**LAW REVIEW[1] 19112**
**December 2019**

# Another Favorable Appellate Case on Section 4311 of USERRA

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About Sam Wright

1.1.1.7—USERRA applies to state and local governments
1.2—USERRA forbids discrimination
1.4—USERRA enforcement

***Greer v. City of Wichita,* 2019 U.S. App. LEXIS 35882 (10th Cir. December 3, 2019).[3]**

Ms. Anjela Greer is a part-time Navy Reservist. On the civilian side, she works for the City of Wichita, Kansas, at the Wichita Art Museum. After about five years working for the City as a

[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1900 "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 1700 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 43 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 very recent decision of the United States Court of Appeals for the 10th Circuit, the federal appellate court that sits in Denver and hears appeals from district courts in Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. As with all federal appellate cases, the case was assigned to a panel of three judges. In this case, the panel consisted of Judge Robert E. Bacharach, Judge Carolyn B. McHugh, and Judge Allison H. Eid. Judge Bacharach wrote the decision, and the other two judges joined in a unanimous panel decision.

security guard at the museum, she applied for a vacancy as the museum's Operations Supervisor. Although she was one of only two candidates, she was denied an interview and was not selected.

Greer sued the City, contending that denying her an interview was motivated, at least in part, by her Navy Reserve service and by her occasional absences from work that her service necessitated. She claimed that denying her an interview violated section 4311 of the Uniformed Services Employment and Reemployment Rights Act (USERRA). That section reads as follows:

> **(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.
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> **(c)** An employer shall be considered to have engaged in actions prohibited—
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> > **(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
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> > **(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]

I invite the reader's attention to Law Review 17016 (March 2017), by attorney Thomas G. Jarrard and me, for a detailed discussion of how to prove a violation of section 4311, including a discussion of one Supreme Court case and four Court of Appeals cases.

Under section 4311(c) of USERRA,[5] it is not necessary to prove that one of the protected statuses or activities was *the reason* for the firing, denial of initial employment, or denial of a promotion or a benefit of employment. It suffices to prove that one of the protected activities or statuses was *a motivating factor* in the employer's decision. If the plaintiff proves motivating factor, the *burden of proof shifts to the employer to prove (not just say) that it would have made the same decision in the absence of the protected status or activity.*

USERRA's legislative history explains section 4311 as follows:

> Current law [the VRRA] protects Reserve and National Guard personnel from termination from their civilian employment or other forms of discrimination based on their military obligations. Section 4311(a) would reenact the current prohibition against discrimination which includes discrimination against applicants for employment (*see Beattie v. The Trump Shuttle, Inc.,* 758 F. Supp. 30 (D.D.C. 1991), current employees who are active or inactive members of Reserve or National Guard units, current employees who seek to join Reserve or National Guard units (*see Boyle v. Burke,* 925 F.2d 497 (1st Cir. 1991), or employees who have a military obligation in the future such as a person who enlists in the Delayed Entry Program which does not require leaving the job for several months. *See Trulson v. Trane Co.,* 738 F.2d 770, 775 (7th Cir. 1984). The Committee [House Committee on Veterans' Affairs] intends that these anti-discrimination provisions be broadly construed and strictly enforced. The definition of employee, which also includes former employees, would protect those persons who were formerly employed by an employer and who have had adverse action taken against them by the former employer since leaving the former employment.
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> If the employee is unlawfully discharged under the terms of this section prior to leaving for military service, such as under the Delayed Entry Program, that employee would be entitled to reinstatement for the remainder of the time the employee would have continued to work plus lost wages. Such a claim can be pursued before or during the employee's military service, even if only for lost wages.
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> Section 4311(b) [now 4311(c), as amended in 1996] would reaffirm that the standard of proof in a discrimination or retaliation case is the so-called "but for" test and that the burden of proof is on the employer, once a prima facie case is established. This

[4] 38 U.S.C. 4311 (emphasis supplied).
[5] 38 U.S.C. 4311(c).

provision is simply a reaffirmation of the original intent of Congress when it enacted current section 2021(b)(3) [later renumbered 4321(b)(3)] of title 38, in 1968. *See* Hearings on H.R. 11509 Before Subcommittee No. 3 of the House Committee on Armed Services, 89th Cong., 1st Session at 5320 (February 23, 1966). In 1986, when Congress amended section 2021(b)(3) to prohibit initial hiring discrimination against Reserve and National Guard members, Congressman G.V. Montgomery (sponsor of the legislation and Chairman of the House Committee on Veterans' Affairs) explained that, in accordance with the 1968 legislative intent cited above, the courts in these discrimination cases should use the burden of proof analysis adopted by the National Labor Relations Board and approved by the Supreme Court under the National Labor Relations Act. *See* 132 Cong. Rec. 29226 (October 7, 1986) (statement of Cong. Montgomery) citing *National Labor Relations Board v. Transportation Management Corp.,* 462 U.S. 393 (1983).

