LAW REVIEW[1] 20015
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Recent Federal Circuit Case on Section 4311 of USERRA

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]
About Sam Wright

1.1.1.8—USERRA applies to the Federal Government
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***McGuffin v. Social Security Administration,* 942 F.3d 1099 (Fed. Cir. 2019).[3]**

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1900 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 1700 of the articles.

[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 43 years, I have worked 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 36 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 SWright@roa.org.

[3] This is a recent (11/7/2019) decision of the United States Court of Appeals for the Federal Circuit, the specialized federal appellate court that sits in Washington, DC and has nationwide jurisdiction over certain kinds of cases, including appeals from final decisions of the Merit Systems Protection Board (MSPB). The citation means that you can find this published court decision in Volume 942 of *Federal Reporter Third Series,* starting on page 1099. As is

Facts

Clarence McGuffin, an attorney and a veteran, was hired by the Office of Disability Adjudication and Review (ODAR), of the Social Security Administration (SSA), on 2/8/2010, as an "attorney advisor" assisting SSA Administrative Law Judges (ALJs) in writing decisions on appeals concerning eligibility for SSA disability benefits.[4] The Federal Circuit decision says almost nothing about McGuffin's military service. It appears that he served on active duty several years prior to his federal civilian service and that he suffered a "cognitive disability" as a result of his service.

Under the Civil Service Reform Act (CSRA)[5] of 1978, an individual who has held a federal civil service position for at least two years and who is then fired or suspended without pay for 15 days or more can appeal the firing or suspension to the Merit Systems Protection Board (MSPB).[6] If the individual is a preference-eligible veteran, like McGuffin, he or she has MSPB appeals rights after just one year of federal civilian service.[7] McGuffin's one-year point of employment, when his MSPB appeals rights would vest, was Monday, 2/7/2011. He was fired on Thursday, 2/3/2011.

ODAR rules provide that a new attorney-advisor, in his or her first year of employment, is not to be judged on his or her number of completed appeals. The idea is that the first year of employment should be devoted primarily to training, and the new attorney should not be judged on his or her productivity in writing decisions until he or she has completed the training.

In his first months of ODAR employment, McGuffin received generally favorable reviews on his work, but in October 2010 his supervisor apparently concluded that McGuffin was slow in writing draft decisions and that he should be fired before his MSPB appeal rights vested on the first anniversary of his ODAR hiring. ODAR finally provided McGuffin with some necessary training in January 2011, shortly before his one-year point, and his productivity improved dramatically, but the supervisor ignored the improvement, apparently already having concluded that McGuffin should be fired.

McGuffin challenges the lawfulness of the firing.

Shortly after he was fired, McGuffin filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging that SSA had violated the Americans with Disabilities Act (ADA) by failing to make reasonable accommodations for his disability and for discriminating against him

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always the case in the federal appellate courts, the case was decided by a panel of three appellate judges. In this case the three judges were Raymond T. Chen, Kimberly Ann Moore, and Raymond T. Chen, all Federal Circuit judges. Judge Reyna wrote the decision, and the other two judges joined in a unanimous panel decision.

[4] The facts in this case come directly from the court decision. I have no personal knowledge of the facts.

[5] Public Law 95-454, 92 Stat. 1111 (Oct. 13, 1978), codified in scattered sections of Title 5 of the United States Code.

[6] 5 U.S.C. 7511(a)(1)(C).

[7] 5 U.S.C. 7511(a)(1)(B).

based on the disability. McGuffin's EEOC complaint was not successful, but during the EEOC proceeding he deposed the supervisor. In his deposition testimony, the supervisor acknowledged that there had been a rush to fire McGuffin before his MSPB appeal rights vested and that "we would prefer not to have to go through the formal process of an MSPB hearing" and that "we advise managers that if they know someone is not going to work out as a writer … to terminate that person before their MSPB appeal rights vest."

