Reserve Organization of America

LAW REVIEW[1] 26026
June 2026
Important Federal Circuit Case about USERRA.
By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.2—USERRA forbids discrimination.
1.4—USERRA enforcement.

Beck v. Department of the Navy, 997 F.3d 1171 (Fed. Cir. 2021).

This is a 2021 decision of the United States Court of Appeals for the Federal Circuit, the intermediate federal appellate court that sits in Washington, DC and has nationwide jurisdiction over certain kinds of

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,300 "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), the title 38 chapters that provide for veterans' benefits administered by the Department of Veterans Affairs (VA), 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. I have dealt with USERRA and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 44 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. As of 5/1/2026, I have come out of retirement and have affiliated with Maher Legal Services in an "of counsel" role. You can reach me by e-mail at samuel@maherlegalservices.com or by telephone at (708) 468-8155.

cases, including appeals from decisions of the Merit Systems Protection Board (MSPB). The MSPB is a quasi-judicial federal executive agency that adjudicates claims that federal agencies have violated several laws, including the Uniformed Services Employment and Reemployment Rights Act (USERRA).[3]

How does USERRA apply to a case of this kind?

USERRA applies to almost all employers in the United States, including the Federal Government, the States, the political subdivisions of States (local governments), and private employers, regardless of size.[4] USERRA's first section includes the following provision: "It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter."[5] Section 4324 of USERRA provides the enforcement mechanism for this law with respect to federal executive agencies as employers, as follows:

> **(a)**
> **(1)**
> A person who receives from the Secretary [of Labor] a notification pursuant to section 4322(e) may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board. Not later than 60 days after the date the Secretary receives such a request, the Secretary shall refer the complaint to the Office of Special Counsel established by section 1211 of title 5.

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[3] Public Law 103-353, 108 Stat. 3182. USERRA was signed into law by President Bill Clinton on 10/13/1994, as a long-overdue update and rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940 as part of the Selective Training and Service Act, Public Law 76-783, 54. Stat. 885. *See generally* Law Review 15067 (August 2015) for a detailed discussion of the history of the federal reemployment statute.

[4] You only need one employee to be an employer covered by USERRA. *See Cole v. Swint,* 961 F.2d 58,60 (5th Cir. 1992).

[5] 38 U.S.C. § 4301(b).

(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.

(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 shall award such person reasonable attorney fees, expert witness fees, and other litigation expenses. The Board may, in its discretion, award reasonable attorney fees in a case settled before the issuance of an order if the person can demonstrate that significant attorney fees were incurred and that justice requires such an award.
(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.
(3) In such Federal Circuit proceeding, the court shall award such person reasonable attorney fees, expert witness fees, and other litigation expenses if such person—
(A)
prevails in such Federal Circuit proceeding; and

(B)
is not represented by the Special Counsel in such Federal Circuit proceeding.[6]

Under USERRA, like the VRRA before 1994, a person who leaves a civilian job for voluntary or involuntary service in the uniformed services is entitled to reemployment in the civilian job after release from the period of service if he or she meets the simple eligibility criteria.[7] Decades ago, Congress recognized that employers could make a mockery of the right to reemployment by firing those employees who are serving part-time in the Reserve Components of the armed forces, including the National Guard, or by refusing to hire such persons in the first place. Accordingly, USERRA includes a comprehensive provision outlawing employment discrimination based on past or present service in the uniformed services, application to join one of the uniformed services, or application or obligation to perform future service. That provision is as follows:

(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)

[6] 38 U.S.C. § 4324.
[7] *See generally* Law Review 24047 (October 2024).

An employer may not discriminate in employment against or take any adverse employment action or other retaliatory 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.[8]

In recent years, especially since the terrorist attacks of 9/11/2001, most USERRA cases have pertained to persons serving in the National Guard or Reserve, but USERRA (including the anti-discrimination provision of section 4311) most definitely applies to service in the active component as well as the reserve component of the armed forces.[9]

In the *Beck* case, the Department of the Navy, as defendant, asserted that section 4311 of USERRA does not forbid discrimination by an Active Component officer against a retired enlisted service member, based on animus against enlisted personnel. In its decision, the United States Court of Appeals for the Federal Circuit forcefully rejected this argument, as follows:

> Lastly, the Navy argues on appeal that the Board's decision should be affirmed on the alternate ground that the USERRA does not extend to acts of discrimination against a service member based on military *rank* or *status* in the uniformed services. *See, e.g.*, Resp't's Br. 24-32. We decline the Navy's invitation to hold that an individual's military rank falls outside the gamut of potential classifications protected under the USERRA. For purposes of this

[8] 38 U.S.C. § 4311.

