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EEOC Flouts USERRA

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About Sam Wright

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Bottom line up front

The Uniformed Services Employment and Reemployment Rights Act (USERRA) is a great and much-needed law, but some employers (federal, state, local, and private sector) flout the law,

[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2000 "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 1800 of the articles.

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and sometimes they get away with it. The Equal Employment Opportunity Commission (EEOC), an independent federal executive agency that is responsible for enforcing Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans With Disabilities Act, and other important laws, has flouted USERRA and has gotten away with it, at least so far.

The facts

Ringo Chan is a Staff Sergeant in the Army Reserve and a member of the Reserve Organization of America.[3] She was born in Hong Kong, which at the time was a Crown Colony of the United Kingdom, under a 99-year lease. The lease expired in 1997, and Hong Kong became part of the People's Republic of China (PRC). She emigrated from Hong Kong to our country and enlisted in the United States Army. After she left active duty, she affiliated with the Army Reserve.

Chan began her federal civilian career in 2015, when she was hired as a GS-7 employee of the EEOC at its office in Miami, Florida. She did well in her EEOC employment and was rapidly promoted to GS-9 on 5/29/2016 and to GS-11 on 5/15/2017. While in Miami, Chan was rated as "fully successful" in her civilian personnel evaluations, and she had no difficulty with her civilian supervisors about her absences from work for USAR training and service. Her EEOC supervisors in Miami understood that those absences from work were protected by the Uniformed Services Employment and Reemployment Rights Act (USERRA)[4] and they complied with that federal statute without complaint.

In early 2017, Chan learned that the Army would be transferring her from a reserve unit that drilled in Florida to one that drilled in California, so she requested that the EEOC transfer her to a job in California. In April 2017, she was interviewed by telephone by the supervisor of the San Diego EEOC office. During the interview, she was asked about her one-year recall to active duty, her military obligations, and whether she was scheduled for deployment in the foreseeable future.

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[3] At its September 2018 annual convention, the Reserve Officers Association amended its Constitution to make all service members (E-1 through O-10) eligible for membership and adopted a new "doing business as" (DBA) name: Reserve Organization of America. The full name of the organization is now the Reserve Officers Association DBA the Reserve Organization of America. The point of the name change is to emphasize that our organization represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most senior officers. Our nation has seven Reserve Components. In ascending order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The number of service members in these seven components is almost equal to the number of personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more dependent than ever before on the Reserve Components for national defense readiness. More than a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

[3] In order of size, the seven components are ARNGUS, the Army Reserve, the Air National Guard of the United States (ANGUS), the Air Force Reserve, the Navy Reserve, the Marine Corps Reserve, and the Coast Guard Reserve. Like the ARNGUS, the ANGUS is a hybrid federal-state organization. The other five components are purely federal entities.

[4] 38 U.S.C. 4301 through 4335.

Asking Chan about her military obligations during the interview about her request to transfer to the San Diego office was probably unlawful.[5] The San Diego office supervisor's objection to Chan's military obligations did not prevent her from transferring, but the objection is relevant in explaining Chan's subsequent difficulties with the San Diego office leadership concerning her USAR obligations and her absences from work that were necessitated by those obligations.

Chan was one of six investigators assigned to the San Diego EEOC office, and she was the only employee in the office with military obligations as a member of a Reserve Component (RC) of the United States armed forces. Her immediate supervisor was the Intake Supervisor (IS), and her second-level supervisor was the Director of the San Diego office.[6]

Shortly after she transferred to San Diego, Chan was away from her job for military service for three weeks, from 6/4/2017 until 6/25/2017. She gave prior notice to the IS and the Director, but they refused to reassign her work to other employees during his military-related absence from work. When Chan returned to work on 6/26/2017, the IS told her that she would be required to make up the work that she missed while she was on military leave and that, going forward, she would be required to cover all her missed shifts when she was away for military duty by switching shifts with other investigators.[7]

Sometime during that same week, the Director went into Chan's office to look at the calendar that she had posted next to her case file shelf. On that calendar, she had marked the possible dates of future military requirements. The Director complained that there were "a lot of leave days" marked on the calendar and interrogated her about her military duties. A few days later, on 7/3/2017, Chan was 30 minutes late for work because of unexpectedly heavy traffic on the day before the Independence Day holiday. She was required to meet with the Director, who chastised her for her tardiness and charged her one-half hour of earned annual leave. He also told her that whenever she was away from work for military duty it was incumbent on her to cover her assigned shifts by trading with other EEOC employees.

Chan was again away from work for military duty from 8/4/2017 until 8/17/2017 (13 days). Because of administrative problems within the Army Reserve, she was not notified of these

[5] *See Horneman v. Department of Veterans Affairs,* 2016 MSPB LEXIS 1342 (MSPB Initial Decision March 4, 2016). In that case, the panel considering Douglas Horneman (a Navy Reserve officer) for a civilian promotion at the Department of Veterans Affairs discussed Horneman's Navy Reserve obligations when considering Horneman and other candidates for the promotion, and the panel selected another candidate. The panel's discussion of Horneman's military obligations constituted evidence that the military obligations were "a motivating fact" in the employer's decision to select another candidate instead of Horneman, and that is all that Horneman was required to prove to establish a violation of section 4311 of USERRA, 38 U.S.C. 4311. I discuss the *Horneman* case in detail in Law Revie 16014 (March 2016).

[6] These supervisors are named in the MSPB decision, but I will not use their names in this article.