McGuffin then appealed to the MSPB, alleging that the firing violated section 4311 of the Uniformed Services Employment and Reemployment Rights Act (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, 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.
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> **(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.
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> **(c)** An employer shall be considered to have engaged in actions prohibited—
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> **(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
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> **(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.[8]

Because McGuffin was fired just before he attained one year of federal civilian employment, he could not appeal the firing to the MSPB under section 7511(a)(1)(B) of title 5 of the United States Code. However, he could appeal the firing under section 4324 of USERRA, which provides:

(a)

(1) A person who receives from the Secretary 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.

(2)

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

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

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

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

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

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

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

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

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

[8] 38 U.S.C. 4311 (emphasis supplied).

(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.[9]

In accordance with standard MSPB practice, McGuffin's appeal to the MSPB was heard initially by an Administrative Judge (AJ) of the MSPB. After a hearing, the AJ ruled against McGuffin, holding that firing him just before his MSPB appeal rights vested was within the prerogative of the agency and that the SSA had proved that it would have fired McGuffin anyway, without regard to his military status.

[9] 38 U.S.C. 4324 (emphasis supplied).

The party losing an MSPB case at the AJ level can appeal to the MSPB itself within 35 days after the AJ's decision is announced. Normally, I would have suggested that McGuffin appeal to the MSPB, but nothing is "normal" at the MSPB these days. As I explained in Law Review 19098 (October 2019), the MSPB has been without a quorum since January 2017, and it has been without any members since March 2019. President Trump has nominated highly qualified individuals for the three MSPB positions, but the Senate has not yet acted on the nominations. Until there are at least two confirmed MSPB members, the MSPB cannot decide any cases.

McGuffin was aware of the MSPB's sad situation, and he very intelligently waited 35 days for the AJ's decision to become the final decision of the MSPB itself, then he filed his appeal with the Federal Circuit. In a way, it is fortunate that the AJ ruled against McGuffin. If the AJ had ruled in his favor, it is likely that the SSA would have appealed to the MSPB itself. In that case, the *McGuffin* case would have joined a backlog of almost 3,000 cases waiting for a quorum at the MSPB. Even if the Senate confirms the three MSPB nominees this month, it may take years for the MSPB members to work through this massive backlog.

In his scholarly opinion, joined by his two Federal Circuit colleagues on the *McGuffin* case, Judge Raymond T. Chen wrote:

> USERRA prohibits discrimination in employment on the basis of military service. 38 U.S.C. § 4311; *Erickson v. U.S. Postal Serv.*, 571 F.3d 1364, 1368 (Fed. Cir. 2009); *Sheehan v. Dep't of Navy*, 240 F.3d 1009, 1012 (Fed. Cir. 2001). The statute provides:
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> > (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.
> > . . . .
> > (c) An employer shall be considered to have engaged in actions prohibited . . . 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 . . . .
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> 38 U.S.C. § 4311.
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> A "benefit of employment" includes "any advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed) that accrues by reason of an employment contract or agreement." *Id.* § 4303(2).

The employee asserting a USERRA claim has the initial burden of showing by a preponderance of the evidence that his "membership . . . in the uniformed services" was a substantial or motivating factor in the adverse employment action. *Id.* § 4311(c)(1); *Erickson*, 571 F.3d at 1368. Once an employee has met this burden, the burden shifts to the employer to prove by preponderant evidence that it "would have taken the adverse action anyway, for a valid reason." *Sheehan*, 240 F.3d at 1013. An employer violates USERRA "if it would not have taken the adverse employment action but for the employee's military service or obligation." *Erickson*, 571 F.3d at 1368.

A.

