LAW REVIEW[1] 24013
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Recent USERRA Decision in the Northern District of Illinois.
By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.1.1.7—USERRA applies to state and local governments.
1.2—USERRA forbids discrimination.
1.4—USERRA enforcement.
1.6—USERRA statute of limitations.
1.8—Relationship between USERRA and other laws/policies.
2.0—Paid leave for government employees who are Reserve Component personnel.

[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 Spouses' 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 (ROA), 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 by other lawyers.

[2] BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 45 years, I have collaborated with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 38 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. §§ 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at mailto:swright@roa.org.

***Lara v. Rock Valley Police Department,* 2023 U.S. Dist. LEXIS 36689, 2023 WL 2374979 (N.D. Ill. March 6, 2023).**

Vincent Lara is a Master Sergeant in the United States Army Reserve (USAR) and a member of the Reserve Organization of America (ROA).[3] He sued the Rock Valley College[4] Police Department in the United States District Court for the Northern District of Illinois, Western Division, in Rockford, Illinois. Lara is represented by Lieutenant Colonel John Norman Maher, USAR, a life member of ROA. The case was assigned to Judge Philip G. Reinhard and United States Magistrate Judge Margaret J. Schneider.

The facts stated in this article come from Lara's complaint, initiating his lawsuit. Because Judge Reinhard granted the defendant's motion to dismiss, there has been no trial and there has not even been discovery. I do not represent Master Sergeant Lara, and I have not investigated the facts of this case.

On the civilian side, Lara was employed as a police officer for Rock Valley College until he was constructively discharged.[5] Sergeant Coe of

[3] The Reserve Officers Association was established in 1922 and received its congressional charter in 1950. In 2018, ROA members amended the ROA Constitution to make enlisted service members, as well as officers, eligible for membership. The organization adopted the "doing business as" name of Reserve Organization of America to emphasize that the organization represents and seeks to recruit as members service members and veterans of all ranks, from E-1 to O-10.

[4] "Rock Valley College [RVC] is a public community college in Rockford, Illinois. It is part of the Illinois Community College System. RVC's district comprises Winnebago County, Boone County, and parts of Stephenson County, Ogle County, McHenry County, and DeKalb County." *See* https://en.wikipedia.org/wiki/Rock_Valley_College. Rock Valley College is a political subdivision of the State of Illinois. Political subdivisions do not have sovereign immunity under the 11th Amendment of the United States Constitution, and it is possible for a person claiming that his or her rights under the Uniformed Services Employment and Reemployment Rights Act (UJSERRA) have been violated to sue a political subdivision in federal district court, in his or her own name and with his or her own lawyer, just like suing a private employer. *See* Law Review 23012 (March 2023).

[5] The United States Equal Employment Opportunity Commission (EEOC) has defined the term "constructive discharge" as follows: "A constructive discharge occurs when an employee resigns from his/her employment because (s)he is being subjected to unlawful employment practices. If the resignation is directly related to the respondent's [employer's] unlawful employment practices, it is a foreseeable consequence of those practices and

the College's police department was initially Lara's second-level supervisor in the department, was a direct report to the Chief of Police, and Coe was also responsible for the scheduling of the College's police officers.[6] Coe strenuously objected to Lara's voluntary[7] participation in the USAR and to the inconvenience that Lara's service placed on the department and Coe personally.

Coe claimed that Lara volunteered for extra Army Reserve details to "take advantage of the College's liberal military leave policy."[8] Coe especially objected when Lara presented orders for him to attend the "Army Ten-Miler" event in our nation's capital.[9] Because of Coe's strenuous objection, Lara asked the Army to rescind the orders for the "Army Ten-Miler," and the Army complied with his request.

Although Lara withdrew his request for military leave for the Army Ten-Miler, Coe conducted what he characterized as an informal

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constitutes a constructive discharge. Commission Decision No. 72-2062, *CCH EEOC Decisions* (1973), P. 6366. Respondent is responsible for a constructive discharge in the same manner that it is responsible for the outright discriminatory discharge of a charging party." *U.S. EEOC CM-612,* § 612.9(a).

[6] There has been no trial in this case, nor has there been discovery. The facts stated in this article come from Lara's complaint, as summarized by Judge Reinhard's decision.

[7] All military service in our country is essentially voluntary because half a century ago Congress abolished the draft and established the All-Volunteer Military (AVM). On 6/30/1973, the last involuntary conscript entered active duty. *See* Law Review 23002 (January 2023). That article is by First Lieutenant Tara C. Buckles, USMCR. Without a law like USERRA, and without effective enforcement of that law, it would not be possible for the armed forces to recruit enough qualified volunteers to make the AVM work. *See* Law Review 14080 (July 2014).

