

USERRA Does Not Require an Employer To Accommodate the Military Service of the Spouse of an Employee

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***Norris v. Glassdoor, Inc.*, 2018 U.S. Dist. LEXIS 117043 (S.D. Ohio July 13, 2018).**³

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 (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 very recent decision by Judge Algenon L. Marbley of the United States District Court for the Southern District of Ohio. Judge Marbley granted Glassdoor's motion to dismiss, holding that Norris had no claim under federal law even if all the facts are as alleged by Norris in her complaint. Accordingly, the facts in Judge Marbley's decision, and the facts in this article, come directly from Norris' complaint.

Facts

Mrs. Stacy Norris served on active duty in the Navy for exactly four years, from September 1997 until September 2001. After she left active duty, she did not affiliate with a Navy Reserve unit, but she remained in the Individual Ready Reserve (IRR) until September 2005, when she completed her eight-year enlistment and was honorably discharged from the Navy.

While she was on active duty, she married a man whose name does not appear in the judge's decision. Her husband was also on active duty in the Navy, and he remained on active duty after she left. They are still married.

Norris was hired by Glassdoor, Inc., a company in Ohio, in 2007. She normally worked from home, using a computer. In 2011, her husband was transferred by the Navy to Virginia Beach, Virginia, and she wanted to move to Virginia to live with her husband. She inquired of Glassdoor as to whether she could move to Virginia and continue working for Glassdoor, from home, but the company denied her request and told her that if she gave up her Ohio residence she would be required to resign from the company or be fired. She reluctantly resigned her Glassdoor position and moved with her husband to Virginia.

Norris' claim that Glassdoor discriminated against her based on her husband's military service

In 2013, Norris and her husband returned to Ohio after he completed his two-year active duty assignment in Virginia. She sought reinstatement at Glassdoor, but the company denied her application for employment. She sued, claiming that she was discriminated against based on her husband's military service and that the discrimination violated section 4311 of the Uniformed Services Employment and Reemployment Rights Act (USERRA). That section provides:

(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.⁴

Judge Marbley correctly held that requiring Norris to remain in Ohio, as a condition of her continued employment at Glassdoor, did not violate section 4311. Section 4311(a) makes it unlawful for an employer (federal, state, local, or private sector) to deny a person "retention in employment" (among other benefits) on the basis of membership in a uniformed service, application to join a uniformed service, performance of uniformed service, or application or obligation to perform uniformed service. Section 4311(b) makes it unlawful for an employer to deny retention on the basis of the person having:

1. Taken an action to enforce a protection for any person under USERRA.
2. Testified or made a statement in connection with a proceeding under USERRA.
3. Assisted a USERRA investigation.
4. Exercised a right under USERRA.

Judge Marbley carefully considered each of the subsections of section 4311 and found that none of them applied to Norris' situation. Section 4311 does not make it unlawful for an employer to deny an employee retention in employment based on the uniformed service of the employee's spouse or based on the employee's departure from the vicinity of the employer's facility to accompany a spouse who has been transferred by a uniformed service. Yes, USERRA

⁴ 38 U.S.C. 4311 (emphasis supplied).

is to be construed liberally for the benefit of those who serve our country in uniform.⁵ But liberal construction does not include creating a whole new basis for employer liability in addition to the nine bases explicitly mentioned in section 4311.

I do not deny that military spouses have employment problems related to the military service of the service member spouse, who is routinely transferred every two to four years during an active duty military career. The solution to this problem will not be found in USERRA as currently written.

Norris' claim that Glassdoor discriminated against her based on her own military service

Norris also claimed that Glassdoor had denied her retention in employment because of her own military service, and she appended a copy of her DD-214⁶ to show that she was an honorably discharged veteran. Judge Marbley correctly held that Norris' status as an honorably discharged veteran was not enough to establish a violation of section 4311. To have a valid section 4311 claim, Norris would need to allege that she was denied retention in employment *because of* her past military service, and she did not allege that in her complaint.

When Norris was hired by Glassdoor in 2007, her military service was over. She did not need time off from her Glassdoor job for drill weekends or annual training, and she was not subject to voluntary or involuntary recall to active duty. She did not make a credible allegation as to why the employer would be tempted to discriminate against her based on her military service.

The pendent state claims

In her complaint, Norris also alleged Ohio common law causes of action for breach of contract and misrepresentation. When a federal court adjudicates a lawsuit based on a federal cause of action, it can also adjudicate closely related state law claims.⁷ Because Norris' federal USERRA claims were dismissed for failure to state a claim for which relief can be granted, Judge Marbley dismissed Norris' state law claims without prejudice, meaning that she can refile those claims in state court.

⁵ *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

⁶ The DD-214 is the form that the armed forces routinely provide to the service member when he or she is released from active duty.

⁷ 28 U.S.C. 1367(c).