We first turn to whether Mr. McGuffin sufficiently proved by preponderant evidence that his preference-eligible veteran status was a substantial or motivating factor in his termination. "[M]ilitary service is a motivating factor for an adverse employment action if the employer 'relied on, took into account, considered, or conditioned its decision' on the employee's military-related . . . obligation." *McMillan*, 812 F.3d at 1372 (quoting *Erickson*, 571 F.3d at 1368). Because employers "rarely concede an improper motivation for their employment actions," employees may meet their burden by submitting evidence from which such a motive may be fairly inferred. *Id.* To determine if discriminatory motive can be reasonably inferred, this court considers the so-called four, non-exclusive "*Sheehan* factors," which are:

[1] proximity in time between the employee's military activity and the adverse employment action, [2] inconsistencies between the proffered reason [for the adverse personnel action] and other actions of the employer, [3] an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and [4] disparate treatment of certain employees [those protected by USERRA] compared to other employees [those not protected] with similar work records or offenses. *Sheehan*, 240 F.3d at 1014.

The Board determined that SSA's rush to terminate Mr. McGuffin before he obtained his CSRA benefits was a proper exercise of its "management prerogative." J.A. 8. SSA, however, cannot escape liability under USERRA when Mr. McGuffin's CSRA benefits are intrinsically tied to his preference-eligible veteran status. Guiding our reasoning is *Erickson*, in which this court explained that an employer cannot discriminate against an employee for action that is intrinsically tied to his military service. *See Erickson*, 571 F.3d at 1368.

In *Erickson*, the Postal Service stated that the sole reason for removing the employee was his excessive use of military leave. *Id.* The Board found that "Erickson had failed to show that his military service was a motivating factor for the agency's action because the 'real reason' for his removal was his absence from work—regardless of whether that absence was caused by his military obligation." *Id.* This court rejected that argument, holding that "[a]n employer cannot escape liability under USERRA by claiming that it was merely discriminating against an employee on the basis of his absence when that absence was for military service." *Id.* Permitting otherwise "would eviscerate the protections afforded by USERRA" to those who serve or have served in the military. *Id.*

So too here. The one-year timeline for obtaining CSRA benefits is intertwined with a veteran's prior military service. If employers could discriminate against veterans based on this one-year timeline, then what Congress created as a benefit to veterans for their service—a shortened timeframe for obtaining CSRA protection—could be turned against the veteran by employers, who, like ALJ McGraw, "would prefer not to have to go through the formal process of an MSPB hearing." J.A. 556. Thus, the proper inquiry on appeal is not simply whether Mr. McGuffin's preference-eligible veteran status played a substantial or motivating factor in his termination, but also whether it was a substantial or motivating factor in SSA's *timing* of his termination, which occurred four days before he was set to receive CSRA benefits.

In this case, no reasonable inference of discrimination under the *Sheehan* factors is needed. The record compels a finding that SSA's decision to terminate Mr. McGuffin *when it did*—four days before he completed one year of employment—was substantially motivated by Mr. McGuffin's preference-eligible veteran status.

To summarize, by late October 2010, after becoming aware of Mr. McGuffin's preference-eligible veteran status, SSA decided that Mr. McGuffin "must" be terminated before his one-year mark in order to prevent him from receiving CSRA benefits. J.A. 234. Then, from November 2010 to December 2010, Mr. McGuffin's supervisors refused to offer additional training to Mr. McGuffin and became solely focused on finalizing his termination before his one-year mark. J.A. 825, 1099, 1100, 1113.

In January 2011, at the behest of Ms. Bosworth, Mr. McGuffin's supervisors finally placed Mr. McGuffin in additional training. J.A. 1110. Despite Mr. McGuffin's dramatic increase in his DWSI rating and positive feedback from ALJ Bowling during the training, Mr. Strong characterized Mr. McGuffin as not having "fared well" during January 2011 and pressed forward with terminating Mr. McGuffin. J.A. 1112.

The record is clear that SSA closed the door on Mr. McGuffin well before the end of his first year to avoid the inconvenience of defending itself should Mr. McGuffin assert his procedural safeguards afforded under the CSRA. For these reasons, substantial evidence supports only one conclusion: Mr. McGuffin's preference-eligible veteran status was a substantial factor in SSA's decision to terminate Mr. McGuffin just four days shy of his one-year anniversary at SSA.

B.

