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Employers and Supervisors: Saying "Thank You for Your Service" Is Not Enough.

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1.1.1.8—USERRA applies to the Federal Government
1.2—USERRA forbids discrimination
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1.8—Relationship between USERRA and other laws/policies

***Santos v. National Aeronautics and Space Administration,* 2021 U.S. App. LEXIS 7147 (Fed. Cir. March 11, 2021).**

Enforcing USERRA against federal agencies as employers

This is a recent 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 appeals, including appeals from final decisions of the Merit Systems Protection Board (MSPB). The MSPB is a quasi-judicial federal executive agency that was created by the Civil Service Reform Act of 1978 (CSRA). That law divided the former Civil Service Commission (CSC) into three separate agencies.

The Office of Personnel Management (OPM) inherited most of the CSC's employees, administrative and policymaking functions, and the beautiful headquarters building called the Theodore Roosevelt Building, located at 1900 E Street Northwest in Washington. The MSPB

[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,000 "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 specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America, initiated this column in 1997. I am the author of more than 90% of the articles, but we are always looking for "other than Sam" articles.

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inherited the adjudicatory functions of the former CSC. The Office of Special Counsel (OSC) inherited the investigatory and prosecutive functions.

Appeals from federal civil service employees who have been fired or suspended without pay for 15 days or more make up the great majority of the MSPB's caseload. A federal civil service employee who has completed the initial probationary period (usually one year of federal civilian employment) and who thereafter is fired or suspended without pay for 15 days or more can appeal the adverse action to the MSPB.

In 1994, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA)[3] as a long-overdue update and rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940.[4] The VRRA applied to the Federal Government, but the VRRA lacked a specific enforcement mechanism with respect to USERRA violations by federal executive agencies as employers. Congress corrected that oversight when it enacted USERRA in 1994.[5] Section 4324 of USERRA provides:

> **Enforcement of rights with respect to Federal executive agencies**
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> **(a)**
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> **(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 a request, the Secretary shall refer the complaint to the Office of Special Counsel established by section 1211 of title 5.
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> **(2)**
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> **(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.

[3] Public Law 103-353. USERRA is codified in title 38 of the United States Code, sections 4301 through 4335, 38 U.S.C. 4301-35. USERRA applies to almost all employers in this country, including the Federal Government, the states, the political subdivisions of states, and private employers, regardless of size.

[4] Please see Law Review 15067 (August 2015) for a detailed discussion of the history of the federal reemployment statute.

[5] Enforcing USERRA against the Federal Government is particularly important because 23% of National Guard and Reserve part-timers are federal civilian employees and because USERRA's first section expresses the "sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter.: 38 U.S.C. 4301(b).

(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.[6]

A person claiming that a federal executive agency has violated the person's rights under USERRA can file a formal written USERRA complaint against the agency with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS).[7] DOL-VETS will then investigate the complaint and, if DOL-VETS finds a violation, will make "reasonable efforts" to get the employer to comply with USERRA.[8] If the DOL-VETS efforts do not result in compliance, DOL-VETS is required to notify the complainant of the results of the investigation and of the complainant's right to request referral to OSC.[9]

If OSC is reasonably satisfied that the complainant is entitled to the USERRA benefits that he or she seeks, OSC may appear and act as attorney for the complainant in the MSPB proceeding.[10] If OSC decides not to represent the complainant, it must notify the complainant in writing of the declination.[11] At that point, the complainant can bring his or her own USERRA complaint to the MSPB with private counsel or acting as his or her own counsel.[12]

Alternatively, the complainant, upon receiving the DOL-VETS notification of the results of the investigation, can choose not to request referral to OSC and can bring his or her own case in the MSPB.[13] As a third option, the complainant can choose to bypass DOL-VETS altogether and bring the case directly to the MSPB.[14] This final method is the method chosen by Fernando Santos in this case.

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[6] 38 U.S.C. 4324.
[7] 38 U.S.C. 4322(a).
[8] 38 U.S.C. 4322(d).
[9] 38 U.S.C. 4322(e), 4324(a)(1).
[10] 38 U.S.C. 4324(a)(2)(A).
[11] 38 U.S.C. 4324(a)(2)(B).
[12] 38 U.S.C. 4324(b)(4).
[13] 38 U.S.C. 4324(b)(3).
[14] 38 U.S.C. 4323(b)(1).