[8] Rock Valley College has a policy of paying its employees for workdays missed to perform training or service in the Reserve or National Guard. USERRA is a floor and not a ceiling on the employment and reemployment rights of service members and veterans—an employer can always do more than USERRA requires, but the fact that an employer does more than USERRA requires in one area does not authorize the employer to do less than USERRA requires in other areas. The Department of Labor (DOL) USERRA Regulation states: "If an employer provides a benefit that exceeds USERRA's requirements in one area, it cannot reduce or limit other rights or benefits provided by USERRA. For example, even though USERRA does not require it, an employer may provide a fixed number of days of paid military leave per year to employees who are members of the National Guard or Reserve. The fact that it provides such a benefit, however, does not permit an employer to refuse to provide an unpaid leave of absence to an employee to perform service in the uniformed services in excess of the number of days of paid military leave." 20 C.F.R. § 1002.7(d).

[9] This is an official event, and many Army Reserve, Army National Guard, and Regular Army soldiers attend the event on orders. This annual event promotes physical fitness among soldiers and also helps the Army to recruit new soldiers in the next generation.

investigation into Coe's view that Lara had "manipulated the College's liberal military leave policy." Coe accused Lara of presenting a "fictious" military order,[10] falsifying leave, attendance, and military leave records, threatening Lara's sworn military law enforcement career with a criminal investigation, arrest, and prosecution. Trying to end the discrimination based on Army Reserve service and avoid a criminal investigation and arrest (fatal to a sworn law enforcement officer's ability to secure future law enforcement employment), Lara was effectively forced to resign and thus was constructively discharged.

Coe was not satisfied by Lara's resignation from the department, and Coe referred his informal investigation to detectives in the Winnebago County Sheriff's Office. The detectives accepted Coe's allegations without any independent investigation and arrested Lara for alleged fraud.

Lara was forced to spend one night in jail and then spent the next two years defending against the criminal prosecution. He was precluded from obtaining law enforcement work, and he incurred large legal fees. The resulting financial uncertainties put strains on his marriage and family. After almost two years, the county prosecutors withdrew the charges. Lara sought and secured an expungement, which was entered into the court's record.

In his opinion, dismissing Lara's original complaint for failure to state a claim, Judge Reinhard firmly rejected the contention that initiating criminal proceedings against an employee and threatening arrest and prosecution against a law enforcement employee as a reprisal for the

[10] Coe apparently meant to say "fictitious." The Army later reviewed all the orders that Lara had submitted to the College and determined that they were all genuine Army orders for necessary military training.

employee having exercised USERRA rights amounts to a violation of section 4311 of USERRA.[11] In his opinion, Judge Reinhard wrote:

> Given that USERRA requires an adverse employment action for an actionable claim and that, as just discussed, a criminal prosecution is not an adverse employment action because it does not involve plaintiff's job conditions, a claim based on malicious prosecution is not actionable under USERRA.

Judge Reinhard dismissed Lara's lawsuit without prejudice. This means that Lara had the opportunity to rewrite the complaint and refile the lawsuit, and Lara did just that.

Q: Did Judge Reinhard correctly rule that initiating a criminal prosecution in bad faith, in order to discourage an employee from exercising his or her USERRA rights, does not violate USERRA?

A: In my opinion, no.

Section 4311(b) of USERRA provides:

> 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

[11] 38 U.S.C. § 4311. That section forbids discrimination in employment, including initial employment, retention of employment, and benefits of employment on the basis of an employee's or applicant's membership in a uniformed service, application to join a uniformed service, performance of service, or application or obligation to perform future service.

> 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.[12]

Section 4311(b) makes it unlawful for an employer to take an "adverse employment action" (like firing or demotion) against an employee for having exercised USERRA rights. I do not agree with Judge Reinhard's holding that an investigation, even if initiated in bad faith and for improper reasons, is not an "adverse employment action."

I have found a case involving an Army Reservist who was also a local police officer and who alleged that his supervisors and his employer (the Police Department of the City of Suffolk) had initiated an Internal Affairs Division (IAD) investigation of the employee as a reprisal for his having exercised his USERRA rights. The defendants (the City of Suffolk and the supervisors) filed a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, claiming that an investigation cannot be an "adverse employment action" for purposes of section 4311(b) of USERRA. Judge Rebecca Beach Smith of the United States District Court for the Eastern District of Virginia rejected that argument, holding:

> The facts pleaded also support a claim under Section 4311(b). Plaintiff alleges that the investigation conducted by Internal Affairs, which may be construed as "an adverse employment action" within the scope of Section 4311(b), was conducted as a result of plaintiff's meeting with Dodson at which plaintiff attempted to request accommodation for his military service. On its face, the complaint states that the investigation is pretextual

[12] 38 U.S.C. § 4311(b) (emphasis supplied).

> and that it was instigated by plaintiff's enforcement of his federal rights. An investigation of the sort plaintiff pleads constitutes retaliatory action within the scope of the statute such that this court can grant relief.[13]

Nonetheless, I favor an amendment to USERRA to remove doubt from this question. I have proposed that Congress amend section 4311(b) by adding "or other adverse action" after "adverse employment action." We will keep the readers informed of developments on this front.

Q: In Law Review 23064 (December 2023), you wrote about H.R. 3943, the proposed "Servicemember Employment Protection Act of 2023." You wrote that this bill will, if enacted in its present form, amend section 4311(b) of USERRA to forbid "any adverse employment action *or other retaliatory action*" motivated by an individual's exercise of USERRA rights, asserting a USERRA claim, or participating in an USERRA investigation. If H.R. 3943 is enacted in this form, how will that new amendment apply to the *Lara* case?