This standard and burden of proof is applicable to all cases brought under this section regardless of the date of accrual of the cause of action. To the extent that courts have relied on dicta from the Supreme Court's decision in *Monroe v. Standard Oil Co.,* 452 U.S. 549, 559 (1981), that a violation can occur only if the military obligation is the sole factor (*see Sawyer v. Swift & Co.,* 836 F.2d 1257, 1261 (10th Cir. 1988), those decisions have misinterpreted the original legislative intent and history of 38 U.S.C. 2021(b)(3) and are rejected on that basis.[6]

**USERRA Regulations**

Two sections of the Department of Labor (DOL) USERRA Regulations address how to prove a violation of section 4311:

**§ 1002.22 Who has the burden of proving discrimination or retaliation in violation of USERRA?**

The individual has the burden of proving that a status or activity protected by USERRA was one of the reasons that the employer took action against him or her, in order to establish that the action was discrimination or retaliation in violation of USERRA. If the individual succeeds in proving that the status or activity protected by USERRA was one of the reasons the employer took action against him or her, the employer has the burden to prove the affirmative defense that it would have taken the action anyway.[7]

[6] House Committee Report, April 28, 1993 (H.R. Rep. No. 103-65, Part 1), reprinted in Appendix B-1 of *The USERRA Manual* by Kathryn Piscitelli and Edward Still. The quoted paragraphs can be found on pages 665-66 of the 2016 edition of the *Manual.*

[7] 20 C.F.R. 1002.22 (bold question in original).

**§ 1002.23 What must the individual show to carry the burden of proving that the employer discriminated or retaliated against him or her?**

- **(a)** In order to prove that the employer discriminated or retaliated against the individual, he or she must first show that the employer's action was motivated by one or more of the following:
    - **(1)** Membership or application for membership in a uniformed service;
    - **(2)** Performance of service, application for service, or obligation for service in a uniformed service;
    - **(3)** Action taken to enforce a protection afforded any person under USERRA;
    - **(4)** Testimony or statement made in or in connection with a USERRA proceeding;
    - **(5)** Assistance or participation in a USERRA investigation; or,
    - **(6)** Exercise of a right provided for by USERRA.

- **(b)** If the individual proves that the employer's action was based on one of the prohibited motives listed in paragraph (a) of this section, the employer has the burden to prove the affirmative defense that the action would have been taken anyway absent the USERRA-protected status or activity.[8]

**The *Greer* case**

Greer established that her direct supervisor had continually disparaged her Navy Reserve service and that the supervisor had animus against Greer because of her service. While the direct supervisor was not the ultimate decision-maker in denying Greer an interview when she applied for a promotion, the direct supervisor's input was certainly considered.

At the end of the discovery process, the City of Wichita filed a motion of summary judgment (MSJ), and the district judge granted it.[9] Greer appealed, setting up this case.

A district judge should grant an MSJ 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.* If this high standard is not met, the district judge should deny the MSJ. If the district judge granted the MSJ anyway, the Court of Appeals should overturn the MSJ, as happened in this case.

In his scholarly opinion, Judge Bacharach discussed the various ways of proving a section 4311 violation and found that there was ample evidence to support a jury finding for Greer, the plaintiff.

[8] 20 C.F.R. 1002.23 (bold question in original).
[9] *Greer v. City of Wichita,* 2018 U.S. Dist. LEXIS 108715 (D. Kan. June 29, 2018).

### Where do we go from here?

Greer's case was remanded to the United States District Court for the District of Kansas. There will be a trial on the merits, with a jury if Greer requests a jury. If the court finds that the City violated USERRA by denying Greer an interview, the City may go through the motions of giving her an interview and then selecting another candidate. That would likely mean a whole new case by Greer.

It is also possible that the City of Wichita will come to its senses, make Greer a reasonable offer, and start complying with USERRA. We will keep the readers informed of developments in this interesting and important case.

### What about sovereign immunity and the 11th Amendment?

In Law Review 19091 (October 2019), I explained in detail that political subdivisions of states do not have sovereign immunity under the 11th Amendment of the United States Constitution. An individual like Greer can sue a political subdivision like the City of Wichita in federal court, in her own name and with her own lawyer.

### Congratulations to Greer's attorney

I congratulate attorney Susan R. Schrag of Clearwater, Kansas for her imaginative, diligent, and (so far) successful representation of Navy Reservist Anjela Greer.

## Please join or support ROA

This article is one of 1900-plus "Law Review" articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

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Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are

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