MSPB cases, including MSPB USERRA cases, begin before an Administrative Judge (AJ) of the MSPB. The AJ conducts a hearing and makes findings of fact and conclusions of law. The losing party (either the individual complainant or the defendant federal executive agency) can appeal to the MSPB itself, at its headquarters in Washington, DC.

When fully staffed, the MSPB has three members, including a Chair and Vice-Chair, who are to be of the President's political party, and the other member is to be a member of the other major political party. Each member must be nominated by the President and confirmed by the Senate. A quorum of at least two members, duly nominated and confirmed, is necessary to act on an appeal.

As I have explained in detail in Law Review 19098 (October 2019) and several other articles, the MSPB has been without a quorum since January 2017 and has been without any members since March 2019. The three members serve staggered seven-year terms. When a term expires and a replacement has not been nominated and confirmed, the member can serve an overtime period of up to one year, or until the replacement is confirmed by the Senate, whichever comes first.

The Vice-Chair under President Obama left office in 2015. The Chair under President Obama left office on 1/13/2017, one week before President Trump was inaugurated. The final MSPB member was Mark Robbins. His term expired in March 2018 and his one-year overtime period expired in March 2019.

Although the MSPB has been without any members for more than two years, the agency has not ceased to exist, and its functions continue. The AJs continue to hear and decide cases, and when losing parties at the AJ level appeal to the MSPB itself those cases go into a backlog now exceeding 3,500 cases. When the MSPB has at least two confirmed members, the Board will likely have to address the cases in the enormous backlog before deciding any new cases.

President Trump nominated three highly qualified persons for the three MSPB vacancies, but the Senate never acted on the Trump nominations. As of this writing, President Biden has not yet nominated anyone for these critical vacancies.

When an individual complainant loses at the AJ level, as Santos did, he or she can wait 35 days, at which time the AJ decision becomes the final decision of the MSPB. Then, the complainant can appeal the MSPB final decision to the Federal Circuit.[15] If the federal executive agency loses at the MSPB, it cannot appeal to the Federal Circuit.[16]

[15] 38 U.S.C. 4324(d)(1).
[16] Id.

Facts of the *Santos* case

Fernando Santos, the complainant in the MSPB and the appellant in the Federal Circuit, is a Commander (O-5) in the Navy Reserve. He is not a member of the Reserve Officers Association, now doing business as the Reserve Organization of America, but he is certainly eligible, and we are trying to recruit him.

Santos was a mechanical engineer for the National Aeronautics and Space Administration (NASA) for more than 18 years but was fired in 2018. Earlier that year, he was transferred within NASA to the agency's Ground Systems Branch, Commercial Division, and he was put under a new supervisor. The Federal Circuit decision contains the following recitation of the facts:

> In 2018, Fernando Santos—a mechanical engineer for National Aeronautics and Space Administration ("NASA") and a commander in the United States Navy Reserve—was transferred to a new division of NASA and placed under the supervision of Angela Balles, chief of the Ground Systems Branch of the Commercial Division. Despite working at NASA for over 18 years and receiving multiple accolades for his service, Santos began receiving letters of instruction and reprimand under his new supervisor alleging deficient performance. Although Balles maintained that she had no problems with Santos's mandatory military obligations, the timing of many letters coincided with Santos's requests for or absences due to military leave. The letters, moreover, made much of Santos's ability to "report to work in a timely manner and maintain regular attendance at work." After months of difficulties, Balles formally placed Santos on a performance improvement plan ("PIP"). On August 27, 2018, Balles issued Santos a notice of proposed removal. Santos was removed from his position on September 26, 2018.[17]

Proceedings in the MSPB

On 10/26/2018, just one month after the firing, Santos appealed to the MSPB. As a non-probationary federal civil service employee who had been fired, he had the right to appeal the firing to the MSPB, and he did so. He also appealed under section 4324 of USERRA, which is quoted above. Santos claimed that the firing violated section 4311 of USERRA, which provides:

> **(a)** A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, *retention in employment*, promotion,

[17] Santos v. NASA, No. 2019-2345, 2021 U.S. App. LEXIS 7147, at *1-2 (Fed. Cir. Mar. 11, 2021).