A: I had the *Lara* case in mind when I suggested this amendment, but H.R. 3943 will, if enacted, apply only prospectively, starting on the date of enactment (the date that the President signs the bill into law). New federal statutes normally apply only starting on the date of enactment, and if Congress wants to make the statute apply retroactively it needs to make that intention clear in the text of the statute.[14]

Q: Why didn't Lara's lawyer cite section 1983 of title 42 in challenging the lawfulness of the bad-faith criminal prosecution?

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[13] *Brandasse v. City of Suffolk, Virginia,* 72 F. Supp. 2d 608, 615 (E.D. Va. 1999).
[14] *See* https://sgp.fas.org/crs/misc/IF11293.pdf.

A: Section 1983 would have been an excellent section to cite, but unfortunately Lara waited too long to seek legal advice. By the time Lara retained an attorney, the statute of limitations under section 1983 had expired.

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution *and laws*, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.[15]

Q: Time out! In more than one article you have written that USERRA does not have a statute of limitations and that it precludes the application of other statutes of limitations. What gives?

A: Here is the pertinent subsection of USERRA:

[15] 42 U.S.C. § 1983 (emphasis supplied).

> If any person seeks to file a complaint or claim with the Secretary [of Labor], the Merit Systems Protection Board, or a Federal or State court under this chapter [USERRA] *alleging a violation of this chapter*, there shall be no limit on the period for filing the complaint or claim.[16]

Section 4327(b) does not apply to Lara's cause of action under section 1983.

Q: What happened after Judge Reinhard granted the defendant's Motion to Dismiss?

A: In accordance with the Federal Rules of Civil Procedure, Lara had the opportunity to file an amended complaint, and he did so. The defendant filed a new motion to dismiss. On 12/26/2023, Judge Reinhard denied the motion to dismiss with respect to the amended complaint.

Judge Reinhard's opinion dated 12/26/2023 is not published either in LEXIS or in Westlaw, the two primary legal research databases. Accordingly, I have put the entire text of the opinion at the end of this article.

Q: Has Judge Reinhard changed his opinion that initiating a criminal complaint against an employee to reprise against the employee for exercising USERRA rights is not an "adverse employment action" and does not violate USERRA?

[16] 38 U.S.C. § 4327(b) (emphasis supplied). There is no deadline on filing a USERRA lawsuit, but this preclusion of statutes of limitations does not apply to other causes of action that a service member or veteran may have. This is not to say that I recommend sleeping on your rights. The longer you wait, the more difficult it is to prove your case.

A: It is by no means clear that Judge Reinhard has changed his view on that most important point. Lara has alleged that the defendant violated USERRA in several ways. Initiating the criminal complaint was the most egregious violation, but certainly not the only one. It is possible that Judge Reinhard will not permit the introduction of evidence on this alleged violation based on his holding that this allegation, even if true, does not amount to a violation of USERRA.

Q: Where do we go from here?

A: Now that Master Sergeant Lara has survived the defendant's motion to dismiss, the next step is discovery. Discovery has been described as follows:

> **Discovery** is a pre-trial process in **civil litigation** where each party involved in a lawsuit requests information about the other side's claims and defenses. The purpose of discovery is to ensure both parties have access to all facts surrounding their dispute so they can make informed decisions during trial proceedings. .

The most common types of discovery in civil cases are:

1. **Depositions**: Questioning a witness under oath outside a courtroom.
2. **Interrogatories**: Written requests sent by one party to another asking for specific answers to questions about the case.
3. **Request for Production of Documents**: Allows one party to ask another for copies or originals of certain documents related to the dispute.

The role of discovery in the litigation process includes:

1. Gathering evidence and information from both sides: The litigation process is typically characterized as a competition between the plaintiff and defendant to gain an advantage through the gathering of evidence and information. The discovery process allows each side to request documents, answer questions, take depositions, and submit interrogatories.
2. Facilitating settlement negotiations and resolving disputes: Through the discovery process, each side can learn more about the other's positions and reasoning. It can lead to settlement negotiations that may result in an out-of-court dispute resolution.
3. Providing information to the court: Discovery is essential for resolving disputes in the courtroom, as both parties can compile evidence to submit to the court. This allows the judge or jury to make an informed decision based on facts rather than speculation.[17]

In a case like this, the discovery process can be extended and controversial and can last for months, even years. When the discovery process is complete, there will be a trial before a jury or a judge without a jury. It is also possible that the members of the Board of Trustees of the Rock Valley Community College will come to their senses and will order all components of the College, including the Police Department, to comply with USERRA and to compensate Master Sergeant Lara for the egregious USERRA violations. We will keep the readers informed of developments in this case.

Please join or support ROA

This article is one of 2,100-plus "Law Review" articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing

[17] *See* https://www.jdsupra.com/legalnews/what-is-discovery-and=why-is-it-54352461.

business as the Reserve Organization of America (ROA), initiated this column in 1997. We add new articles each month.