[9] *See generally* Law Review 22065 (October 2022).

> appeal, it suffices to note that § 4311 explicitly protects the "performance of *service*" in the armed forces. 38 U.S.C. § 4311(a) (emphasis added).[10]

In an important precedential decision, the Federal Circuit set forth a detailed roadmap for deciding cases about alleged anti-military discrimination in violation of section 4311 of USERRA:

> The USERRA was enacted in congressional response to the Supreme Court's decision in *Monroe v. Standard Oil Co.*, 452 U.S. 549, 69 L. Ed. 2d 226, 101 S. Ct. 2510 (1981), wherein the Court held that the USERRA's antecedent, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, "was enacted for the significant but limited purpose of protecting the employee-reservist against discriminations . . . motivated solely by reserve status." *Id*. at 559. The Court concluded that liability for violation of the statute could not be found unless the employee's reserve status was the sole motivation for the discriminatory conduct. The 1994 enactment broadened the statute by providing that a violation occurs when a person's military service is a "motivating factor" in the discriminatory action, even if not the sole factor. *See* 38 U.S.C. § 4311(c)(1).
>
> The 1994 enactment also confirmed "that the standard of proof in a discrimination or retaliation case is the so-called 'but-for' test and that the burden of proof is on the employer, once [the employee's] case is established," the legislative history citing the procedures and allocation of burdens of proof for actions under

[10] *Beck,* 997 F.3d at 1191.

the National Labor Relations Act as discussed by the Supreme Court in *National Labor Relations Bd. v. Transportation Management Corp.*, 462 U.S. 393, 401, 76 L. Ed. 2d 667, 103 S. Ct. 2469 (1983) (modified by *Office of Workers' Compensation v. Greenwich Collieries*, 512 U.S. 267, 129 L. Ed. 2d 221, 114 S. Ct. 2251 (1994)). H.R. Rep. No. 65, 103d Cong., 2d Sess. 24 (1994), *reprinted in* 1994 U.S.C.C.A.N. at 2457; S. Rep. No. 158, 103d Cong., 2d Sess. 45 (1994); *see also Gummo*, 75 F.3d at 105-06 (discussing legislative history); *Peterson*, 71 M.S.P.R. at 239-240 (same). Thus the USERRA provides that even if prohibited discrimination was a factor, the employer does not violate the statute if "the employer can prove that the action would have been taken in the absence of [military status]." 38 U.S.C. § 4311(c)(1).

Precedent interpreting and applying the USERRA is sparse. Those courts that have applied it, as well as the MSPB, have implemented the legislative intent to adopt the *Transportation Management* evidentiary scheme for cases arising under the National Labor Relations Act. The Court in *Transportation Management* in turn had adopted and approved the National Labor Relations Board's reasoning in *Wright Line*, 251 N.L.R.B. 1083, 1089 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981). We apply this precedent to the appellants' USERRA claims.

The procedures established by precedent require an employee making a USERRA claim of discrimination to bear the initial burden of showing by a preponderance of the evidence that the employee's military service was "a substantial or motivating

factor" in the adverse employment action. *See Transportation Management*, 462 U.S. at 400-01. If this requirement is met, the employer then has the opportunity to come forward with evidence to show, by a preponderance of the evidence, that the employer would have taken the adverse action anyway, for a valid reason. *See id.*; *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977); *Holo-Krome Co. v. Nat'l Labor Relations Bd.*, 954 F.2d 108, 110-12 (2d Cir. 1992); *see also Matson Terminals, Inc. v. Nat'l Labor Relations Bd.*, 324 U.S. App. D.C. 446, 114 F.3d 300, 303 (D.C. Cir. 1997); *FPC Holdings, Inc. v. Nat'l Labor Relations Bd.*, 64 F.3d 935, 942 (4th Cir. 1995); *Mississippi Transport, Inc. v. Nat'l Labor Relations Bd.*, 33 F.3d 972, 979 (8th Cir. 1994); *Union-Tribune Pub. Co. v. Nat'l Labor Relations Bd.*, 1 F.3d 486, 490 (7th Cir. 1993).