or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c) An employer shall be considered to have engaged in actions prohibited—

(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is *a motivating factor* in the employer's action, unless the employer can *prove* that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

(2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.[18]

Under section 4311(c)(1), the plaintiff is not required to prove that he or she was fired (denied "retention in employment") *solely because* of the person's performance of uniformed service or obligation to perform future service. It is sufficient for the plaintiff to prove that his or her service or obligation to perform service was *a motivating factor* in the employer's decision to fire or to take some other adverse action. If the plaintiff proves motivating factor, he or she wins unless the employer can *prove* (not just say) that the employer would have taken (not just could have taken) the same adverse action, for a valid reason, in the absence of the protected service or obligation.[19]

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

[19] 38 U.S.C. 4311(c)(1). Please see Law Review 17016 (March 2017), by attorney Thomas Jarrard and me, for a detailed discussion of the case law under section 4311 of USERRA/

The MSPB AJ who heard Santos' case considered and rejected Santos' claim that the firing violated section 4311. The AJ relied on the fact that the NASA supervisor who decided to fire Santos was "very patriotic" and had "thanked Santos for his service" and had not expressed to others her belief that Santos took "too much" military leave.

Santos appeals to the Federal Circuit

Realizing that the MSPB was without a quorum and could not decide appeals from AJ decisions, Santos wisely waited 35 days for the AJ's decision to become the final MSPB decision, and then he appealed that decision to the Federal Circuit. As is always the case in our federal appellate courts, the case was assigned to a panel of three judges. In this case, the three judges were Kathleen M. O'Malley, William C. Bryson, and Todd M. Hughes. Judge O'Malley wrote a lengthy and scholarly opinion and was joined by Judge Bryson. Judge Hughes wrote a terse separate opinion, concurring in the judgment and the result, which was to vacate the MSPB decision and remand the case to the MSPB.

Santos made several legal arguments that Judge O'Malley endorsed in her scholarly opinion.

The MSPB AJ gave entirely too much weight to the supervisor's expressions of "patriotism" and "thank you for your service."

In her scholarly opinion, Judge O'Malley wrote:

> We make clear, moreover, that, on remand, the Board [MSPB] must actually apply the *Sheehan* factors, which it has not yet done. Santos argued to the Board that "his removal was discriminatory because . . . management held the time he was absent for military service against him." *Santos*, 2019 WL 2176543, at *12. And he detailed the extent to which reprimands or complaints about his performance dovetailed with his requests to fulfill his military obligations. The Board simply concluded that Santos failed to show his military service was a substantial or motivating factor in his removal because Balles "thanked [Santos] for his service" and was "very patriotic." *Id.* Those minimal factual findings do not suffice under *Sheehan*. On remand, the Board must apply the *Sheehan* factors to all the facts concerning Santos's performance and Balles's supervision of Santos, both pre-and post-PIP.[20]

In adjudicating section 4311 cases, the MSPB and its AJs must apply the *Sheehan* factors.

[20] Santos v. NASA, No. 2019-2345, 2021 U.S. App. LEXIS 7147, at *18-19 (Fed. Cir. Mar. 11, 2021).

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.[21]

The MSPB AJ who decided *Santos* did not cite or apply to *Sheehan* factors. Instead, the AJ cited trivial irrelevancies like the supervisor's "patriotism" and the supervisor having said "thank you for your service" to the complainant, Santos. *Sheehan* is extraordinarily well-researched and well-written. The MSPB and its AJs must apply this precedent.

> **Granting a military leave of absence but then expecting the employee to achieve the same quantity and quality of work as employees who are not Reserve or National Guard members violates USERRA.**

In her scholarly opinion, Judge O'Malley wrote:

> Before the Board, Santos testified that, although he "had never had problems with his use of military leave previously, he noticed as the year progressed that Balles was routinely taking a longer amount of time to approve his use of military leave." He also testified that he was often held accountable for meetings missed due to his military obligations, even though those meetings were scheduled after he had submitted notice of military leave. In November 2017, for example, Santos notified Balles that he would be out on military leave from November 5, 2017 through November 19, 2017. Upon his return, Santos alleged that Balles instructed him to develop a report that required knowledge of what was discussed during a meeting that took place while he was on leave. Although Santos eventually obtained a copy of the meeting minutes and submitted the report, Balles informed Santos that the report was unsatisfactory and asked another employee to redo Santos's work. Additionally, on February 13, 2018—one day after Balles had officially approved another request for Santos's military leave—Balles issued a Letter of Instruction providing "explicit instructions concerning [Santos's] use of leave, [] work schedule, and the recording of [] hours at work."
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> According to Santos, this cycle repeated itself for the next few months: Balles would assign Santos a task that coincided with his military duty; Santos would be unable to complete the task due to his concurrent military obligations; and Balles would reprimand