ROA is more than a century old—on 10/2/1922 a group of veterans of "The Great War," as World War I was then known, founded our organization at a meeting in Washington's historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing, who had commanded American troops in the recently concluded "Great War." 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 more than a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Through these articles, and by other means, including amicus curiae ("friend of the court") briefs that we file in the Supreme Court and other courts, we advocate for the rights and interests of service members and educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, 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.

If you are now serving or have ever served in any one of our nation's eight[18] uniformed services, you are eligible for membership in ROA, and

[18] Congress recently established the United States Space Force as the eighth uniformed service.

a one-year membership only costs $20 or $450 for a life membership. 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 https://www.roa.org/page/memberoptions 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 Organization of America
1 Constitution Ave. NE
Washington, DC 20002[19]

Here is the entire text of Judge Reinhard's Opinion and Order dated 12/26/2023:

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS WESTERN DIVISION
Vincent Lara,)) Plaintiff, v. Rock Valley College Police Dept., et al., Defendants.

ORDER For the reasons stated below, Rock Valley College and Rock Valley College Police Department are dismissed as they do not have a separate legal existence apart from the Rock Valley College Board of Trustees. Defendant's motion to dismiss is otherwise denied.

[19] You can also contribute on-line at www.roa.org.

The parties are directed to contact Magistrate Judge Schneider within 28 days to discuss settlement possibilities.

STATEMENT-OPINION:

Plaintiff, Vincent Lara, in his first amended complaint, brings this action against defendant, Rock Valley College Board of Trustees. Plaintiff alleges defendant injured him by taking actions against him that violated the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301, et seq. ("USERRA") by discriminating against him and harassing him (Count I), retaliating against him (Count II), denying him benefits of employment (Count III), and constructively discharging him (Count IV) because of his service in the United States Army Reserve ("Reserve"). Jurisdiction is properly pled pursuant to 38 U.S.C. § 4323(b)(3) & (i). Defendant moves to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P.12(b)(6).

The United States has an all-volunteer military force. *White v. United Airlines, Inc.,* 987 F.3d 616, 625 (7th Cir. 2021). In 1994, Congress passed USERRA "with the goal of prohibiting civilian employers from discriminating against employees because of their military service." Id. at 619. USERRA provides that the "term 'service in the uniformed services' means the performance of duty on a voluntary or involuntary basis . . . and includes active duty, active duty for training, initial active duty for training, [and] inactive duty training." 38 U.S.C. § 4303(13).

Plaintiff also named Rock Valley College and Rock Valley College Police Department as defendants. Naming Rock Valley College and Rock Valley College Police Department is superfluous. The Rock Valley College Board of Trustees is the proper defendant. 110 ILCS 805/3-11. Rock

Valley College and Rock Valley College Police Department are dismissed as they do not have a separate legal existence apart from the Rock Valley College Board of Trustees.

USERRA "is very similar to Title VII." *Staub v. Proctor Hospital*, 562 U.S. 411, 417 (2011). Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). USERRA protects members of the military service from similar conduct by providing that 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." 38 U.S.C. § 4311(a).

An employer is considered to have engaged in action prohibited by Section 4311(a) if the plaintiff's military service is a motivating factor for the employer's action "unless the employer can prove that the action would have been taken in the absence of such membership." 38 U.S.C. § 4311(c)(1).

USERRA provides that the "term 'benefit', 'benefit of employment', or 'rights and benefits' means the terms, conditions, or privileges of employment, including any advantage, profit, privilege, gain, status, account or interest (including wages or salary for work performed) that accrues by reason of employment contract or agreement or an

employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment." 38 U.S.C. § 4303(2).

USERRA also provides that an "employer may not discriminate in employment against or take any adverse employment action against any person because such person . . . (4) has exercised a right provided for in this chapter." 38 U.S.C. § 4311(b). An employer is considered to have engaged in action prohibited by Section 4311(b) if the plaintiff's exercise of a right provided by USERRA is a motivating factor for the employer's action "unless the employer can prove that the action would have been taken in the absence of such person's … exercise of a right." 38 U.S.C. § 4311(c)(2).

Plaintiff alleges defendant violated 38 U.S.C. § 4311(a), by denying him a "benefit of employment" as defined by 38 U.S.C. § 4303(2) because of his membership in the Reserve and retaliated against him for exercising a right provided by USERRA in violation of 38 U.S.C. § 4311(b). As with actions for Title VII violations, actions premised on violations of 38 U.S.C. § 4311(a) &(b) require that the discrimination or retaliation against plaintiff results in a materially adverse employment action for employer liability. *Crews v. City of Mt. Vernon*, 567 F.3d 860, 869 (7th Cir. 2009); *Maher v. City of Chicago,* 547 F.3d 817, 824 (7th Cir. 2008).

Amended Complaint

The facts are taken from the amended complaint. Plaintiff was employed by defendant as a police officer beginning in December 2012.

Prior to beginning work for defendant and throughout his tenure with defendant plaintiff served in the Reserve. Plaintiff enlisted in the Reserve in 1999 and currently is a First Sergeant, (paygrade E-8).

While a member of the Reserve, plaintiff worked as a police officer in other jurisdictions, prior to being hired by defendant. When plaintiff began working for defendant, he expected to serve two to three days per month on active duty with the Reserve and participate in one annual training per year and occasional Army-sponsored schools, which would last approximately two weeks.

