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Important New USERRA Case—Part 2

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About Sam Wright

1.3.1.4—Affirmative defenses
1.4—USERRA enforcement
1.8—Relationship between USERRA and other laws/policies

***Jackson v. City of Birmingham,* 364 F. Supp. 3d 1310 (N.D. Ala. 2019).[3]**

Affirmative defense of judicial estoppel

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[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, now doing business as the Reserve Organization of America (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 recent decision of Judge Madeline Hughes Haikala of the United States District Court for the Northern District of Alabama, denying the defendant City of Birmingham's motion for summary judgment. The citation means that you can find this published decision in Volume 364 of *Federal Supplement Third Series,* starting on page 1310.

The City of Birmingham asserted, as an affirmative defense,[4] that Jackson's claim under the Uniformed Services Employment and Reemployment Rights Act (USERRA) should be dismissed because he had also filed a claim with the Social Security Administration for "total disability." In her scholarly opinion, Judge Haikala wrote:

> Before examining the merits of the parties' positions, the Court addresses the City's contention that Mr. Jackson is judicially estopped from asserting his USERRA claim or arguing that he is qualified individual with a disability under the ADA because he (Mr. Jackson) applied for and received social security disability benefits.
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> "[P]ursuit, and receipt, of [social security disability] benefits does not automatically estop the recipient from pursuing an ADA claim." *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 797, 119 S. Ct. 1597, 143 L. Ed. 2d 966 (1999). Still, "an ADA plaintiff cannot simply ignore [his disability] contention that []he was too disabled to work. . . . [He] must explain why that [disability] contention is consistent with [his] ADA claim [**21] that []he could 'perform the essential functions' of h[is] previous job, at least with 'reasonable accommodation.'" *Cleveland*, 526 U.S. at 797. "[A] plaintiff's sworn assertion in an application for disability benefits that []he is, 'unable to work' will appear to negate an essential element of h[is] ADA case," unless the plaintiff offers a "sufficient explanation" for the contradiction. *Cleveland*, 526 U.S. at 806.
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> In his declaration, Mr. Jackson states that he "was not asked during the [social security disability] process if [he] could work with an accommodation." (Doc. 31-1, ¶ 10). Mr. Jackson maintains that "even though [he] was disabled, if provided a reasonable accommodation, [he] could work." (Doc. 31-1, ¶ 10). Like Mr. Jackson, the plaintiff in *Cleveland* explained that she represented to the Social Security Administration that she was totally disabled "in a forum which does not consider the effect that reasonable workplace accommodations would have on the ability to work." *Cleveland*, 526 U.S. at 807. On the record before the Court, the City is not entitled to summary judgment based on a judicial estoppel argument. *See Talavera v. School Bd. of Palm Beach County*, 129 F.3d 1214, 1220 (11th Cir. 1997) ("A certification of total disability on an SSD application does mean that the applicant cannot perform the essential functions of her job without reasonable accommodation. It does not necessarily mean that the applicant cannot perform the essential functions of her job *with* reasonable accommodation.") (emphasis in *Talavera*).

[4] The term "affirmative defense" has been defined as follows: "In code pleading. New matter constituting a defense; new matter which, assuming the complaint to be true, constitutes a defense to it." *Black's Law Dictionary,* Revised Fourth Edition, page 82. Please see Law Review 1289 (September 2012).

> The ADA estoppel analysis applies equally to Mr. Jackson's USERRA claim. In support of its argument that Mr. Jackson is judicially and equitably estopped from asserting his USERRA claim, the City cites one non-binding opinion in which a district court held that a plaintiff was judicially estopped from bringing USERRA claims because the plaintiff had represented to the VA in previous litigation that he was disabled. (Doc. 26, pp. 22-23) (citing *Brown v. Con-Way Freight, Inc.*, 2016 U.S. Dist. LEXIS 28420, 2016 WL 861210, at *6-8 (N.D. Ill. Mar. 7, 2016)). In *Brown*, the plaintiff had represented that "his injuries were permanent and that he was not going to recover." *Brown*, 2016 U.S. Dist. LEXIS 28420, 2016 WL 816120, at *6. The City has presented no evidence in this case that Mr. Jackson represented that he had permanent injuries that would prevent him from performing his job. Rather, Mr. Jackson contends that he can work with an accommodation. Therefore, the Court is not persuaded by the rationale in *Brown*. *See Scudder v. Dolgencorp, LLC*, 900 F.3d 1000, 1007 (8th Cir. 2018) ("Under USERRA, an employer must make 'reasonable efforts ... to qualify' a returning service member for employment, which includes making 'reasonable [**23] efforts ... to accommodate ... a disability incurred in, or aggravated during, such service.' 38 U.S.C. § 4313(a). Accordingly, a service member who is considered 'disabled' under the Social Security Act could still be qualified for work and therefore entitled to reemployment under USERRA. *Cf.* *Cleveland*, 526 U.S. at 803, 119 S. Ct. 1597.").[5]

Please note that Judge Haikala declined to grant summary judgment[6] to the City of Birmingham on the judicial estoppel issue; she did not grant summary judgment for Jackson. Judicial estoppel could still be at issue when there is a trial on the merits. I adhere to the advice that I have given in previous articles, to the effect that one should be very careful about making inconsistent claims in separate proceedings at about the same time.

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[5] *Jackson,* 364 F. Supp. 3d at 1319-20.

[6] Under Rule 56 of the Federal Rules of Civil Procedure, the 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 in support of the non-moving party's claim or defense and that no reasonable jury could find for the non-moving party on that issue. Jackson must be given the opportunity to explain the apparent inconsistency. Judicial estoppel could still be an issue at the trial if Jackson's explanation is insufficient or unconvincing.

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