[21] *Sheehan v. Department of the Navy,* 240 F.3d 1009, 1014 (Fed. Cir. 2001).

> Santos for failing to complete the task to a satisfactory level. Santos also alleged that, when he expressed concerns about projects that would be due during his upcoming military leave, Balles responded that it was "his responsibility to figure out how to have everything covered." And, Santos noted that Balles issued him a Letter of Reprimand for a training that had lapsed while he was out on military duty, but which he completed two days after returning from leave.[22]

Under USERRA, an employee (federal, state, local, or private sector) is entitled to military leave (generally unpaid but job-protected) to perform "service in the uniformed services" including voluntary or involuntary active duty, active duty for training, or inactive duty training (drills).[23] If the employer grants military leave but then demands that the employee produce just as much work as other employees who are not on leave, the employer has not granted military leave at all. In her scholarly opinion, Judge O'Malley at least implicitly recognized and accepted this vital concept.

Santos has managed to create a valuable precedent that will help not only federal employee reservists and National Guard members, but also Guard and Reserve members generally. I have heard many times from law firm associates[24] who serve part-time in the National Guard or Reserve. To make partner after about seven years as an associate, or even to remain employed as an associate, the associate must achieve a minimum number of "billable hours" per fiscal year. I have long argued that the firm's billable hours target must be adjusted for the associate who is away from the firm for a substantial part of the fiscal year for military leave. The *Santos* decision provides substantial support for this argument.

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.[25]

Another predictable and unavoidable consequence of Reserve service is that the employee who is away from work on military leave will not get as much work done as the employee who is

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[22] Santos v. NASA, No. 2019-2345, 2021 U.S. App. LEXIS 7147, at *4-6 (Fed. Cir. Mar. 11, 2021).
[23] *See* 38 U.S.C. 4316(b).
[24] An associate is a junior attorney at a law firm and is an employee, not a partner.
[25] *Erickson v. United States Postal Service,* 571 F.3d 1364, 1368 (Fed. Cir. 2009).

present for work every workday. Allowing an employer to fire or otherwise punish an employee for this unavoidable consequence will make a mockery of USERRA protections.

Effective enforcement of USERRA is essential.

Throughout our nation's history, when the survival of liberty has been at issue, our nation has defended itself by calling up state militia forces (known as the National Guard since the early 20th Century) and by drafting young men into military service.[26] A century ago, in the context of World War I, the United States Supreme Court upheld the constitutionality of the draft.[27]

Almost two generations ago, in 1973, Congress abolished the draft and established the All-Volunteer Military (AVM). No one is required to serve in our country's military, but someone must defend this country. When I hear employers complain about the "burdens" imposed by laws like USERRA, I want to remind those folks that our government is not drafting you, nor is it drafting your children and grandchildren. Yes, USERRA imposes burdens on some members of our society, but those burdens are tiny in comparison to the far greater burdens (sometimes the ultimate sacrifice) voluntarily undertaken by that tiny sliver of our country's population who volunteer to serve in uniform.

As we approach the 19th anniversary of the "date which will live in infamy" for our time, when 19 terrorists commandeered four airliners and crashed them into three buildings and a field, killing almost 3,000 Americans, let us all be thankful that in that period we have avoided another major terrorist attack within our country. Freedom is not free, and it is not a coincidence that we have avoided a repetition of the tragic events of 9/11/2001. The strenuous efforts and heroic sacrifices of American military personnel have protected us all.

