassignment to a different service bay

The dealership has multiple service bays that are used by Duarte and other mechanics to service motorcycles. Some of the bays have two lifts, and the others have only one lift each. A mechanic using a two-lift bay can be more productive and can service more motorcycles in a work day. Since the mechanic's pay depends in part on the number of motorcycles he or she services, reassignment to a one-lift bay reduces a mechanic's compensation. Judge Merryday held that Duarte's testimony about his supervisors' opposition to his Air Force Reserve service precluded granting summary judgment on the issue of whether reassigning Duarte to a one-lift bay was motivated by his military service.

Where do we go from here?

The denial of the defendants' motion for summary judgment on two of Duarte's three complaints means that there will be a trial on the two remaining counts, unless the parties settle (as often happens).