Having determined that Mr. McGuffin carried his burden under the USERRA inquiry, we now turn to whether SSA carried its burden to prove that it terminated Mr. McGuffin for a valid reason. The Board determined that SSA sufficiently proved that Mr. McGuffin was terminated because he was a "poor" performer who had not demonstrated the "required productivity, timeliness and quality after a year of training." J.A. 22.

The documentary evidence, however, does not support a finding that Mr. McGuffin was a poorly performing new hire attorney advisor. As previously noted, SSA evaluates newly hired attorney advisors like Mr. McGuffin under a limited evaluation plan during the first year. J.A. 480. The record indicates, however, that Mr. Thompson and Mr. Strong instead held Mr. McGuffin to a higher standard of meeting his "fair share," an evaluation element that is applied to attorney advisors only after their first year of employment. The record further indicates that Mr. Thompson and Mr. Strong became fixated on Mr. McGuffin's inability to meet his fair share, having noted this concern multiple times in Mr. McGuffin's October 2010 evaluation report, as well as raising it with Ms. Bosworth. J.A. 508, 823-24. Mr. Thompson and Mr. Strong knew that this element was not applicable to Mr. McGuffin until his second year, at which point Mr. McGuffin would acquire his CSRA benefits. J.A. 824. Not willing to wait until then, Mr. Thompson and Mr. Strong, with the help of Ms. Bosworth, modified the "engages in new learning" element to implicitly contain a fair share standard. J.A. 510, 514, 823-24. For example, after instructing Mr. Thompson that the fair share standard could not be a basis for Mr. McGuffin's termination, Ms. Bosworth recrafted Mr. McGuffin's draft termination letter by replacing the "fair share" reference with a reference to an inability to independently complete his work, a sub-element to the "engages in new learning" element. J.A. 510, 514.

Disregarding the improper references to Mr. McGuffin's inability to meet his fair share and other numeric data, the agency's evaluation report for October 2010 indicates that Mr. McGuffin successfully met the limited two element evaluation standard for new hires. J.A. 500-01. Furthermore, despite SSA's argument that the "quality" of Mr. McGuffin's work was lacking, Mr. Thompson testified at Mr. McGuffin's EEOC hearing that Mr. McGuffin had to re-write a decision on only two occasions throughout his first year at SSA. J.A. 408. Additionally, these two occasions occurred in late December 2010 and January 2011, well after Mr. Thompson had already decided in early November 2010 that Mr. McGuffin should be fired instead of being trained.

Mr. Thompson further testified at that same EEOC hearing that it was "not uncommon" for an ALJ to be "unhappy with a decision" drafted by an attorney advisor and to require edits to that decision. J.A. 407-08, 413. In addition, the record indicates that Mr. McGuffin received positive feedback from various ALJs about the quality of his work. This evidence demonstrates that Mr. McGuffin was not performing poorly, let alone so poorly as to justify the agency's rush to remove him four days before his one-year mark. For these reasons, SSA's purported reason for terminating Mr. McGuffin—his poor performance—is inconsistent with the documentary evidence, which points to only one reasonable motive: SSA rushed to terminate Mr. McGuffin four days before he completed his first year at the agency solely to prevent him from obtaining CSRA benefits.

The Board determined that, based on the testimony of Mr. Strong, Mr. Thompson, and ALJ McGraw, SSA sufficiently proved that Mr. McGuffin was validly terminated due to his poor performance. The Board noted that Mr. McGuffin's supervisors "credibl[y]" testified that they would have terminated any employee who was performing as poorly as Mr. McGuffin "after almost a year of training." J.A. 22. The testimony relied on by the Board, however, is

undermined by the documentary evidence reviewed above and, thus, the Board erred by not giving due weight to this evidence.

The Board may not insulate its findings from review by denominating them credibility determinations when "documents or objective evidence may contradict the witness' story." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985); *see also Jones v. Dep't of Health & Human Servs.*, 834 F.3d 1361, 1368 (Fed. Cir. 2016).