[7] It was impossible for Chan to meet this requirement, as well as her ongoing work requirements, because she was not permitted to work overtime.

orders until the very last minute, and she shared the information with her civilian employer (EEOC) as soon as she received it.[8]

At the time, Chan was working a "4x10" schedule. That means that she worked ten hours per day Monday through Thursday and had Friday off. On Friday, 8/4, Chan came in to work on the day that she was scheduled to depart (that evening) for military duty. She came in to work, trying to comply with the Director's order that she switch shifts with other employees to cover shifts that she missed because of her military duties. She had only been at work for 15 minutes when the Director sent her home, because she had already worked 40 hours that week (Monday through Thursday) and the EEOC headquarters had not authorized overtime.

The Director gave Chan a written reprimand for "unauthorized changes to the work schedule, unauthorized overtime, and discourteous behavior." The Director also suspended Chan's teleworking privileges and her "4x10" work schedule. The Director never restored these revoked privileges. Despite all these problems in 2017, the Director marked Chan as "fully successful" in her annual performance appraisal in December of that year.

On 1/8/2018, the San Diego EEOC office received a written complaint from a charging party[9] alleging that Chan had treated the charging party rudely during an intake session on 8/12/2017. Chan *could not have been guilty of this alleged offense*. She was on military duty from 8/4/2017 until 8/17/2017. *On the date of the alleged offense, she was far from the San Diego EEOC office.*

The Director of the San Diego office communicated the complaint to Chan. On 1/24/2018, Chan filed a written rebuttal with the Director, denying that she had treated any charging party discourteously and pointing out that she could not be guilty as charged because she was away from the EEOC office, on military duty, on the date of the alleged offense. In her letter to the Director, she stated that she hoped that the accusations against her were not retaliation against her because of her military service, and she asked to be treated like the other investigators in the San Diego office.

Between 2/15/2018 and 3/26/2018, Chan received five sets of orders from her new USAR unit, directing her to report for short tours of military duty in Arizona, California, Hawaii, and Texas. Four of these orders were eventually revoked by the Army.

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[8] Under section 4312(a)(1) of USERRA, 38 U.S.C. 4312(a)(1), Chan was required to provide advance written or verbal notice to her employer before absenting herself from work for military duty, unless giving advance notice was precluded by military necessity or otherwise impossible or unreasonable. 38 U.S.C. 4312(b). USERRA does not require the individual to provide any specific minimum amount of advance notice, and Chan could not provide notice to her employer before she had notice from the Army. The Army Reserve needs to do a better job of providing advance notice to reservists like Chan, and the individual should be excused from any required training unless the Army can provide at least 14 days of advance notice.

[9] The EEOC uses the term "charging party" for a person who files a complaint with he EEOC, alleging an employer violation of Title VII of the Civil Rights Act of 1964 or one of the other anti-discrimination statutes that the EEOC is responsible for enforcing.

On 3/20/2018, Chan received three more sets of military orders. One order required her to report for military duty on 4/20/2018. Chan immediately shared information about the orders with the Director and the IS of the San Diego office.

At the very last minute, on 4/2/2018, the Army moved up the report date from 4/20/2018 to 4/3/2018, the very next day. Chan notified her EEOC supervisors as soon as possible, on the evening of April 2, 2018. [10] Chan was on military duty and away from her civilian job from 4/3/2018 until 5/5/2018. After completing this period of service, she reported back to her job the very next day, 5/7/2018. On that same day, the Director gave her a performance evaluation that failed her on every element, and he put her on a Performance Improvement Plan (PIP) for 90 days. Chan was suspended without pay for two days (5/14 and 5/15, 2018), based on the charging party's written complaint that the San Diego office received on 1/8/2018.

On 5/23/2018, the Director again chastised Chan for her absences from work for military duty, although those absences were protected by USERRA. On 9/11/2018, Chan received from the EEOC the written notice of proposed removal from federal employment. She responded in writing on 10/5/2018. On 11/7/2018, she received the Notice of Final Decision, firing her, effective 11/15/2018. She filed her appeal with the Merit Systems Protection Board (MSPB) just a month later, on 12/17/2018.

How USERRA applies to these facts

a. There is no such thing as "too much" military leave.

The Director of the San Diego EEOC office thought that Chan took "too much" military leave, but under USERRA, there is no such thing as "too much" military leave. The law provides:

> In any determination of a person's entitlement to protection under this chapter, the timing, frequency, and duration of the person's training or service, or the nature of such training or service (including voluntary service) in the uniformed services, shall not be a basis for denying protection of this chapter if the service does not exceed the limitations set forth in subsection (c) [the five-year limit, with its exemptions] and the notice requirements established in subsection (a)(1) [prior notice to the employer] and the notification requirements [timely application for reemployment]established in subsection (e) are met.[11]

USERRA's legislative history explains the purpose and effect of section 4312(h) as follows:

[10] As I explained in footnote 9, above, the Army needs to do a much better job of providing advance notice of pending duty to reservists like Chan. These last-minute orders exacerbate the issues between the individual reservist and his or her employer.

[11] 38 U.S.C. 4312(h).