Throughout the years, the plaintiff advanced in rank and was given more responsibilities in the Reserve. These promotions required him to work more than two to three days per month for the Reserve. These increased duties also included increased service to render funeral honors for soldiers and veterans.

Plaintiff alleges defendant took a "series of increasingly discriminatory workplace actions—not directed at other non-military employees—for purposes of attendance and shift scheduling, e.g., demanding orders, questioning the validity of military orders, claiming Lara manufactured a 'fictitious' military order when none existed, requiring Lara to secure cancellation of military orders as 'dishonest,' referring to Lara's military orders as 'unnecessary,' referring to other orders as an 'unjustified request for military leave,' instructing Lara not to volunteer for Reserve duties, and/or spreading rumors about Lara forging time cards/vacation slips, leave requests."

Plaintiff's supervisors became frustrated with the leave plaintiff was taking from his civilian employment to fulfill his military duties. Other

officers at defendant complained and made sarcastic remarks about the amount of time plaintiff was allowed to spend performing his Reserve duty. Defendant began questioning plaintiff as to whether plaintiff had volunteered for any of his Reserve missions or had been ordered to perform those missions involuntarily. Despite federal regulations to the contrary, defendant required plaintiff to use personal leave to secure enough time to rest between police shifts and time needed to travel to Reserve duty safely, perform those duties safely, and return home safely.

This practice of defendant resulted in plaintiff having less personal leave than defendant's other personnel. Defendant forced plaintiff to find replacements for his shifts when he was required to be away for Reserve duty. When plaintiff could not find a replacement, he would need to request the Reserve to reschedule his military duty in order to work his shifts for defendant.

As early as 2014, plaintiff provided defendant with information about USERRA. Again, in June 2017, plaintiff provided defendant information describing the rights provided plaintiff under USERRA. The information was provided in a letter from plaintiff's Army Reserve Company Commander, Captain Kevin Eisel, asking for cooperation in granting plaintiff leave to attend to Reserve duties.

One of plaintiff's supervisors, Police Sergeant Thomas Coe, was responsible for scheduling shifts, including requests for leave, vacation, and sick leave. Plaintiff's military leave disrupted this scheduling. Coe took active steps to ostracize the plaintiff from his colleagues and superiors. These efforts resulted in plaintiff being isolated, looked upon concerned plaintiff had been taking three or four days of military leave

per month, rather than two days per month stating: “I felt that there was a possibility that Officer Lara volunteered for and [sic] extra detail to take advantage of the liberal military leave practice. It should be noted that Officer Lara is often getting three to four military leave days a month.” Coe questioned the validity of plaintiff’s Reserve mobilizations which often were only for days for skeptically by other personnel, and often responding to calls without back-up in an attempt by Coe to force plaintiff out because of plaintiff’s military service.

On the morning of August 5, 2017, Coe, who at the time was plaintiff’s second-line supervisor, surveilled plaintiff and took video footage of plaintiff on defendant’s campus buying a musical instrument for plaintiff’s daughter. The plaintiff was in transit from his home to the location of his Reserve duty wearing his military uniform.

In September 2017, Coe removed plaintiff’s direct supervisor and assigned himself to be plaintiff’s direct supervisor. Coe did so to micro-manage plaintiff’s civilian employment and find something to harm plaintiff’s police career.

In September 2017, plaintiff again presented defendant with a Department of the Army letter highlighting USERRA protections and employer obligations. Coe wrote that plaintiff was “double dipping” by being paid by defendant and by the Reserve, implying plaintiff was engaged in a scheme to defraud. Coe instructed plaintiff that he must inform Coe of any military duty plaintiff volunteered to perform and ordered plaintiff not to volunteer for military duty without first receiving permission from defendant. Coe considered plaintiff to be insubordinate by not checking with Coe prior to volunteering for a short-term Reserve mission. Coe wrote plaintiff “[i]s this necessary

training?" and "what kind of training is this?" Coe "re-opened" and scrutinized plaintiff's leave and attendance records from 2012- 2017, essentially plaintiff's entire term of service with defendant, reviewing plaintiff's entire history of military leave requests, civilian and military payroll records, and the documentation plaintiff provided in support of his requests for military leave.

Coe challenged plaintiff's military orders as unjustified, questioned the location of plaintiff's military training, and wrote that one of plaintiff's military orders was not valid despite knowing plaintiff's military orders were valid.

Another concern Coe had regarding plaintiff's military duties involved an Army-sponsored event in the Washington, D.C. area known as the "Army Ten-Miler." Coe disparaged the event as a "run/festival" and falsely accused plaintiff of fabricating the true nature of the event and the honor of plaintiff having been selected to represent his Reserve unit at the event. Coe accused plaintiff of dishonesty and falsifying the military necessity of the event and deduced that plaintiff's purpose for attending the event was to take a recreational trip with his family to Washington, D.C.

