

# LAW REVIEW 14093<sup>1</sup>

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## USERRA Forbids Discrimination Based on Having Performed Uniformed Service or on Having Sued To Enforce USERRA

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1.1.3.3—USERRA applies to National Guard service

1.2—USERRA forbids discrimination

1.4—USERRA enforcement

***Hance v. Norfolk Southern Railway Corp.*, 571 F.3d 571 (6<sup>th</sup> Cir. 2009).**

***Hance v. BNSF Railway Co.*, 2014 WL 6676773 (W.D. Tenn. Oct. 29, 2014).**

Kelly W. Hance is a Sergeant (E-5) in the Tennessee Army National Guard (TNARNG), and he recently joined the Reserve Officers Association (ROA), after our members amended the ROA Constitution to make noncommissioned officers (NCOs) eligible for full membership in ROA.<sup>3</sup>

Hance was already a member of the TNARNG when he was hired by Norfolk Southern Railway Co. (NSRC) in May 1999, as a conductor-trainee. Hance was frequently harassed by his NSRC supervisors about his TNARNG service and the absences from work that were necessitated by such service, although Hance clearly had the right to be absent from work for military training and service, under a federal law called the Uniformed Services Employment and Reemployment Rights Act (USERRA).<sup>4</sup> NSRC fired Hance in August 2001, alleging that he was guilty of insubordination.

Hance retained private counsel and sued NSRC in the United States District Court for the Eastern District of Tennessee, alleging that the firing violated section 4311 of USERRA, which reads as follows:

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<sup>1</sup> We invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find almost 1,300 "Law Review" articles about 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. The Reserve Officers Association (ROA) initiated this column in 1997, and we add new articles each week.

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<sup>3</sup> In ROA's Department of Florida, the Air Force Vice President and Air Force Junior Vice President are both Air Force Reserve NCOs.

<sup>4</sup> As is explained in Law Review 104 and other articles, Congress enacted USERRA (Public Law 103-353) on October 13, 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRRA), which was originally enacted in 1940. USERRA is codified in title 38, United States Code, sections 4301-4335 (38 U.S.C. 4301-4335).

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

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

(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has 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.”

38 U.S.C. 4311 (emphasis supplied).

After a bench trial (without a jury), the district court judge found that the firing violated section 4311. The judge found that Hance had proved that his TNARNG service was at least *a motivating factor* in the employer's decision to fire him and that NSRC had not proved that it would have fired him anyway, for a lawful reason, even if he had not been a member of a Reserve Component of the armed forces. The district court ordered NSRC to reinstate Hance and awarded him \$352,845.93 in back pay, lost benefits, and interest, and also ordered the railroad to pay Hance's attorney fees.

NSRC appealed to the United States Court of Appeals for the Sixth Circuit.<sup>5</sup> The appeals court affirmed the district court on liability and affirmed the order to reinstate Hance.<sup>6</sup> The appeals court reversed the district court on a couple of minor points having to do with the computation of damages and remanded the case back to the district court to make new findings of fact and to adjust the computation of damages. Most of the substantial cash award was affirmed and was eventually paid by NSRC.

Hance received a substantial cash award, but it merely compensated him for the pay and benefits that he lost, over a period of several years, because of NSRC's unlawful firing. Moreover, he is far too young to retire. In January 2013 he applied for a Conductor Trainee position with Burlington Northern & Santa Fe Railway Co. (BNSF). He completed an on-line assessment and passed. BNSF then invited him to a hiring event in Birmingham, Alabama on February 7, 2013. Along with 31 other job applicants, he took a 90-minute handwritten aptitude test and passed. He then participated in an interview process led by Ms. Maxine Kazen, a third-party human resources consultant who had previously worked for BNSF. Kazen and the other panel members scored Hance and the other 30 candidates as "acceptable" or "unacceptable" on six different "dimensions."<sup>7</sup> Some of the questions asked of Hance during the interview related to his National Guard service, including the extent of his time commitment and the chances that he might be mobilized.<sup>8</sup>

Based on recommendations from Kazen and the other panel members, BNSF did not offer employment to Hance, and he sued, claiming that the company had violated his rights under section 4311(a) and section 4311(b) of USERRA. Under section 4311(a), Hance alleged that the failure to hire was motivated by Hance's membership in the TNARNG, his past performance of uniformed service, and his obligation to perform future service. Under section 4311(b), Hance alleged that the failure to hire was motivated by the enforcement action that he had brought (successfully) against NSRC.

After completion of the discovery process, BNSF filed a *motion for summary judgment* under Rule 56 of the Federal Rules of Civil Procedure (FRCP). BNSF asserted that, based on the evidence produced during discovery, there was no way that a reasonable jury could find for Hance on his 4311(a) claim or his 4311(b) claim. The judge granted the defendant's motion for

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<sup>5</sup> The 6<sup>th</sup> Circuit is the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee.

<sup>6</sup> For reasons that are not clear, Hance did not return to work for NSRC after the appellate court affirmed the reinstatement order.

<sup>7</sup> The dimensions were review of job application, work experience and training, work ethic and conscientiousness, safety behaviors and beliefs, working with others, and communication.

<sup>8</sup> As I explained in Law Review 14064 (May 2014), it is not unlawful *per se* for a prospective employer to ask a job applicant about RC membership or obligations in a job interview or application form, but perhaps it should be. I contend that if the prospective employer asks the question, that in and of itself is sufficient for the claimant to make his or her *prima facie* case that the individual's service and obligation to serve constituted at least a *motivating factor* in the employer's decision not to hire. If the military affiliation were irrelevant to the employer, the employer would not ask about it on the application form or during the interview.

summary judgment on the section 4311(a) claim<sup>9</sup> but denied it as to section 4311(b) claim. I believe that the section 4311(b) claim is stronger.<sup>10</sup>

There will soon be a trial on Hance's section 4311(b) claim, unless the parties settle. Many cases settle "on the courthouse steps" just as the trial is about to start, or even after the trial is already under way.

We will keep the readers informed of developments in this interesting and important case.

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<sup>9</sup> I think that the judge should not have granted summary judgment for the railroad under section 4311(a). By asking Hance questions about his National Guard status, activities, and obligations during the interview, the defendant employer clearly demonstrated that it considered Hance's military status to be a relevant inquiry and therefore a motivating factor in the decision not to offer him employment.

<sup>10</sup> I can certainly understand why an employer would be reluctant to hire an individual who had recently and successfully sued another employer in the same industry, but that does not make the hiring refusal lawful.