

LAW REVIEW 14061

May 2014

That Promotion Was Mine!

By Captain Samuel F. Wright, JAGC, USN (Ret.)

1.2—USERRA forbids discrimination

1.4—USERRA enforcement

Q: I am a Lieutenant in the Navy Reserve and I recently joined ROA. I am currently serving on active duty in Africa. I was called to active duty in October 2013. I expect to leave active duty and return to my civilian job in July of 2014.

For the last nine years, I have worked for a contractor that operates an ammunition facility for the Department of the Army. I am not a federal employee, but I work with federal employees and Army personnel. Five years ago, I became the Deputy Chief of the security force for this facility, and it was always understood that I was being groomed to take the Chief's position when he retired, which was expected to be in middle to late 2014, but the Chief's health took a turn for the worse at the end of 2013 and he expedited his planned retirement by a few months.

A friend of mine at the facility sent me an e-mail and advised me of the Chief's retirement and the contractor's plan to consider both internal and external candidates for the position. I submitted my application on-line, and I was interviewed by telephone. Because of the great distance involved and the time difference, the telephone interview only lasted a few minutes, but during that interview I was

asked several questions about my Navy Reserve service, including when I would be back at the facility and what were the chances that I would be called up again.

I believe that I was the only internal candidate interviewed. The person selected had been working for another contractor, performing a similar function at a similar facility in a distant state. Unlike me, he is not a member of any Reserve Component of the armed forces.

I know very little about the person selected, except that he was born two months after I was born. The last Chief retired after 25 years as Chief and 40 years total with the organization. I think that I just lost out on my last chance to get this promotion, and there are no other promotion opportunities for me at this organization. Have my rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) been violated?

A: I think that you have a decent argument that the selection of the other candidate over you violated section 4311 of USERRA, which provides as follows:

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

(a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

(b) An employer may not discriminate in employment against or take

any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter [38 USCS §§ 4301 et seq.], (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 [38 USCS §§ 4301 et seq.], or (4) has exercised a right provided for in this chapter [38 USCS §§ 4301 et seq.]. 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 [38 USCS §§ 4301 et seq.], (B) testimony or making of a statement in or in connection with any proceeding under this chapter [38 USCS §§ 4301 et seq.], (C) assistance or other participation in an investigation under this chapter [38 USCS §§ 4301 et seq.], or (D) exercise of a right provided for in this chapter [38 USCS §§ 4301 et seq.], 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 [38 USCS § 4312(d)(1)(C)].

🚩History:

(Added Oct. 13, 1994, P.L. 103-353, § 2(a), 108 Stat. 3153; Oct. 9, 1996, P.L. 104-275, Title III, Subtitle B, § 311(3), 110 Stat. 3334.)

38 U.S.C. 4311.¹

To prevail in a section 4311 case, you must prove, by a preponderance of the evidence, that your membership in the Navy Reserve, your performance of service, and/or your obligation to perform future service constituted *a motivating factor* in the employer's decision to select the other candidate over you.² If you prove that your service was a motivating factor (one of the considerations taken into account by the decision-maker, even if there were other considerations), the *burden of proof* shifts to the employer to prove that you would not have been selected even if you had not been a member of the Navy Reserve and even if you had not been away from work for active duty at the time the Chief retired.

You don't need a "smoking gun" and you can prove "motivating factor" by circumstantial as well as direct evidence. One factor that courts examine closely is *proximity in time* between the exercise of USERRA

¹ The citation means that you can find this section in title 38 of the United States Code, section 4311. This section was enacted as part of USERRA in 1994 and has not been amended since that date. As I explained in Law Review 104 and other articles, Congress enacted USERRA (Public Law 103-353) in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act. I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 1,052 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week. We added 169 new articles in 2013. I invite the reader's attention specifically to Category 1.2 in the Subject Index, where you will find 147 articles about section 4311 of USERRA.

² If there were 15 reasons why the other guy was chosen over you, and one of the reasons was that you are in the Navy Reserve and the other guy has no military obligation, that means that your service was a motivating factor in the decision.

rights and the unfavorable personnel action about which you complain, and of course you have proximity in time because you were on active duty at the time the selection was made. You also have the fact that the interviewer asked about your Navy service during the telephone interview.

Q: Am I required to file a complaint with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS) as a condition precedent to filing suit under USERRA?

A: No. You are not required to “exhaust remedies” through DOL-VETS, and you do not need a “right to sue letter” from that agency, the Equal Employment Opportunity Commission (EEOC), or any other agency before you file suit. You can sue a private sector employer in the United States District Court for any district where the employer maintains a place of business.³ If you sue through private counsel and prevail, the court can order the employer to pay your reasonable attorney fees.⁴

If you want free representation by the United States Department of Justice (DOJ), you must file a written complaint with DOL-VETS.⁵ In most cases, I think that you are better off with private counsel—you need an advocate, not a neutral. Call me, and I can recommend several attorneys who are well qualified and who take USERRA cases on a contingent fee basis.

³ 38 U.S.C. 4323(c)(2).

⁴ 38 U.S.C. 4323(h)(2).

⁵ 38 U.S.C. 4323(a)(1).