The factual question of discriminatory motivation or intent may be proven by either direct or circumstantial evidence. *See FPC Holdings, Inc.*, 64 F.3d at 942 ("Motive may be demonstrated by circumstantial as well as direct evidence and is a factual issue which the expertise of the Board [NLRB] is peculiarly suited to determine."); *Matson Terminals*, 114 F.3d at 303-04; *see also Kumferman v. Dep't of Navy*, 785 F.2d 286, 290 (Fed. Cir. 1986) (intent is a question of fact to be found by the MSPB). Circumstantial evidence will often be a factor in these cases, for discrimination is seldom open or notorious.

Discriminatory motivation under the USERRA may be reasonably inferred from a variety of factors, including proximity in time between the employee's military activity and the adverse

employment action, inconsistencies between the proffered reason and other actions of the employer, an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses. *Cf. W.F. Bolin Co. v. Nat'l Labor Relations Bd.*, 70 F.3d 863, 871 (6th Cir. 1995). In determining whether the employee has proven that his protected status was part of the motivation for the agency's conduct, all record evidence may be considered, including the agency's explanation for the actions taken.

When the employee has met this burden, the burden shifts to the employer to prove the affirmative defense that legitimate reasons, standing alone, would have induced the employer to take the same adverse action. *Transportation Management*, 462 U.S. at 400; *Mt. Healthy*, 429 U.S. at 285-86. This applies to both so-called "dual motive" cases (in which the agency defends on the ground that, even if an invalid reason played a part in the adverse action, the same action would have been taken in the absence of the invalid reason) and so-called "pretext" cases (in which the agency defends on the ground that it acted only for a valid reason). *See Holo-Krome*, 954 F.2d at 110-11.

The procedural framework and evidentiary burdens set out in § 4311, as explained in *Transportation Management* for NLRB rulings, are different from those in discrimination cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), as described in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792,

36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), and subsequent decisions. *McDonnell Douglas*, while allocating the burden of production of evidence, does not shift the burden of persuasion to the employer. *See Nat'l Labor Relations Bd. v. Weiss Memorial Hospital*, 172 F.3d 432, 442 (7th Cir. 1999) (contrasting *Wright Line* with "the shifting burdens of production under the ubiquitous *McDonnell Douglas* analysis, which is merely a method for ordering the proof"); *Walker v. Mortham*, 158 F.3d 1177, 1184-85 n.10 (11th Cir. 1998), *cert. denied* 528 U.S. 809, 145 L. Ed. 2d 36, 120 S. Ct. 39 (1999) (distinguishing the employer's burden to prove its affirmative defense under the NLRA from the *McDonnell Douglas* prima facie case, which shifts the burden of production but not the risk of nonpersuasion).

Thus in USERRA actions there must be an initial showing by the employee that military status was at least a motivating or substantial factor in the agency action, upon which the agency must prove, by a preponderance of evidence, that the action would have been taken despite the protected status.[11]

Facts of the *Beck* case.

Jerry Edward Beck enlisted in the Navy in 1984 and served continuously for 21 years until he retired as a Chief Petty Officer (CPO) in 2005.[12] After he retired from the active-duty Navy, he became a civilian employee of the Department of the Navy, performing duties that were similar to duties that he performed in the latter years of his active-duty

[11] *Sheehan v. Department of the Navy,* 240 F.3d 1009, 1012-14 (Fed. Cir. 2001).
[12] The facts in this case are exceedingly complicated and contested. For a complete recitation of the facts, please see the Federal Circuit decision.

service. The dispute that gave rise to this case arose out of a job announcement in May 2011. The Federal Circuit decision stated:

> On May 16, 2011, the United States Department of the Navy (Navy) Office of the Chief of Naval Operations (OPNAV) published a job announcement for an Event Forum Project Chief. J.A. 267. The vacancy was a full-time, permanent, GS-13/14 grade position with an annual salary range of $89,033 to $115,742. J.A. 267-68. The job's primary responsibility entailed the overall management of senior-level executive events, including conferences, symposia, and other star-flag level meetings on behalf of the Chief of Naval Operations. J.A. 267. Prior to the announcement, OPNAV determined that Captain Tyrone Payton—then Deputy Director, Navy Staff—would hire and serve as the supervisor of the individual selected. J.A. 269. The job posting remained open for four days until May 20, 2011. J.A. 267. By the closing date, only two candidates—Beck and Suzanne Wible—were certified as qualified for the position. J.A. 250. Captain Payton ultimately selected Wible for the vacancy. *Id.*[13]

Proceedings in the MSPB

Under section 4324 of USERRA, the Merit Systems Protection Board (MSPB) is responsible for adjudicating claims that Federal executive agencies, as employers, have violated USERRA.[14] The MSPB is a quasi-judicial Federal executive agency with three members, each of whom is nominated by the President and must be confirmed by the Senate.