In a Memorial Day speech at Arlington National Cemetery on May 30, 2016, the Chairman of the Joint Chiefs of Staff (General Joseph Dunford, USMC) said:

> Some [of those we honor today] supported the birth of the revolution; more recently, others have answered the call to confront terrorism. Along the way, more than one million Americans have given the last full measure [of devotion]. Over 100,000 in World War I. Over 400,000 in World War II. Almost 40,000 in Korea. Over 58,000 in Vietnam. And over 5,000 have been killed in action since 9/11. Today is a reminder of the real cost of freedom, the real cost of security, and that's the human cost.

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[26] No one has been drafted by our country since 1973, but under current law young men are required to register in the Selective Service System when they reach the age of 18. In Resolution 13-03, ROA has proposed that Congress amend the law to require women as well as men to register. Please see Law Review 15028 (March 2015).

[27] *Arver v. United States,* 245 U.S. 366 (1918). The citation means that you can find this decision in Volume 245 of *United States Reports,* starting on page 366.

In a speech to the House of Commons on 8/21/1940, Prime Minister Winston Churchill said:

> The gratitude of every home in our island, in our Empire, and indeed throughout the world except in the abodes of the guilty goes out to the British airmen who, undaunted by odds, unweakened in their constant challenge and mortal danger, are turning the tide of world war by their prowess and their devotion. Never in the course of human conflict was so much owed by so many to so few.

Churchill's paean to the Royal Air Force in the Battle of Britain applies equally to America's military personnel who have protected us from a repetition of 9/11/2001, by their prowess and their devotion.

In the last 19 years, most of the American people have made no sacrifices (beyond the payment of taxes) in support of necessary military operations. The entire U.S. military establishment amounts to just 0.75% of the U.S. population. This tiny sliver of the population bears almost all the cost of defending our country.

On January 27, 1973, more than 47 years ago, Congress abolished the draft and established the AVM. The AVM has been a great success, and when Representative Charles Rangel of New York introduced a bill to reinstate the draft he could not find a single co-sponsor. Our nation has the best-motivated, best-led, best-equipped, and most effective military in the world, and perhaps in the history of the world. I hope that we never need to return to the draft. Maintaining the AVM requires that we provide incentives and minimize disincentives to serve among the young men and women who are qualified for military service.

I have written:

> Without a law like USERRA, it would not be possible for the services to recruit and retain the necessary quality and quantity of young men and women needed to defend our country. In the All-Volunteer Military, recruiting is a constant challenge. Despite our country's current economic difficulties and the military's recent reductions in force, recruiting remains a challenge for the Army Reserve—the only component that has been unable to meet its recruiting quota for Fiscal Year 2014.
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> Recruiting difficulties will likely increase in the next few years as the economy improves and the youth unemployment rate drops, meaning that young men and women will have more civilian opportunities competing for their interest. Recent studies show that more than 75% of young men and women in the 17-24 age group are not qualified for military service, because of medical issues (especially obesity and diabetes), the use of illegal drugs or certain prescription medicines (including medicine for conditions like

> attention deficit hyperactivity disorder), felony convictions, cosmetic issues, or educational deficiencies (no high school diploma).
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> Less than half of one percent of America's population has participated in military service of any kind since the September 11 attacks. A mere 1% of young men and women between the ages of 17 and 24 are interested in military service and possess the necessary qualifications. The services will need to recruit a very high percentage of that 1%. As a nation, we cannot afford to lose any qualified and interested candidates based on their concerns that military service (especially service in the Reserve or National Guard) will make them unemployable in civilian life. There is a compelling government interest in the enforcement of USERRA.[28]

Those who benefit from our nation's liberty should be prepared to make sacrifices to defend it. In the AVM era, no one is required to serve our nation in uniform, but our nation needs military personnel, now more than ever. Requiring employers to reemploy those who volunteer to serve is a small sacrifice to ask employers to make. All too many employers complain about the "burdens" imposed on employers by the military service of employees, and all too many employers seek to shuck those burdens through clever artifices.

I have no patience with the complaining of employers. Yes, our nation's need to defend itself puts burdens on the employers of those who volunteer to serve, but the burdens borne by employers are tiny as compared to the heavy burdens (sometimes the ultimate sacrifice) borne by those who volunteer to serve, and by their families.