> Section 4312(i) [later renumbered as 4312(h)] is a codification and amplification of *King v. St. Vincent's Hospital,* 112 S. Ct. 570 (1991), which held that there was no limit as to how long a National Guardsman could serve on active duty for training and still have reemployment rights under former section 2024(d) of title 38. This new section makes clear the Committee's [House Committee on Veterans' Affairs] intent that no "reasonableness" test be applied to determine reemployment rights and that this section prohibits consideration of timing, frequency, or duration of service so long as it does not exceed the cumulative limitations under section 4312(c) and the servicemember has complied with the requirements under sections 4312(a) and (e).[12]

As I explained in Law Review 30 (October 2001), it is for military authorities to decide which RC personnel need to serve or train to serve, and to decide the timing, frequency, and duration of service and training periods. These military decisions must not be second-guessed by civilian employers or the courts.

Yes, USERRA puts a burden on civilian employers, and sometimes on the civilian colleagues of those who answer the country's call. The burden placed on the civilian employers and colleagues of those who serve is tiny as compared to the much greater burden (sometimes the ultimate sacrifice) voluntarily undertaken by those who serve and by their families.

To employers who complain about the burdens they bear, I say:

> Our country is not drafting you, nor is it drafting your children and grandchildren. When you find RC personnel in your workforce or among job applicants, you should cheerfully do all that USERRA requires and more. It has been 47 years since Congress abolished the draft and established the all-volunteer military in 1973. Without a law like USERRA, the services would not be able to recruit and retain the quality and quantity of personnel needed to defend our country. Do not complain about the tiny burdens that you are required to bear. Cheerfully honor and support those who serve in your place, and in the place of your offspring.[13]

b. USERRA applies with special force to the Federal Government, and especially to the EEOC.

USERRA's first section includes the following sentence: "It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this

[12] House Committee Report, April 28, 1993, H.R. Rep. 103-65 (Part 1), reprinted in Appendix D-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found at pages 774-75 of the 2019 edition of the *Manual.* Please see Law Review 09029 (July 2009) for a detailed discussion of *King v. St. Vincent's Hospital,* 502 U.S. 215 (1991).

[13] Please see Law Review 17055 (June 2017) and Law Review 14080 (July 2014).

chapter."[14] USERRA's final section, added in 2008, requires federal agencies to train supervisors in USERRA:

> **(a) Training required.** The head of each Federal executive agency shall provide training for the human resources personnel of such agency on the following:
>
> **(1)** The rights, benefits, and obligations of members of the uniformed services under this chapter.
>
> **(2)** The application and administration of the requirements of this chapter by such agency with respect to such members.
>
> **(b) Consultation.** The training provided under subsection (a) shall be developed and provided in consultation with the Director of the Office of Personnel Management.
>
> **(c) Frequency.** The training under subsection (a) shall be provided with such frequency as the Director of the Office of Personnel Management shall specify in order to ensure that the human resources personnel of Federal executive agencies are kept fully and currently informed of the matters covered by the training.
>
> **(d) Human resources personnel defined.** In this section, the term "human resources personnel", in the case of a Federal executive agency, means any personnel of the agency who are authorized to recommend, take, or approve any personnel action that is subject to the requirements of this chapter with respect to employees of the agency.[15]

The Director of the EEOC's San Diego office should be required to answer two questions under oath: Did you take the required training? And were you listening?

As an agency that is responsible for enforcing Title VII of the Civil Rights Act of 1964 and other federal anti-discrimination laws, the EEOC should be especially careful to comply with anti-discrimination laws in its relationship with its own employees, and that includes complying with USERRA.

c. Section 4311 of USERRA forbids discrimination.

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA in 1994 as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. Under the VRRA, a person who was drafted or who voluntarily enlisted in the armed forces was entitled to reemployment in the pre-service civilian job after honorable service. In 1955 and 1960, Congress expanded the VRRA to apply also to initial active duty training, active duty for training, and inactive duty training performed by Reserve and National Guard members.

[14] 38 U.S.C. 4301(b).

[15] 38 U.S.C. 4335 (bold print in original).

When leaving a job for service and returning to the job became a recurring phenomenon rather than a once-in-a-lifetime experience, Congress amended the VRRA in 1968, adding a provision making it unlawful for an employer to fire a Reserve Component service member or to deny such a person promotions or "incidents or advantages of employment" based on "any obligation as a member of a Reserve Component of the Armed Forces." In 1986, Congress amended this provision to forbid discrimination in hiring.

The VRRA only forbade discrimination based on "any obligation as a member of a Reserve Component of the armed forces." USERRA's anti-discrimination provision is much broader. It forbids the denial of initial employment, retention in employment, promotion, or a benefit of employment based on membership in a uniformed service, application to join a uniformed service, performance of service, or application or obligation to perform service.[16]

Just prior to the enactment of USERRA in 1994, the pertinent section of the VRRA read as follows:

> Any person who seeks or holds a position described in clause (A) [a position with the United States Government, any territory or possession of the United States or a political subdivision of a territory or possession, or the Government of the District of Columbia] or (B) [a state, a political subdivision of a state, or a private employer] of subsection (a) of this section shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment *because of any obligation as a member of a Reserve component of the Armed Forces.*[17]

USERRA (enacted in 1994) contains a much broader and stronger anti-discrimination provision, as follows:

> § 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited
>
> - **(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

[16] 38 U.S.C. 4311(a).

[17] 38 U.S.C. 4321(b)(3) (1988 edition of the United States Code) (emphasis supplied).

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.[18]

Section 4321(b)(3) of the VRRA forbade discrimination by employers only if such discrimination was "because of any obligation as a member of a Reserve component of the Armed Forces." Section 4311 of USERRA forbids discrimination based on any one of the following statuses or activities:

a. Membership in a uniformed service.[19]
b. Application to join a uniformed service.
c. Performing uniformed service.
d. Having performed uniformed service in the past.
e. Application to perform uniformed service.
f. Obligation to perform uniformed service.
g. Having taken an action to enforce a USERRA protection for any person.