[13] *Beck,* 997 F.3d at 1175-76.

[14] *See* 38 U.S.C. § 4324. *See generally* Law Review 24052 (November 2024) for a detailed discussion of USERRA's enforcement mechanism with respect to Federal executive agencies as employers.

MSPB cases, including MSPB USERRA cases, begin before an Administrative Judge (AJ) of the MSPB. The AJ conducts a hearing and makes findings of fact and conclusions of law. Either party, the individual plaintiff or the agency defendant, can appeal the AJ's decision to the MSPB itself.

The Federal Circuit decision set forth the proceedings in the MSPB as follows:

> Perceiving unfair treatment in the EFPC selection process, Beck approached Deborah Cubbage—the HR specialist working under Payton's supervision—to express his discontent in June 2011. J.A. 189-92. Beck complained that he had not even been interviewed for the position and shared his belief that Payton harbored animus and biases toward him. J.A. 193, 1432. Beck told Cubbage he wanted to file a formal grievance. J.A. 192, 2399. In response, Cubbage indicated "he could not grieve nonselection." J.A. 222. Beck claims that Cubbage then advised him that (1) the only way "to challenge [Wible's] selection lay under federal [Equal Employment Opportunity (EEO)] law," (2) he should not request a hearing before the Equal Employment Opportunity Commission (EEOC), and (3) he should "pursue a final agency action." J.A. 152.
>
> Based on those recommendations, Beck indicated he would file an EEO complaint, and Cubbage provided him with the contact information of a deputy EEO officer. J.A. 192, 222. Beck met with the EEO officer, who helped "frame" his discrimination complaint within the EEO context. J.A. 1432. Acting pro se, Beck filed a

formal EEO action alleging discrimination based on race, gender, age, and disability on September 15, 2011. J.A. 196.

Beck's protests engendered a retaliatory and hostile work environment. Throughout the Summer of 2011, Beck alleges that Payton "ridiculed [him] at office meetings, challenged his responsibilities and workplace authority[,] and attempted to denigrate him before his superiors and co-workers." J.A. 1434-35. It became clear that the grievance had all but foreclosed his prospects for advancement at the OPNAV and, therefore, Beck decided to resign. J.A. 1433. He left to pursue a lower, GS-11 grade position with the US Army in Germany. J.A 202, 1433. And just as Beck's career prospects at OPNAV ended, a protracted litigation journey had begun.

In July 2012, the Navy issued a Final Agency Decision denying his EEO claims. J.A. 154. Beck immediately appealed the decision to the EEOC and sought the advice of counsel. J.A. 1432. After a discussion of the facts, Beck's lawyer determined that the discriminatory motive behind the nonselection was rooted in Beck's prior military service, rather than an EEO cause of action. J.A. 152, 1432. Accordingly, in November 2012, Beck voluntarily withdrew his complaint before the EEOC and filed a claim under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) before the Merit Systems Protection Board (Board). J.A. 152.

A series of discovery-related delays ensued. The first Administrative Judge (AJ) assigned to the case, Raphael Ben-Ami,

allowed the Navy to depose Beck but never granted Beck's requests to depose Payton, Wible, Cubbage, Grady, and Bird. J.A. 1355. The AJ allegedly questioned the merits of Beck's case and made remarks that Beck's case was weak because "one service member could not discriminate against another." J.A. 1354. In March 2013, the AJ dismissed the case, sua sponte, on grounds that rank-based discrimination was not a violation of the USERRA. J.A. 1355. Beck petitioned for review of the Initial Decision and dismissal. In January 2014, the Board reversed and remanded the AJ's Initial Decision. J.A. 835.

The case languished for more than two years until Beck filed a petition for a writ of mandamus in this court on February 25, 2016. J.A. 1357. That same day, a new, second AJ was assigned to the case and Beck, therefore, withdrew his petition before it was docketed. *Id* On September 15, 2016, the AJ issued an Initial Decision laying out findings of fact and denying corrective action. J.A. 7.

E. The AJ's Factual Determinations

After hearing testimony and reviewing the evidence in the record, the AJ found that Beck's military service was a motivating or substantial factor in the Navy's decision not to hire him for the EFPC position. J.A. 10. The AJ credited Beck's account of the September 2010 meeting notwithstanding Payton's hesitant testimony. J.A. 12. According to the AJ, Beck's testimony was "inherently more probable" and "more credible" than Payton's,

especially in light of contradictions in the record about the Navy's reasons for selecting Wible over Beck. J.A. 13-14.