The Army Ten-Miler is an annual event incorporating recruiting, public outreach, fitness promotion, and professionalism. U.S. Army units from around the world send representatives to support the event. After Coe's badgering regarding the propriety of plaintiff's participation in the Army Ten-Miler, plaintiff asked the Army to rescind his orders to the event and his orders were rescinded so plaintiff did not participate in the event due to the pressure from Coe.

During this increased harassment from Coe, plaintiff was distracted from his primary duties as a police officer on a number of occasions and he was coerced into taking a shift off after Coe "lectured" him and he appeared to Coe "not to be thinking clearly."

On October 2, 2017, Coe met with plaintiff's Reserve Company Commander, Captain Eisel, to question him about plaintiff's military leave. Coe asked Eisel about USERRA's provisions concerning time allotted to plaintiff to rest between his shift with defendant and the beginning of his Reserve duty. During this conversation, Coe did not tell Eisel that plaintiff worked the night shift for defendant, which entitled plaintiff to a period of rest before traveling. to his Reserve duty.[20]

Coe wrote to defendant's Chief of Police, incorrectly stating that "the USERRA Military Leave law requires the soldier to consider their employer's needs." However, USERRA does not require Reserve personnel to consider the impact their military service would have on their civilian employer's staffing schedule.

Coe wrote repeatedly to others employed with defendant that plaintiff engaged in "degree[s] of deception." Coe threatened the plaintiff with a "Brady Letter." The Illinois Brady List includes all known issues of police misconduct, do not call status, decertification, public complaints, use-of-force reports, and citizen reports. Coe knew that placing a Brady Letter on the Brady List against plaintiff would effectively end his career as a sworn law enforcement officer.

[20] Without this information, Eisel opined to Coe that on at least one occasion under USERRA plaintiff would not be entitled to receive the day off prior to his Reserve duty.

On October 4, 2017, Coe ordered plaintiff to provide all plaintiff's military records dating back to 2012 within 5 days "[a]s part of the ongoing informal inquiry into your military leave." Coe did not provide plaintiff with administrative leave to fulfill this order. Plaintiff still had to perform his ordinary shifts in addition to complying with the order. Plaintiff complied with the order.

On or about October 6, 2017, Coe advised the plaintiff that plaintiff would be subjected to a compelled interrogation and threatened plaintiff with being arrested and prosecuted. Coe knew plaintiff's civilian leave slips, timecards, and payroll records coincided with the military documentation plaintiff had provided defendant. Still, Coe pressed plaintiff's false arrest knowing that even if plaintiff were acquitted it would cost plaintiff in terms of his civilian and police careers, result in loss of pay, benefits, and seniority, attorneys' fees and expenses and render plaintiff a law enforcement outcast.

Being arrested can end a career in law enforcement. Resignation is often viewed as more favorable to future career prospects. When a police officer is also a part-time military police officer an arrest can stall opportunities, stagnate, and end the officer's military career. Coe knew this and calculated he could compel plaintiff to resign from defendant to preserve his future opportunities for civilian law enforcement employment and continued advancement in the Reserve.

After Coe's threats of arrest and prosecution, plaintiff verbally stated he intended to resign. He did so to end the harassment with the understanding Coe would not carry out his threat to have plaintiff arrested and prosecuted. Plaintiff followed with a written statement indicating his intent to resign. He tendered this statement because he

believed his only other options were to bear the continued harassment and eventually be terminated.

After tendering this statement, plaintiff asked to rescind his resignation on October 6, 2017, but Coe refused to accept the request to rescind. On October 18, 2017, Coe went to the Detective Bureau of the Winnebago County Sheriff ("Sheriff") concerning his investigation of plaintiff's military leave requests. Coe provided the Sheriff with the police report he had prepared. Coe advised the Sheriff that plaintiff had provided at least one "Fictious Order" from plaintiff's unit regarding military duty to be performed in October 2017. However, no such "Fictious Order" exists. Coe knew there was no "Fictitious Order."

Coe knew plaintiff's civilian leave slips, timecards, and payroll records coincided with the military documentation plaintiff had provided defendant. Coe provided this false information to the Sheriff to induce the Sheriff to pursue criminal charges against plaintiff after plaintiff had resigned. The Sheriff did not conduct any independent investigation and obtained an arrest warrant for the plaintiff based on the information provided by Coe. Plaintiff was notified of the warrant by phone by a Sheriff's detective. Plaintiff drove to the Sheriff's office where he was handcuffed and arrested.

The Army found there were no discrepancies between plaintiff's military leave requests to defendant and his Reserve duties performed. The Division Security Manager and Chief Intelligence Officer of plaintiff's Reserve unit, Colonel Rose, confirmed that there were no discrepancies between plaintiff's requests for time off from defendant and the documentation of the Reserve duty plaintiff performed.

In a memorandum, Colonel Rose detailed the dates plaintiff had been present pursuant to military orders from 2013 through 2017. He concluded that "[g]iven the absence of any discrepancies between requests for time off from [defendant] and documentation confirming Army Reserve duty performed, my initial and continued assessment is that the charges against [plaintiff] are unfounded."

The Winnebago County State's Attorney dismissed the criminal case against plaintiff in August 2019 and plaintiff's arrest records were expunged on January 15, 2020. Plaintiff alleges Coe fabricated the existence of a "Fictitious Order" and that the criminal allegations against plaintiff were concocted by Coe based on Coe's resentment of plaintiff's participation in the Reserve.