In sum, as noted above, the preference-eligible veteran must satisfy his statutory burden. If met, then the burden shifts to the employer, who must show a "valid" reason for terminating a preference-eligible veteran within his probationary period to not run afoul of USERRA. *Sheehan*, 240 F.3d at 1013.

SSA's improper evaluation of Mr. McGuffin based on the fair share standard, SSA's delay in providing Mr. McGuffin with adequate training, and its disregard of the positive results of that training in January 2011 do not support Mr. Strong's self-serving and incorrect statement that the agency "bent over backwards to try to be fair," or a conclusion that SSA was honestly dissatisfied with Mr. McGuffin's performance. J.A. 247. Instead, the record indicates that SSA was honestly concerned with the administrative burden of defending itself should Mr. McGuffin assert his CSRA procedural safeguards. For these reasons, substantial evidence does not support a finding that SSA terminated Mr. McGuffin *when it did* for poor performance.

To be clear, USERRA allows for termination of veterans within their first year of employment so long as the employer's reason for termination is valid. Based on the circumstances of this case, however, substantial evidence does not support such a conclusion. SSA's discriminatory treatment of Mr. McGuffin violates USERRA's objective of protecting veterans from being disadvantaged in the workplace by virtue of their military service, and, thus, cannot stand. *See Erickson*, 571 F.3d at 1368.

IV. CONCLUSION

We have considered all of SSA's remaining arguments and find them unpersuasive. For the foregoing reasons, we reverse the Board's decision that USERRA was not violated, and remand for determination of an appropriate remedy.

REVERSED AND REMANDED.[10]

Because the MSPB lacks a quorum, and because that situation is not likely to be corrected anytime soon, it may be some time before the MSPB determines an appropriate remedy, as

[10] *McGuffin,* 942 F.3d at 1107-10 (emphasis in original).

directed by the Federal Circuit. We will keep the readers informed of developments in this interesting and important case.[11]

Please join or support ROA

This article is one of 1900-plus "Law Review" articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

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[11] As Thomas G. Jarrard and I explained in detail in Law Review 17016 (March 2017), meritorious cases alleging discrimination under section 4311 of USERRA normally involve currently serving National Guard and Reserve personnel—civilian employers are annoyed with them because of their repeated and sometimes lengthy absences from work necessitated by Reserve and Guard training and service. But section 4311 also makes unlawful discrimination against employees or prospective employees who performed uniformed service in the past, even many years in the past. *McGuffin* is one of the unusual section 4311 cases that does not involve a currently serving Reserve or National Guard service member.

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

UPDATE—June 2020

In an e-mail to me on 6/13/2020, Andrew McGuffin (the complainant in this case) wrote: "After the Federal Circuit denied SSA's [Social Security Administration's] motion for panel rehearing and rehearing en banc, my case came before MSPB Washington Regional Office Chief Judge Jeremiah Cassidy for a determination of remedies. There, SSA sought Judge Cassidy's acquiescence to propound discovery in an effort to mine something, anything, that could justify the agency avoiding back pay. We had a couple of teleconferences, and a couple of pleadings (SSA even sought sanctions against me) but, ultimately, Judge Cassidy sided with me. On May 22, 2020, he ordered my reinstatement within 20 days, and that SSA pay all undisputed back pay within 60 days. Thus, last Thursday, June 11, SSA reinstated me, albeit to a different SSA office. Now, we are still trying to hammer out several issues that will land us back at the Board for compliance proceedings if SSA will not resolve them."

I congratulate Mr. McGuffin for his successful representation of his own interests and, especially, for having created a favorable appellate court precedent that will be valuable to other veterans in the federal workforce. He succeeded based on a legal theory that I brusquely and incorrectly rejected when he first contacted me in 2012.

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

Correction—July 2020

In Law Review 20015 (February 2020), I wrote that the scholarly opinion in *McGuffin v. Social Security Administration,* 942 F.3d 1099 (Fed. Cir. 2019) was written by Judge Raymond Chen. In fact, the decision was written by Judge Jimmie V. Reyna. I regret the error.

Judge Chen was on the panel and joined in the unanimous panel decision.