[18] 38 U.S.C. 4311 (emphasis supplied).

[19] As defined by USERRA, the uniformed services include the Army, Navy, Marine Corps, Air Force, and Coast Guard, as well as the commissioned corps of the Public Health Service (PHS). 38 U.S.C. 4303(16). The commissioned corps of the National Oceanic and Atmospheric Administration (NOAA) is not a uniformed service for USERRA purposes, although it is a uniformed service as defined in 10 U.S.C. 101(a)(5). Please see Law Review 15002 (January 2015) for an explanation of how it came to pass that USERRA applies to the PHS Corps but not the NOAA Corps. Under more recent amendments, Intermittent Disaster Response Appointees of the National Disaster Medical System under the cognizance of the Department of Health and Human Services and persons who serve in the National Urban Search and Rescue Response System under the cognizance of the Federal Emergency Management Agency in the Department of Homeland Security have reemployment rights under USERRA. Please see Law Review 17011 (February 2017).

h. Having testified or otherwise made a statement in or in connection with a USERRA proceeding.
i. Having assisted or otherwise participated in a USERRA investigation.
j. Having exercised a USERRA right.

Under section 4311(c) of USERRA,[20] 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 is enough 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.
>
> 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 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,

[20] 38 U.S.C. 4311(c).

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.[21]

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.[22]

§ 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;

[21] 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.*

[22] 20 C.F.R. 1002.22 (bold question in original). Strictly speaking, the DOL USERRA regulations apply to state and local governments and private employers, not to federal agencies as employers. But since USERRA's first section expresses the "sense of Congress that the Federal Government should be a model employer" with respect to USERRA, it is reasonable to argue that the spirit of the DOL USERRA regulations applies to federal agencies.

- **(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.[23]

Case law under section 4311 of USERRA

***Staub v. Proctor Hospital*[24]**

While employed by Proctor Hospital as an angiography technician, Vincent Staub (a noncommissioned officer in the Army Reserve) was required to attend one drill weekend per month and two or three weeks of full-time training per year. Because the angiography department of the hospital required weekend staffing, Staub's military obligations imposed some burden on the hospital.

Both Janice Mulally, Staub's immediate supervisor, and Michael Korenchuk, Mulally's supervisor, were hostile to Staub's military obligations. Mulally scheduled Staub for additional shifts without notice so that he would have to "pay back the department for everyone else having to bend over backward to cover his schedule for the Reserves." She also informed Staub's co-worker (Leslie Swedeborg) that Staub's "military duty has been a strain on the department" and she asked Swedeborg to help her "get rid of" Staub. Korenchuk referred to Staub's military obligations as "a bunch of smoking and joking and a waste of the taxpayers' money" and he stated that he was aware that Mulally was "out to get" Staub.[25]

In January 2004, Proctor Hospital issued Staub a "corrective action" disciplinary warning for purportedly violating a company rule requiring him to stay in his work area whenever he was not working with a patient. In April 2004, Proctor Hospital fired Staub for allegedly violating the corrective action. Staub contended that both the corrective action and the allegation that he had violated it were invented by Mulally and Korenchuk based on their animus against him because of his Army Reserve service.

Proctor Hospital contended that the decision to fire Staub was made by Linda Buck, the hospital's human relations director, and that Buck was not infected by any of the anti-military animus that

[23] 20 C.F.R. 1002.23 (bold question in original).

[24] 562 U.S. 411 (2011). This is a 2011 decision of the United States Supreme Court. The citation means that you can find the decision in Volume 562 of *United States Reports* (where Supreme Court decisions are published), and the decision starts on page 411. I discuss this case in detail in Law Review 1122 (March 2011).

[25] These facts come directly from the majority opinion, written by Justice Antonin Scalia. At the outset, Justice Scalia wrote: "Staub and Proctor hotly dispute the facts surrounding the firing, but because the jury found for Staub in his claim of employment discrimination against Proctor, we describe the facts in the light most favorable to him."

Korenchuk and Mulally had exhibited. But Korenchuk and Mulally clearly initiated the process that led to the firing of Staub, and Buck must have relied primarily on adverse reports about Staub's work performance that she received from Korenchuk and Mulally.

Staub sued the hospital in the United States District Court for the Central District of Illinois, claiming that the firing violated section 4311 of USERRA.[26] The case was tried before a jury, and Staub prevailed. After hearing the evidence in multi-day trial, and after hearing the District Judge's instructions, the jury found that Staub had proved, by a preponderance of the evidence, that his Army Reserve service was a motivating factor in Proctor Hospital's decision to terminate his employment, and that the hospital had not proved that it would have fired him anyway, for lawful reasons, in the absence of his membership in the Army Reserve, his performance of uniformed service, and his obligation to perform future service.

The District Judge denied Proctor's motion for new trial and motion for judgment notwithstanding the verdict. Proctor then appealed to the United States Court of Appeals for the 7th Circuit.[27] A three-judge panel of the 7th Circuit reversed the District Court verdict for Staub, holding that under the "cat's paw doctrine"[28] Proctor Hospital could not be held liable for discrimination by Korenchuk and Mulally unless Staub proved that Buck was "singularly influenced" by the two direct supervisors.