The pendency of the criminal proceedings against plaintiff caused him to be denied at least one Reserve deployment that would have enhanced his Reserve career and entitled him to additional compensation and caused him to be denied jobs with other local law enforcement agencies.

Analysis

The Federal Rules of Civil Procedure provide that "[a] civil action is commenced by filing a complaint with the court." Fed. R. Civ. P. 3. A complaint is "[a] pleading that states a claim for relief" and, as such, it must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

A claim is the plaintiff's expression of the wrong done to him. *Albiero v. City of Kankakee*, 122 F.3d 417, 419 (7th Cir. 1997). It is "the aggregate of operative facts which give rise to a right enforceable in the courts."

Sojka v. Bovis Lend Lease, Inc., 686 F.3d 394, 399 (7th Cir. 2012) (quotation marks and citations omitted).

A complaint may set out two or more statements of a claim, alternatively, either in a single count or in separate counts. Fed. R. Civ. P. 8(d)(2). If alternative statements of a claim are made, the complaint "is sufficient if any one of them is sufficient." Id.

If a defendant believes the complaint does not comply with Rule 8(a)(2) because it does not contain a "short and plain statement of the claim showing that the pleader is entitled to relief," the defendant may move to dismiss the complaint "for failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To satisfy Rule 8(a)(2)'s requirement that it contain a "short and plain statement of the claim showing that the pleader is entitled to relief," and thus survive a Rule 12(b)(6) motion to dismiss, the complaint need only (1) describe the claim in sufficient detail to give the defendant fair notice of what the claim is and the grounds upon which it rests and (2) plausibly suggest that the plaintiff has a right to relief above a speculative level. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007); see also *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "Even after [*Twombly* and *Iqbal*], a complaint in federal court pleads claims, not facts." *Graham v. Board of Education of the City of Chicago*, 8 F.4th 625, 627 (7th Cir. 2021). "Federal pleading rules call for a short and plain statement of the claim showing that the pleader is entitled to relief."

Johnson v. Shelby, 574 U.S. 10, 11 (2014) (quotation marks and citation omitted).

If plaintiff alleges "simply, concisely, and directly" the events that entitle him to [relief] from defendant, he has met his pleading burden. Id. at 12. If plaintiff informs defendant of the factual basis for his complaint, he is "required to do no more to stave off threshold dismissal for want of an adequate statement of [his] claim." Id.

"A motion to dismiss under Rule 12(b)(6) doesn't allow for piecemeal dismissals of parts of claims; the question at this stage is simply whether the complaint includes factual allegations that state a plausible claim for relief." *BBL, Inc. v. City of Angola*, 809 F.3d 317, 325 (7th Cir. 2015) (emphasis in original). When considering a motion to dismiss, if some plausible theory can be identified that would entitle the plaintiff "to relief on its claim, that claim may move forward and a motion to dismiss other legal theories must be denied." *KFC Corp. v. Iron Horse of Metaire Road,* LLC, No. 18 C 5294, 2020 WL 3892989, * 3 (N.D. Ill. Jul. 10, 2020).

To prevent dismissal under Rule 12(b)(6) in a Title VII case (and therefore in the "very similar" USERRA case), a complaint alleging discrimination based on the plaintiff's membership in a protected class need only allege that the employer instituted a specified adverse employment action against the plaintiff on the basis of the plaintiff's membership in the protected class. *Luevano v. Wal-Mart Stores, Inc.,* 722 F.3d 1014, 1028 (7th Cir. 2013) (sex discrimination). "In these types of cases, the complaint merely needs to give the defendant sufficient notice to enable him to begin to investigate and prepare a defense." Id. "Employers are familiar with discrimination claims and know how to

investigate them, so little information is required to put the employer on notice." *Carlson v. CSX Transportation Co.,* 758 F.3d 819, 827 (7th Cir. 2014).

USERRA prohibits an employer from denying any benefit of employment on the basis of a person's membership in the Armed Forces. 38 U.S.C. § 4311(a). Plaintiff alleges he is a member of the Reserve and, therefore, is a member of the class of persons protected by USERRA. He also alleges he exercised a right provided by USERRA; he took and sought to take military leave from his job with defendant. Thus, under the borrowed Title VII standard, to survive a Rule 12(b)(6) motion, he need only allege defendant took a specific adverse action against him on the basis of his membership in this class or because he took or sought to take military leave.

A "person who is absent from a position of employment by reason of service in the uniformed services shall be – (A) deemed to be on furlough or leave of absence while performing such service; and (B) entitled to such rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service." 38 U.S.C. § 4316(b)(1).

The Department of Labor's implementing regulations for USERRA provide that the "benefits to which an employee is entitled are those that the employer provides to similarly situated employees by an employment contract, agreement, policy, practice, or plan in effect at the employee's workplace." 20 C.F.R. § 1002.150(a). If the benefits "to

which employees on furlough or leave of absence are entitled vary according to the type of leave, the employee must be given the most favorable treatment accorded to any comparable form of leave when he or she performs service in the uniformed services.

