

Another Interesting Recent USERRA Case

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- 1.1.3.1—USERRA applies to voluntary service
- 1.2—USERRA forbids discrimination
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- 1.8—Relationship between USERRA and other laws/policies

***Kassel v. City of Middletown*, 272 F. Supp. 3d 516 (S.D.N.Y. 2017).**³

Matthew K. Kassel is an enlisted member of the New York Air National Guard (ANG) and a paid firefighter for the City of Middletown in New York. His supervisors at the fire department objected strenuously to his ANG participation and gave him a hard time about the days of fire

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 (VRRRA—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 VRRRA 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 VRRRA 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 Kenneth M. Karas of the United States District Court for the Southern District of New York. The citation means that you can find this decision in Volume 272 of *Federal Supplement Third Series*, starting on page 516.

department work that he missed to perform military duty and training,⁴ although those absences were clearly protected by the federal Uniformed Services Employment and Reemployment Rights Act (USERRA).

Kassel's supervisors at the fire department tried to draw a distinction between military service periods to which Kassel was ordered and periods for which he volunteered. Regular readers of this column will recognize that no such distinction exists—USERRA applies equally to voluntary and involuntary service. USERRA's definition of "service in the uniformed services" provides: "The term 'service in the uniformed services' means the performance of duty *on a voluntary or involuntary basis* ..."⁵

Almost half a century ago, in 1973, Congress abolished the draft and established the All-Volunteer Military (AVM). The federal reemployment statute is important and relevant, now more than ever. Without a law like USERRA, the services would not be able to recruit and retain enough personnel to defend our nation. Yes, USERRA puts a burden on civilian employers and supervisors, and sometimes on the co-workers of those who are called to the colors. The burdens imposed upon others are tiny as compared to the much greater burdens (sometimes the ultimate sacrifice) voluntarily undertaken by those who serve our country in uniform.⁶

On 6/15/2013, Kassel took the promotion examination for promotion to the rank of Lieutenant in the Middletown Fire Department, and he had the high score among all Middletown firefighters who took the examination in June 2013. Kassel and other candidates were also interviewed for the promotion by a committee consisting of three fire department supervisors. The evidence showed a gaping chasm of difference between the plaintiff's version of what happened in the interview and the defendants' version.

In his deposition testimony, Kassel stated under oath that the three committee members had raised the issue of Kassel's ANG service and had suggested that his military service disqualified him from the promotion. The defendants' version was that Kassel brought up his military service and tried to use it as an excuse for his own shortcomings.

The city promoted two candidates to the rank of Lieutenant from the June 2013 process. Of the two candidates selected, one scored third on the test and the other fourth. Kassel made a formal, written USERRA complaint to the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), complaining that his non-selection for

⁴ Kassel claimed that he had been harassed by his supervisors and that they had created a "hostile work environment" for him because of his military obligations. Judge Karas held that the hard time was not sufficiently severe to create a "hostile work environment" as defined in the case law and granted the defendants' motion for summary judgment on that issue.

⁵ 38 U.S.C. 4303(14) (emphasis supplied).

⁶ Please see Law Review 17055 (June 2017).

promotion to Lieutenant violated section 4311 of USERRA.⁷ DOL-VETS investigated Kassel's complaint and found it to have merit. Instead of requesting that DOL-VETS refer his case to the United States Department of Justice (DOJ), Kassel chose to retain private counsel and sue the city in federal district court.

Kassel surreptitiously recorded conversations with supervisors at the fire department and has them on tape making negative comments about his military service and tying his service to the non-selection. Kassel provided a copy of the tape to DOL-VETS, during that agency's investigation of Kassel's USERRA complaint. DOL-VETS informed the city of the taping, and the city suspended Kassel for 30 days without pay, as punishment for the surreptitious taping.

Kassel's taping was lawful under New York law.⁸ Like most states, New York is a "one party consent" state. Taping a conversation (either in person or by telephone) is lawful in New York so long as at least one party to the conversation (Kassel) was aware of the taping.

After a protracted and contentious discovery period, both parties (Kassel and the defendants) filed motions for summary judgment in accordance with Rule 56 of the Federal Rules of Civil Procedure. Judge Karas denied all the summary judgment motions, except for the defendants' motion for summary judgment on the "hostile work environment" claim, which he granted. The judge noted that there are many contested issues of fact, precluding summary judgment.

The next step is a trial, unless the parties settle. We will keep the readers informed of developments in this interesting and important case.

⁷ 38 U.S.C. 4311.

⁸ See New York Penal Law sections 250.00 and 250.05.