To the nation's employers, especially those who complain, I say the following: Yes, USERRA puts burdens on employers. Congress fully appreciated those burdens in 1940 (when it originally enacted the reemployment statute), in 1994 (when it enacted USERRA as an update of and improvement on the 1940 statute), and at all other relevant times. We as a nation are not drafting you, nor are we drafting your children and grandchildren. You should celebrate those who serve in your place and in the place of your offspring. When you find citizen service members in your workforce or among job applicants, you should support them cheerfully by going above and beyond the requirements of USERRA.

> **Judge O'Malley firmly rejected NASA's argument, supported by the MSPB AJ, that a federal agency is not required to prove that it imposed a performance improvement plan (PIP) on an employee for a proper, non-pretextual reason.**

Santos' supervisor put him on a PIP because of Santos' alleged work deficiencies. NASA argued, and the MSPB agreed (citing several MSPB precedents) that an agency is not required to prove,

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[28] Law Review 14080 (July 2014) (footnotes omitted). Nathan Richardson was my co-author on Law Review 14080.

to justify firing an employee after the PIP, that the PIP was imposed for a proper, non-pretextual purpose. In her scholarly opinion, Judge O'Malley firmly overruled those MSPB precedents, holding:

> The statute governing post-PIP removals, 5 U.S.C. § 4302, provides that employees "who continue to have unacceptable performance" may only be removed "after an opportunity to demonstrate acceptable performance." 5 U.S.C. § 4302(c)(6). The Board has held that this provision does not require an agency to prove that an employee was performing unacceptably prior to the PIP in order to justify a post-PIP removal. *See Wilson v. Dep't of Navy*, 24 M.S.P.R. 583, 586 (1984) (finding "no statutory or regulatory basis" to require an agency to establish appellant's unsatisfactory performance prior to the PIP). The Board has consistently applied this interpretation to PIP removals. *See, e.g.*, *Brown v. Veterans Admin.*, 44 M.S.P.R. 635, 640 (1990) ("[I]f the employee's performance is unacceptable during the PIP, the agency may generally base an action on this deficiency and need not also show that the employee's performance was unacceptable prior to the PIP, as the Board held in *Wilson*. . . .").
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> We [the Federal Circuit] have not directly addressed the question of whether, when an agency predicates removal on an employee's failure to satisfy obligations imposed by a PIP and that removal is challenged, the agency must justify imposition of a PIP in the first instance under 5 U.S.C. § 4302, though we have discussed the general relevance of pre-PIP performance to a PIP removal. *See Harris v. Sec. & Exch. Comm'n*, 972 F.3d 1307, 1316-17 (Fed. Cir. 2020). Today we confirm that the statute's plain language demonstrates that an agency must justify institution of a PIP when an employee challenges a PIP-based removal.
>
> Section 4302 requires agencies to develop a performance appraisal system that, *inter alia*, "provide[s] for periodic appraisals of job performance of employees." 5 U.S.C. § 4302(a)(1). Section 4302(c) contains six subsections that detail what must comprise an agency's performance appraisal system. Subsections (c)(5) and (c)(6) advise how an agency's performance appraisal system should handle "unacceptable performance." An agency's performance appraisal system should provide for "assisting employees in improving unacceptable performance," 5 U.S.C. § 4302(c)(5), as well as "reassigning, reducing in grade, or removing employees *who continue to have unacceptable performance* but only after an opportunity to demonstrate acceptable performance," 5 U.S.C. § 4302(c)(6) (emphasis added). Agencies usually provide employees "an opportunity to demonstrate acceptable performance" by placing them on a PIP. *See Harris*, 972 F.3d at 1311.
>
> Thus, Section 4302(c)(6) makes clear that an agency is only allowed to "reassign[], reduc[e] in grade, or remov[e] employees who *continue to* have unacceptable performance" during a PIP. 5 U.S.C. § 4302(c)(6) (emphasis added). To "*continue to* have unacceptable performance" during the PIP, as the statutory text requires, an employee

must have displayed unacceptable performance *prior to* the PIP. Under the plain meaning of the statute, then, an agency must defend a challenged removal by establishing that the employee had unacceptable performance before the PIP and "continue[d] to" do so during the PIP.