Staub applied to the 7th Circuit for rehearing *en banc*, but that motion was denied. Staub applied to the Supreme Court for discretionary review, which was granted. Briefs for the parties and friends of the court (including ROA) were filed in July and August 2010. The oral argument was held on November 2, 2010, and the decision came down March 1, 2011.

Justice Antonin Scalia wrote the majority decision, and his opinion was joined by Chief Justice John Roberts, Justice Anthony Kennedy, Justice Ruth Bader Ginsburg, Justice Stephen Breyer, and Justice Sonia Sotomayor. The majority decision relied on principles of agency law and tort law and found that the employer (Proctor Hospital) was liable for the discriminatory actions of supervisory employees Korenchuk and Mulally and that requiring Staub to prove that Buck was "singularly influenced" by the two immediate supervisors was inconsistent with those principles.

Near the end of the majority opinion, Justice Scalia summarized the Court's holding as follows:

> We therefore hold that if a supervisor performs an act motivated by anti-military animus that is *intended* by the supervisor to cause an adverse employment action, and if that act

[26] 38 U.S.C. 4311.

[27] The 7th Circuit is the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.

[28] The "cat's paw" reference is to a fable written by Aesop about 25 centuries ago and put into verse by LaFontaine in 1679. In the fable, a clever monkey induces a cat by flattery to extract roasting chestnuts from the fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing. See footnote 1 of the majority opinion.

> is a proximate cause of the ultimate employment action, then the employer is liable under USERRA.[29]

Justice Samuel Alito, joined by Justice Clarence Thomas, wrote a concurring decision, agreeing with the result (reversal of the 7th Circuit) but relying on the text of USERRA rather than general principles of agency law and tort law. Justice Elena Kagan did not participate.

***Sheehan v. Department of the Navy*[30]**

In an important precedential decision, the Federal Circuit set forth the mode of proving a violation of section 4311, as follows:

> Discriminatory motivation under USERRA may be reasonably inferred from a variety of factors, including (1) proximity in time between an employee's military activity and the adverse employment action, (2) inconsistencies between the proffered reasons [the reasons the employer asserts were the reasons for the adverse employment action] and other actions of the employer, (3) an employer's expressed hostility towards members protected by the statute, and (4) disparate treatment of certain employees compared to other employees with similar work records or offenses.[31]

***Erickson v. United States Postal Service*[32]**

Some employers argue: We did not fire Joe Smith because of his military service. We fired him because he was *absent from work* while performing that service. In an important USERRA case, the United States Postal Service made that argument, and the MSPB accepted it. On appeal, the Federal Circuit firmly rejected this nonsensical argument, holding:

> We reject that argument. An employer cannot escape liability under USERRA by claiming that it was merely discriminating on the basis of absence when the absence was for military service. … The most significant—and predictable—consequence of reserve service with respect to the employer is that the employee is absent to perform that service. To permit an employer to fire an employee because of his military absence would eviscerate the protections afforded by USERRA.[33]

***Bobo v. United Parcel Service*[34]**

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[29] *Staub,* 562 U.S. at 422 (emphasis in original).

[30] 240 F.3d 1009 (Fed. Cir. 2001). This is a 2001 decision of the United States Court of Appeals for the Federal Circuit, the federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from the Merit Systems Protection Board. The citation means that you can find this decision in Volume 240 of *Federal Reporter, Third Series,* and this decision starts on page 1008.

[31] *Sheehan,* 240 F.3d at 1014.

[32] 571 F.3d 1364 (Fed. Cir. 2009). Lieutenant Colonel Mathew Tully and I discuss this case in detail in Law Review 14090 (December 2014).

[33] *Erickson,* 571 F.3d at 1368.

[34] 665 F.3d 741 (6th Cir. 2012). I discuss this case in detail in Law Review 13036 (March 2013).

Walleon Bobo is a Lieutenant Colonel in the Army Reserve (now retired) and was employed by United Parcel Service (UPS) as a supervisor of drivers, until the company fired him. UPS supervisors like Bobo were required to conduct "safety rides" for each driver on an annual basis and after an accident. Because of a shortage of supervisors, Bobo and other supervisors frequently conducted safety rides that did not fully comply with written UPS standards. UPS fired Bobo for allegedly falsifying reports on safety rides.

Bobo alleged that he was being treated more harshly than other supervisors guilty of the same offense because of his Army Reserve service (in violation of section 4311 of USERRA) and because of his African American race (in violation of Title VII of the Civil Rights Act of 1964).[35] Bobo sought to prove his case by showing evidence about "comparators"—other UPS supervisors who were Caucasian and who were not participants in the Reserve or National Guard.

After discovery, UPS filed a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. The District Judge granted the motion, both as to Bobo's USERRA claim and his Title VII claim. Bobo appealed to the United States Court of Appeals for the Sixth Circuit.[36]

Under Rule 56, the district judge is to grant a motion for summary judgment (thus ending the case before trial) only if the judge 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 the moving party is entitled to judgment as a matter of law. By granting a motion for summary judgment, the judge is saying that no reasonable jury could find for the non-moving party, based on the evidence adduced during the discovery process. In considering a motion for summary judgment, the judge should not weigh conflicting evidence, because weighing evidence is the province of the jury.