The AJ further found that the Navy "expressed hostility toward [Beck] after Payton learned of [his] military status." J.A. 14. Notably, despite Payton's testimony that he hired Wible because she (1) "had more hands[-]on experience as an event planner and was able to have professional and constructive conversations with three or four star generals"; (2) "could perform under pressure and demonstrated great leadership qualities"; and (3) had an "upper edge" because he had witnessed her perform in "high-intensity events," J.A. 16 n.5, the AJ determined:

> Viewing all of the record evidence in an objective light, it is *unusually clear* that [Beck] had greater objective qualifications: [H]e had more years of experience in the duties required [and] a higher degree of education, he was highly experienced in the requirements of both the DNS and the CNO, he had a respectable reputation with high[-]ranking military officials, and that he, in fact, was the person who trained Wible to perform [the job] duties prior to her selection for the position at issue. These attributes were confirmed when the [Navy] listed [Beck] as the best qualified [candidate]—more qualified than Wible—on the certification form. I observe that Payton's direct testimony in support of Wible's qualifications was general, and was ultimately not supported by the written record. As such, I find that under the circumstances in this case, [Beck] has proffered preponderant substantial evidence of

> inconsistencies between the [Navy's] actions during the selection and its ultimate explanation for his nonselection. J.A. 17-18 (emphasis added).

Next, the AJ considered whether the Navy had established that it would have hired Wible regardless of Beck's military service. On that point, the AJ summarily found—in one paragraph—that the Navy was "determined to select Wible for the position" and, thus, it did not matter "who else had applied." J.A. 19. Accordingly, the AJ denied Beck's request for corrective action.

Beck filed a petition for review of the AJ's Initial Decision with the Board on November 22, 2016. J.A. 2799. As a result of the Board's petition backlog, Beck's petition went unreviewed for nearly two years. On September 26, 2018, Beck requested permission to withdraw the petition for review so he could file an appeal with this court. J.A. 2824. The Board granted his request on October 12, 2018, *see* J.A. 1, and issued the Board's final order, from which Beck now appeals. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9).[15]

Q: After the AJ determined that Beck was more qualified than Wible and that Captain Payton's decision to select Wible over Beck was motivated, at least in part, by Payton's animus against active duty and retired enlisted personnel, including Beck. In an apparent effort to avoid ordering corrective action for Beck, the AJ made a *sua sponte* determination that the Department of the Navy was going to select

[15] *Beck,* 997 F.3d at 1179-81,

Wible in any case, without regard to the qualifications of other applicants for the position. What do you think of this?

A: The AJ's action was highly unusual and at least arguably improper. It seems that the AJ abandoned his neutral adjudicator role and became an advocate. The Department of the Navy, as defendant, did not suggest the rationale that the AJ adopted.

Moreover, the AJ's determination ran directly contrary to the testimony of Captain Payton and other evidence in the case. Payton testified that Admiral Bird, his supervisor, wanted to have an open competition and to select the most qualified candidate.

Q: After Beck appealed the AJ's controversial decision to the MSPB itself, why was there an inordinate delay?

A: The MSPB cannot act on any appeal unless it has a quorum—at least two of the three members must have been confirmed by the Senate and must participate in hearing and deciding the appeal. During all of President Trump's first term as President, from 1/20/2017 until 1/20/2021, the MSPB lacked a quorum because the Senate failed to act on the President's nomination of highly qualified individuals.[16]

Beck appealed to the United States Court of Appeals for the Federal Circuit.

In accordance with section 4324 of USERRA, the individual plaintiff but not the agency defendant can appeal an MSPB USERRA decision to the

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[16] *See Law Review 22038* (June 2022). *See also* Law Review 18082 (September 2018).

United States Court of Appeals for the Federal Circuit.[17] Beck appealed to the Federal Circuit. As is always the case in the federal appellate courts, the case was assigned to a panel of three judges. In this case, the panel consisted of two active judges of the Federal Circuit and one senior judge. The two active judges were Judge Jimmie V. Reyna and Judge Richard G. Taranto, and the senior judge was Judge Haldane Robert Mayer.