The Office of Personnel Management ("OPM"), the agency tasked with implementing the performance appraisal system of Chapter 43, reads Section 4302 the same way. OPM published a regulation entitled "Addressing Unacceptable Performance," which pertains to subsections (c)(5) and (c)(6) of Section 4302. *See* 5 C.F.R. § 432.104. OPM published a notice of final rulemaking on October 16, 2020, amending this regulation to provide:

At any time during the performance appraisal cycle that an employee's performance is determined to be unacceptable in one or more critical elements, the agency shall notify the employee of the critical element(s) for which performance is unacceptable and inform the employee of the performance requirement(s) or standard(s) that must be attained in order to demonstrate acceptable performance in his or her position.
Id. Notably, OPM stated in its notice of final rulemaking that "[t]he amended rule does not relieve agencies of the responsibility to demonstrate that an employee was performing unacceptably -*which per statute covers the period both prior to and during a formal opportunity period* - before initiating an adverse action under chapter 43." Probation on Initial Appointment to a Competitive Position, Performance-Based Reduction in Grade and Removal Actions and Adverse Actions, 85 Fed. Reg. 65940, 65957 (Oct. 16, 2020) (emphasis added). OPM's statement accords with our understanding that Section 4302(c)(6) requires agencies to justify a challenged post-PIP-based removal by establishing the propriety of the PIP in the first instance.
Our holdings in *Harris* and *Lovshin v. Dep't of the Navy*, 767 F.2d 826 (Fed. Cir. 1985) are not inconsistent with this reading of Section 4302. *Lovshin* delineated four requirements agencies must satisfy before removing an underperforming employee under Section 4303. Agencies must: (a) establish an approved performance appraisal system; (b) communicate the performance standards and critical elements of an employee's position to the employee; (c) warn the employee of inadequacies in "critical elements"; and (d) offer an underperforming employee counseling and an opportunity for improvement. *Lovshin*, 767 F.2d at 834. There, we emphasized that these requirements are consistent with fundamental fairness to employees. *Harris* clarified the third *Lovshin* element, holding that "the PIP notice itself often serves as the warning" of a performance problem. *Harris*, 972 F.3d at 1316.

But, *Harris* also confirmed that pre-PIP performance by the terminated employee and the agency's pre-PIP treatment of the employee may be relevant to the removal inquiry. *See Harris*, 972 F.3d at 1316-1317. While we did not find the pre-PIP evidence in *Harris* sufficient to override the agency's removal decision, we expressly discussed the AJ's consideration of it, concluding that the AJ had adequately done so in that case. *Id.* at 1320-21.

> Confirming an agency's obligation to justify initiation of a PIP where the PIP leads to removal is particularly appropriate, moreover, in situations resembling Santos's, where an employee alleges that both the PIP and the removal based on the PIP were in retaliation for protected conduct. Otherwise, an agency could establish a PIP in direct retaliation for protected conduct and set up unreasonable expectations in the PIP in the hopes of predicating removal on them without ever being held accountable for the original retaliatory conduct. Indeed, these are the circumstances in which the issue of pre-PIP performance would be most relevant.[29]

A PIP is not an adverse personnel action that is appealable to the MSPB. But if the agency asserts that the employee's performance did not improve during the PIP and proceeds to fire the employee, the agency will be required to prove (to sustain the firing) that the PIP was imposed for a proper, non-pretextual reason.

Who represented Fernando Santos?

Although he is an engineer and not a lawyer, Fernando Santos represented himself at the Federal Circuit. Although I generally discourage non-lawyers from representing themselves in complex legal matters, in this case Fernando Santos did a great job in representing his own interests and in creating a precedent that will help Reserve and National Guard personnel generally.

Debra Lynn Roth, Esq., a partner at Shaw, Bransford & Roth P.C. in Washington, DC, filed an amicus curiae (friend of the court) brief supporting Santos on the specific legal question of whether an agency is required to prove that it had a valid, non-pretextual reason to impose a Performance Improvement Plan (PIP) on the employee that it fired. She did this pro bono (no fee). I commend her for her work.

Is this case over?

No, this case is not over. The Federal Circuit vacated the MSPB decision and remanded the case to the MSPB for further proceedings. Unless the parties settle, there will be a new hearing before the same MSPB AJ, or perhaps a new AJ will be assigned. We will keep the readers informed of developments in this interesting and important case.

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[29] Santos v. NASA, No. 2019-2345, 2021 U.S. App. LEXIS 7147, at *9 (Fed. Cir. Mar. 11, 2021) (emphasis in original).

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