On appeal, the 6th Circuit reversed the grant of summary judgment on two grounds. First, the appellate court held that the district court had improperly constrained the plaintiff's discovery and had thus prevented him from obtaining evidence to support his case. Second, the appellate court held that even with the constrained discovery there was enough evidence in support of Bobo's case to preclude granting summary judgment for UPS. The 6th Circuit held:

> In resolving this appeal, we first consider Bobo's argument that the actions of UPS and the district court during litigation of the case unfairly precluded him from presenting additional facts in support of his claims. We agree with Bobo that the district court improperly restricted the scope of discovery when it allowed UPS to determine unilaterally that the only Caucasian, non-military supervisor who was similarly situated to Bobo was Ronnie Wallace. We also conclude that the district court unduly delayed its ruling on Bobo's discovery motions until after the court had already granted summary judgment for UPS. The discovery errors alone convince us that the summary judgment in

[35] If you choose to be represented by private counsel, rather than relying on the Department of Labor (DOL) and the Department of Justice (DOJ), you can combine your USERRA claim with other claims about why an unfavorable personnel action may have been unlawful.

[36] The 6th Circuit is the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee.

favor of UPS cannot stand, but we also conclude that the record demonstrates genuine issues of material fact for trial. As explained in more detail below, we reverse the grant of summary judgment in favor of UPS on most of Bobo's claims and remand the case to the district court with instructions.[37]

USERRA was enacted to prohibit discrimination against individuals because of their military service. *Hance v. Norfolk S. Ry. Co*., 571 F.3d 511, 517 (6th Cir. 2009) (per curiam); *Curby v. Archon*, 216 F.3d 549, 556 (6th Cir. 2000). USERRA provides, among other things, that "[a] person who is a member of . . . a uniformed service shall not be denied . . . retention in employment, . . . or any benefit of employment by an employer on the basis of that membership, . . . performance of service, . . . or obligation." 38 U.S.C. § 4311(c)(1).

An adverse employment action is prohibited under USERRA if the person's obligation for military service "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 . . . obligation for service." *Id*. "Protected status is a motivating factor if a truthful employer would list it, if asked, as one of the reasons for its decision." *Escher v. BWXT Y-12, LLC*, 627 F.3d 1020, 1026 (6th Cir. 2010). Discriminatory motivation may be inferred from a variety of considerations, including proximity in time between the employee's military activity and the adverse employment action, inconsistencies between the employer's conduct and the proffered reason for its actions, the employer's expressed hostility toward military members together with knowledge of the employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses. *Id*. If Bobo carries the initial burden to show by a preponderance that his protected status was a motivating factor in his discharge from employment, the burden shifts to UPS to prove affirmatively that it would have taken the same employment action in the absence of Bobo's protected status. *See Hance*, 571 F.3d at 518 (quoting *Sheehan v. Dep't of Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001)); *Escher*, 627 F.3d at 1026; *Petty v. Metro. Gov't of Nashville-Davidson Cnty*., 538 F.3d 431, 446 (6th Cir. 2008).

Taking all of the evidence in a light most favorable to Bobo, we conclude that there are genuine issues of material fact for trial concerning whether Bobo's military service was a motivating factor in his discharge and whether UPS would have taken the same employment action in the absence of Bobo's protected status. The district court ruled that Morton's comment, "I did not want Walleon volunteering for additional military duty when he was needed at UPS[,]" might have satisfied Bobo's *prima facie* case under USERRA if the statement had been made by someone responsible for the decision to fire Bobo. But, the court reasoned, Bobo did not present admissible evidence to tie Morton to the termination decision, nor did he establish that Morton poisoned the minds of the ultimate decision-makers against Bobo.

[37] *Bobo,* 665 F.3d at 748.

> To the contrary, Bobo's evidence tied Morton and Morton's direct supervisor, Wagner, directly to the termination decision. A jury could reasonably find that Morton's comment is direct evidence that Bobo's military service was a motivating factor in employment decisions. Wagner was aware of Morton's discriminatory remark because he read, signed, and dated the memorandum in which the comment was made. The evidence also shows Bobo complained to Wagner about supervisor Langford's comment that Bobo needed to choose between UPS and the Army, and that Bobo, Morton, and Wagner engaged in ongoing conversations about Bobo's requests to take leave to attend military training. Bobo felt discouraged from taking such leave, especially when Morton asked him if his military service was voluntary or involuntary. Wagner was present at the meeting when managers of the Mid-South District decided to terminate Bobo's employment.
>
> Bobo also produced evidence that might permit a jury to find UPS liable for a USERRA violation through the "cat's paw" theory. This phrase refers to a situation in which "a biased subordinate, who lacks decision-making power, influences the unbiased decision-maker to make an adverse [employment] decision, thereby hiding the subordinate's discriminatory intent." *Cobbins v. Tennessee Dep't of Transp.*, 566 F.3d 582, 586 n.5 (6th Cir. 2009). If a direct supervisor performs an act motivated by anti-military animus that is intended to cause an adverse employment action and that act is a proximate cause of the adverse employment action, then the employer may be held liable under USERRA based on the "cat's paw" theory. *See Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1194, 179 L. Ed. 2d 144 (2011).[38]

On remand, the district judge permitted additional discovery and then set the case for trial. After the trial was well under way, the judge learned of discovery misconduct by the UPS attorneys. He then ordered a mistrial and imposed substantial sanctions on UPS.[39] The company finally came to its senses and settled.

d. USERRA's enforcement mechanism with respect to federal agencies as employers

The Merit Systems Protection Board (MSPB) has jurisdiction to hear and adjudicate a claim that a federal executive agency has violated USERRA, under section 4324 of USERRA. That section provides:

> **(a)**
>
> **(1)** A person who receives from the Secretary [of Labor] a notification pursuant to section 4322(e) may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board. Not later than 60 days after the date the Secretary receives such

[38] *Bobo,* 665 F.3d at 754-55.

