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Navy Reservist Sues Employer for Violating USERRA and Survives Employer's Motion for Summary Judgment

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

1.2—USERRA forbids discrimination
1.4—USERRA enforcement

***Washington v. Blue Grace Logistics, LLC,* 2018 U.S. Dist. LEXIS 1712 (M.D. Fla. January 4, 2018).[3]**

Kevin Washington, a Navy Reservist since 2008, was hired by Blue Grace Logistics LLC (BGL) on 6/1/2015. On 3/7/2016, he gave BGL notice that he would need to be away from his civilian job for Navy Reserve annual training from 3/14/2016 until 3/25/2016. On Friday, 3/11/2016 (the

[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 James D. Whittemore of the United States District Court for the Middle District of Florida.

last work day before the start of his Navy Reserve training), BGL put him on a Performance Improvement Plan. On 3/25/2016 (the last day of his annual training), BGL fired him.

Washington sued BGL in the United States District Court for the Middle District of Florida, contending that the firing violated the Uniformed Services Employment and Reemployment Rights Act (USERRA).[4] After the completion of discovery, BGL filed a motion for summary judgment under 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 Whittemore denied BGL's motion for summary judgment on Washington's USERRA claim and explained his rationale as follows:

> Section 4311(b) prohibits employers from taking adverse employment actions against employees who seek to enforce USERRA's protections. 38 U.S.C. § 4311(b). An employer who takes an adverse action against an employee who exercises a right under USERRA has engaged in retaliatory conduct unless the employer shows it would have taken the action in the absence of the employee's protected activity.1 38 U.S.C. § 4311(b)-(c);2 *see* *Ward v. United Parcel Serv.*, 580 F. App'x 735, 739 (11th Cir. 2014) (per curiam). The "but-for" test utilized in USERRA discrimination cases is utilized in USERRA retaliation cases. *Sheehan v. Dep't of Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001); *see* *Ward*, 580 F. App'x at 739.
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> The requisite discriminatory motive for a USERRA retaliation claim can be inferred from a variety of circumstances. *Coffman*, 411 F.3d at 1238; *Sheehan, 240* F.3d at 1013. For example, Plaintiff may meet his burden by showing a close temporal proximity between his protected activity and the adverse employment action. *See* *Ward*, 580 F. App'x at 739 (citing *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir.2007) (per curiam) (Title VII retaliation case)). And, exercising the right to reemployment under USERRA is protected activity. 38 U.S.C. § 4312; *Wallace v. City of San Diego*, 479 F.3d 616, 625 (9th Cir. 2007) ("Section 4312 of USERRA provides a right to reemployment for members of the armed services who (1) properly notify their employers of the need for a service-related absence, (2) take cumulative absence of no more than five years and (3) properly report to work or reapply for employment, depending upon the length of the absence."). Plaintiff contends that his participation in his annual military training in March 2016 was a motivating factor in his termination, pointing to the close temporal proximity between providing notice of his leave and his termination just two weeks later.
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> On March 7, Plaintiff notified Reese Weathers, his supervisor, that he was required to attend two weeks of annual training with the U.S. Navy Reserves from March 14 through March 25, 2016. (Washington Aff. ¶ 7, Dkt. 45-1; Klingensmith Aff. ¶ 17, Dkt. 36-2; March

[4] Washington also claimed that the company violated the Family Medical Leave Act and Title VII of the Civil Rights Act of 1964. Those claims are not discussed in this article.

7, 2016 Email, Dkt. 36-26). He took his annual training, but before he could return to work, he was terminated on March 25. (Washington Aff. ¶ 13, Dkt. 45-1). He was in the process of exercising his rights under section 4312 when he was terminated.3 And the temporal proximity between his exercise of those rights and the adverse employment action is "'very close.'" *Thomas*, 506 F.3d at 1364 (quoting *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001)).

A reasonable jury could therefore find that Defendant engaged in retaliatory conduct by terminating Plaintiff eighteen days after he notified his supervisor of his annual training and while he was completing that training. *Wallace*, 479 F.3d at 625; *Ward*, 580 F. App'x at 739. Accordingly, to prevail on its summary judgment motion, Defendant must show "that legitimate reasons, standing alone, would have induced [it] to take the same adverse action." *Coffman*, 411 F.3d at 1238; *Sheehan v. Dep't of Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001); *see* *Ward*, 580 F. App'x at 739.

Defendant contends that its reasons for terminating Plaintiff were his poor performance and leaving work without permission on March 11 (". . . [Defendant's] decision to terminate him after he walked off the job on March 11, 2016 in violation of his counseling records and Performance Improvement Plan."). The record evidence, however, reveals inconsistencies between those reasons and the events which took place after March 11.

For example, although Plaintiff's job performance was less that satisfactory in several respects, his January 2016 performance review reflects, among other things, "competent at present level and can move across functions within 6 to 12 months," "new hires will look to you for advice and coaching," and "proficient in understanding and representing the companies." (Washington Aff. 5). And rather than being terminated, he was placed on a performance plan on March 11, the last business day before he began military training, presumably to begin once he returned from his annual leave.4 (Counseling Record, Mar. 11, 2016, Dkt. 36-30). That same day, at 3:56 p.m., he notified his supervisor that he had a personal emergency and would be out the remainder of the day, to which his supervisor responded "Will be in touch[.]" (Text Message Exchange, Mar. 11, 2016, Dkt. 45-3). Plaintiff and his supervisor continued to exchange work related text message while Plaintiff was attending military training. (Washington Aff. ¶ 10, Dkt. 45-1; Text Message Exchange, Mar. 11-17, 2016, Dkt. 45-3). Plaintiff was not terminated until the business day before he was to return from military training.5

A reasonable jury could therefore find that Plaintiff exercised a right under USERRA, his participation in his annual military training in March 2016 was a motivating factor in his termination, and that Defendant did not have a legitimate reason to do. *Wallace*, 479 F.3d at 625; *Coffman*, 411 F.3d at 1238; *Sheehan*, 240 F.3d at 1013; *see* *Ward*, 580 F. App'x at 739. There are material disputed facts which preclude summary judgment. Whether Defendant retaliated against Plaintiff in violation of USERRA will therefore be determined by the jury.

What happens now?

Since Judge Whittemore denied the defendant's motion for summary judgment, the case will proceed to trial unless the parties settle.