In order to determine whether any two types of leave are comparable, the duration of the leave may be the most significant factor to compare. For instance, a two-day funeral leave will not be 'comparable' to an extended leave for service in the uniformed service. In addition to comparing the duration of the absences, other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered." 20 C.F.R. § 1002.150(b). Jury duty, sick leave or other short-term obligations may be comparable to a military-leave obligation for purposes of 38 U.S.C. § 4316(b)(1). *White,* 987 F.3d at 625. The determination whether a given military leave is comparable to another type of leave provided by an employer to its employees is a factual one, "assessed with the help of [20 C.F.R.] section 1002.150(b)." Id.

Plaintiff has sufficiently alleged he was denied benefits of employment because of his military service in violation of USERRA. 38 U.S.C. § 4311(a). He alleges defendant required him to use vacation leave rather than the military leave to which he was entitled for his transit time to his Reserve duty resulting in him having less personal leave than other employees; that it forced him to find replacements for his work shifts in order to take his military leave; and that he would need to ask the Reserve to reschedule his military duty if he could not find a replacement. He alleges non-military employees were not similarly burdened.

While he does not specifically identify what comparable leave other employees received without having to find replacements or use vacation time instead of other leave to which they were entitled, or to reschedule leave if they did not find a replacement, he is not required to do so to state a claim upon which relief can be granted. He has alleged specific adverse actions taken against him because of his military service and this is enough to state a discrimination claim under USERRA, 38 U.S.C. § 4311(a). *Luevano*, 722 F.3d at 1028.

To plead a retaliation claim, plaintiff must allege that he engaged in statutorily protected activity and was subjected to an adverse employment action as a result of that activity. *Luevano*, 722 F.3d at 1029. Plaintiff alleges he took military leave, thereby exercising a right provided by USERRA. The adverse employment actions alleged to support his Section 4311(a) discrimination claim (discussed above) also support his statement of a Section 4311(b) claim for retaliation for exercising a right provided by USERRA. Plaintiff has sufficiently stated a retaliation claim under USERRA, 38 U.S.C. § 4311(b).

Plaintiff also asserts that he was subjected to a hostile work environment and to constructive discharge. Creating a hostile work environment and constructive discharge are adverse employment actions actionable under Title VII if they result from discrimination based on and impermissible basis. A constructive discharge based on a hostile work environment "entails something more" than an actionable hostile work environment. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 147 (2004). A "hostile-environment constructive discharge" occurs where the "working conditions [are] so intolerable that a reasonable person would have felt compelled to resign." Id.

The Seventh Circuit Court of Appeals has not decided whether hostile work environment claims are cognizable under USERRA. *Hackett v. City of South Bend*, 956 F.3d 504, 508 (7th Cir. 2020). However, it has observed that USERRA "states that a 'benefit of employment' includes 'the terms, conditions, or privileges of employment,' [38 U.S.C.] § 4303(2). This is the same language used in Title VII and the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq., that provides the textual basis for hostile work environment claims under those statutes." *Hackett,* 956 F.3d at 508-09, citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986).

Hackett further stated that "Congress specifically added this language to [USERRA] just months after the Fifth Circuit had held that hostile work environment claims were not cognizable precisely because USERRA lacked this exact term. Compare Pub. L. No. 112-56 § 251, 125 Stat. 711, 729 (2011) (amending 38 U.S.C. § 4303(2), with *Carder v. Continental Airlines, Inc*., 636 F.3d 172, 178-79 (5th Cir. 2011)." *Hackett*, 956 F.3d at 509. Thus, assuming that creating a hostile work environment is actionable under USERRA, it is actionable because creating a hostile work environment denies an individual a "benefit of employment" in violation of 38 U.S.C. § 4311(a) & (b).

A hostile work environment is simply one way to show a denial of a benefit of employment under USERRA. Since plaintiff has sufficiently alleged other facts that plausibly allege a denial of a benefit of employment, plaintiff has stated claims for discrimination and retaliation based on denial of a benefit of employment as the adverse action. He need not plead any additional facts to show additional ways defendant denied him a benefit of employment in order to avoid dismissal for failure to state a claim. Where alternative statements of a

claim are made, the complaint "is sufficient if any one of them is sufficient." Fed. R. Civ. P. 8(d)(2). "A motion to dismiss under Rule 12(b)(6) doesn't allow for piecemeal dismissals of parts of claims; the question at this stage is simply whether the complaint includes factual allegations that state a plausible claim for relief." *BBL, Inc*., 809 F.3d at 325 (emphasis in original). A determination of whether, and by what actions, defendant denied plaintiff a benefit of employment because of his service in the Reserve, or his exercising a right provided by USERRA, must await a later stage of this case.

For the foregoing reasons, Rock Valley College and Rock Valley College Police Department are dismissed as they do not have a separate legal existence apart from the Rock Valley College Board of Trustees. Defendant's motion to dismiss is otherwise denied. The parties are directed to contact Magistrate Judge Schneider within 28 days to discuss settlement possibilities.

ENTER: 12/26/2023

Philip G. Reinhard
United States District Court Judge