[39] *See Bobo v. United Parcel Service, Inc.,* 2012 U.S. Dist. LEXIS 166429 (W.D. Tenn. November 12, 2012), affirmed in part and reversed in part, 2013 U.S. Dist. LEXIS 8473 (W.D. Tenn. January 22, 2013).

a request, the Secretary shall refer the complaint to the Office of Special Counsel established by section 1211 of title 5.

(2)

(A) If the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred under paragraph (1) is entitled to the rights or benefits sought, the Special Counsel (upon the request of the person submitting the complaint) may appear on behalf of, and act as attorney for, the person and initiate an action regarding such complaint before the Merit Systems Protection Board.

(B) Not later than 60 days after the date the Special Counsel receives a referral under paragraph (1), the Special Counsel shall—

(i) make a decision whether to represent a person before the Merit Systems Protection Board under subparagraph (A); and

(ii) notify such person in writing of such decision.

(b) A person may submit a complaint against a Federal executive agency or the Office of Personnel Management under this subchapter directly to the Merit Systems Protection Board if that person—

(1) has chosen not to apply to the Secretary for assistance under section 4322(a);

(2) has received a notification from the Secretary under section 4322(e);

(3) has chosen not to be represented before the Board by the Special Counsel pursuant to subsection (a)(2)(A); or

(4) has received a notification of a decision from the Special Counsel under subsection (a)(2)(B) declining to initiate an action and represent the person before the Merit Systems Protection Board.

(c)

(1) The Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to subsection (a)(2)(A) or (b), without regard as to whether the complaint accrued before, on, or after October 13, 1994. A person who seeks a hearing or adjudication by submitting such a complaint under this paragraph may be represented at such hearing or adjudication in accordance with the rules of the Board.

(2) If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.

(3) Any compensation received by a person pursuant to an order under paragraph (2) shall be in addition to any other right or benefit provided for by this chapter and shall not diminish any such right or benefit.

(4) If the Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that such person is entitled to an order referred to in paragraph (2), the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.

(d)

(1) A person adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board under subsection (c) may petition the United States Court of Appeals for the Federal Circuit to review the final order or decision. Such petition and review shall be in accordance with the procedures set forth in section 7703 of title 5.

(2) Such person may be represented in the Federal Circuit proceeding by the Special Counsel unless the person was not represented by the Special Counsel before the Merit Systems Protection Board regarding such order or decision.[40]

The jurisdiction of the MSPB under USERRA is not limited to cases involving persons who can otherwise appeal firings to the MSPB.

MSPB procedures

MSPB USERRA cases, like other MSPB cases, are heard initially by Administrative Judges (AJs) of the MSPB. The AJ conducts a hearing and makes findings of fact and conclusions of law. The losing party at the AJ level (either the individual appellant or the agency) can appeal the AJ's decision to the MSPB itself, in Washington. If neither party appeals to the MSPB itself within 35 days, the decision of the AJ becomes the final decision of the MSPB.

The individual complainant, but not the federal agency, can appeal an unfavorable MSPB decision to the United States Court of Appeals for the Federal Circuit.[41]

USERRA provides:

A person adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board under subsection (c) may petition the United States Court of Appeals for the

[40] 38 U.S.C. 4324.

[41] The Federal Circuit is the specialized federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from final MSPB decisions.

Federal Circuit to review the final order or decision. Such petition and review shall be in accordance with the procedures set forth in section 7703 of title 5.[42]

The MSPB has been without a quorum (at least two members) since January 2017, and that problem is not likely to be solved soon. I invite your attention to the MSPB website, where the following set of "frequently asked questions" appears:

1. How are the 3 Board members appointed?

Board members are nominated by the President and confirmed by the Senate. The Chairman is separately nominated by the President and confirmed by the Senate. The Vice Chairman is designated by the President. The Board members serve 7-year staggered terms. See 5 U.S.C. §§ 1201 and 1202; 5 C.F.R. § 1200.2.

The Board currently has no sitting members. Prior to March 1, 2019, the Board operated for over two years without a quorum. Board members Anne M. Wagner and Susan Tsui Grundmann left on March 1, 2015, and January 6, 2017, respectively. Board Member Mark A. Robbins, who served most recently as Vice Chairman of the Board, served as the sole Board member from January 7, 2017, through February 28, 2019, when his statutory term ended.

2. What is the impact of a lack of quorum and Board members on MSPB operations?

As to the executive leadership of the Board, MSPB General Counsel Tristan Leavitt has assumed the responsibilities for the executive and administrative functions vested in the Chairman in accordance with MSPB's continuity of operations plan.

As to the adjudicatory authorities of the Board, because there are no Board members, the Board is unable to issue final decisions on petitions for review. See generally 5 U.S.C. § 1204(a); 5 C.F.R. § 1200.3.

3. Can administrative judges (AJs) issue initial decisions when there is a lack of Board quorum or Board members?

Yes, AJs may and have continued to issue initial decisions since the lack of quorum began, pursuant to longstanding delegated authority. If neither party files a petition for review to the MSPB, the AJ's decision will become the final decision of the Board and may be appealed to an appropriate court or tribunal. See 5 U.S.C. § 7703. If either party files a petition for review to the MSPB, a Board decision cannot be issued until a quorum of at least two Board members is restored.

4. Can the Board issue decisions on petitions for review without a quorum or Board members?

[42] 38 U.S.C. 4324(d)(1).

Petitions for review received before January 7, 2017, and for which the voting process was not completed before the Board lost a quorum, cannot be issued until a quorum is restored. Petitions for review received after January 7, 2017, have been acknowledged by the Office of the Clerk of the Board and processed according to current Board procedures. However, the Board cannot issue decisions on these petitions until a quorum is restored. General information about the number of pending petitions for review since the lack of quorum began is available in the e-FOIA Reading Room of MSPB's website.

5. Can the Board issue decisions on requests to withdraw petitions for review?

Yes. Pursuant to the May 11, 2018 Policy Regarding Clerk's Authority to Grant Requests to Withdraw Petitions for Review, and the Board's 2011 Manual on Organization Functions and Delegations of Authority, the Clerk of the Board may exercise its delegated adjudicatory authority to "grant a withdrawal of a petition for review when requested by a petitioner."

6. How are appellants advised of their administrative appellate review or judicial options during the period in which there are no sitting Board members?

A party's administrative and/or judicial appeal rights will continue to be listed at the end of every initial decision. If the appellant, the agency, or both file a petition for review, it will be acknowledged and processed by the Board, as explained above. The petition for review filing deadlines will not be tolled (i.e., stopped) during any lack of quorum. This means that parties to a case who wish to file a petition for review must do so within 35 days of issuance of the initial decision, as required by the Board's adjudicatory regulations at 5 C.F.R. § 1201.114. However, the Board cannot issue a decision until a quorum is restored by the nomination and confirmation of at least two Board members.

If neither party to a case files a petition for review, the AJ's initial decision will become the final decision of the Board. An appellant may choose to exercise his or her review rights, which may include an appeal to the U.S. Court of Appeals for the Federal Circuit, U.S. District Court, an appropriate circuit court of appeal, or the Equal Employment Opportunity Commission, depending on the type of appeal and claims raised. See 5 U.S.C. § 7703.

The parties are informed of the current Board lack of quorum and members in initial decisions, and in acknowledgment notices issued by the Office of the Clerk of the Board, if either or both parties file a petition for review with the Board.

7. When does the Board anticipate having a quorum restored?

While it is not possible to determine exactly when the quorum will be restored, two nominations (to serve as Chairman and Member of the Board) are pending before the Senate. As explained in

#1 above, after the President nominates Board members, they must be confirmed by the Senate before they can be sworn in as Board members.

8. Has the Board previously experienced a lack of quorum?

Yes. The Board was briefly without a quorum in 2003.

9. Has the Board previously experienced a lack of any sitting members?

No.

10. How will the parties know when a quorum is present?

We will post information on the MSPB website, issue a press release, and place an announcement on Twitter. We may communicate this information in other ways, as appropriate.

11. Is there a point of contact for other questions?

For further information, please contact the Office of the Clerk of the Board via email to mspb@mspb.gov or via phone at 202-653-7200. Additional information about the Board's organizational structure can be found on the website at www.mspb.gov, in its agency plans and annual reports, and in its current "Organization Functions and Delegations of Authority."

End of quotation from the MSPB website

President Trump has nominated Dennis Dean Kirk to be the Chairman of the MSPB, B. Chad Bungard to be Vice Chairman, and Julia Akins Clark to be the other Member. Please write to your two United States Senators and implore them to schedule a confirmation vote for these three nominees and to vote to confirm them. Ask your friends and relatives to do likewise. Readers: Please communicate with your United States Senators on this important issue.

If the individual appellant (not the agency) loses at the AJ level, he or she can wait 35 days for the AJ's decision to become the final decision of the MSPB and then appeal to the Federal Circuit. But if the individual wins at the AJ level, it is likely that the agency will appeal to the MSPB, and in that situation the case will go into "deep limbo" until the MSPB has a quorum and has managed to work its way through the backlog.

This is what Chan did in this case. After the AJ ruled against her, she waited 35 days for the AJ's decision to become the final decision of the MSPB, and then she appealed to the Federal Circuit.

In a way, it is fortunate that the AJ ruled against her. If the AJ had ruled for her, the EEOC probably would have appealed to the MSPB itself, and then the case would have gone into limbo

for years, until the MSPB has at least two confirmed members and until those confirmed members have worked their way through the massive backlog.

Chan's appeal to the MSPB

Ringo Chan initiated her MSPB action on 12/17/2018, just a month after the firing. She is represented by Adam Augustine Carter, Esq., of the Employment Law Group (ELG) in Washington, DC.[43] Chan's case was assigned to AJ Tamara Ribas of the MSPB's San Francisco office.[44] AJ Ribas conducted a hearing and made findings of fact and conclusions of law, ruling against Chan on all counts. In a lengthy decision, she cited but fundamentally misapplied many of the court precedents that I have cited in this article.

Chan waited 35 days for the AJ's decision to become the final decision of the MSPB and then appealed to the Federal Circuit. We will keep the readers informed of developments in this important case.

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.

Indeed, ROA is the *only* national military organization that exclusively supports America's Reserve and National Guard.

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 members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

[43] I have worked with Mr. Carter and the ELG in several USERRA cases over the last 15 years, and I recommend them for persons who need legal representation in USERRA cases, especially cases involving federal agencies as employers.

[44] The San Francisco office has since moved across the bay to Oakland.

If you are now serving or have ever served in any one of our nation's seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs $20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve.

If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Officers Association
1 Constitution Ave. NE
Washington, DC 20002