Judge Reyna wrote the decision of the panel and was joined by Judge Mayer. Judge Taranto concurred in the result. In his eloquent and scholarly decision, Judge Reyna opened as follows:

> This appeal marks the decade-long journey of a hardworking man who served his country honorably, only to face workplace discrimination on the basis of that service.
>
>> Jerry Edward Beck challenges a decision of the Merit Systems Protection Board denying corrective action under the Uniformed Services Employment and Reemployment Rights Act of 1994. The Board determined that Beck's prior military service was a motivating or substantial factor in the United States Department of the Navy's decision not to select him for an employment position. The Board, however, found that the Navy had permissibly preselected the successful applicant and, thus, met its evidentiary burden to establish that it would have hired her regardless of Beck's military service.

[17] 38 U.S.C. § 4324(d)(1).

> In view of the totality of this record, we conclude that the Navy's preselection determination is not supported by substantial evidence. We further hold that under the Uniformed Services Employment and Reemployment Rights Act of 1994, preselection can buttress an agency's personnel decision to hire a less qualified candidate, but only when the preselection is not tainted by an unlawful discriminatory intent. Because we hold that the Board erred in finding that Beck's nonselection would have occurred regardless of his prior military service as required under 38 U.S.C. § 4311(c)(1), we affirm in part and reverse in part the Board's decision denying Beck's request for corrective action.[18]

Judge Reyna concluded his eloquent decision as follows:

> The Navy's proffered rationale for selecting Wible, in view of the above testimony, strains credulity. After closing of the EFPC announcement, Human Resources provided Payton with an Internal Certificate bearing the names of only two individuals—Beck, who was listed as "best qualified," and Wible, who appeared in the line immediately below and was listed as "qualified." *See* J.A. 250. The certificate instructed Payton to click on the applicants' names to view their résumés and identify his selection from the "selection order menu." *Id.* That Payton felt compelled to ask whether he was "bound" to select the individual HR had labeled as the best-qualified candidate is illustrative of his motive and intent. Given the numerous inconsistencies in Payton's testimony throughout the record, we see no reason to lend credence to the Navy's hiring explanations. "Evidence of

[18] *Beck,* 997 F.3d at 1175.

preselection operates to discredit the employer's proffered explanation for its employment decision." *Goostree*, 796 F.2d at 861 (citations omitted).

When an employer couples unlawful discrimination with preselection to foreclose an applicant's access to employment, the employer cannot disentangle the discrimination from actions that would otherwise constitute benign preselection. As the Supreme Court articulated it: "The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing." *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 403, 103 S. Ct. 2469, 76 L. Ed. 2d 667 (1983), *abrogated on other grounds by Dir., Off. of Workers' Comp. Programs, Dep't of Lab. v. Greenwich Collieries*, 512 U.S. 267, 114 S. Ct. 2251, 129 L. Ed. 2d 221 (1994).

We therefore conclude that, to the extent the Navy could establish that it preselected Wible, it nevertheless cannot disentangle its purported preselection from its USERRA-based discrimination. Unlike oil and water, the two are wholly miscible.

We further hold that under the USERRA, preselection can buttress an agency's personnel decision to hire a less qualified candidate, but only when the preselection is not tainted by an unlawful discriminatory intent. Our judgment is guided by the Supreme Court's Title VII jurisprudence, which we conclude applies with full

and equal force in the USERRA context. Because we conclude that the Navy has not satisfied its evidentiary burden to show that it would have hired Wible in the absence of Beck's prior military service, we reverse the Board's denial of Beck's request for corrective action.

Lastly, the Navy argues on appeal that the Board's decision should be affirmed on the alternate ground that the USERRA does not extend to acts of discrimination against a service member based on military *rank* or *status* in the uniformed services. *See, e.g.*, Resp't's Br. 24-32. We decline the Navy's invitation to hold that an individual's military rank falls outside the gamut of potential classifications protected under the USERRA. For purposes of this appeal, it suffices to note that § 4311 explicitly protects the "performance of *service*" in the armed forces. 38 U.S.C. § 4311(a) (emphasis added).

Throughout the span of more than two decades, the scope of Beck's military service expanded to encompass, among other things, cooking and performing the functions of a CPO—the two activities that underlie the Board's findings of military service-based discrimination. An individual's commitment and obligation to, for example, provide health care (nurse), fly aircraft during armed conflict (fighter pilot), write legal briefs (Judge Advocate General's officer), or even cook meals for fellow service members ought not to diminish the significant contributions of that person's service in the armed forces.

IV. Conclusion

> Beck has endured a decade of delayed justice. We cannot correct every wrong in society; but we remedy *this* wrong today. Working-class men and women striving to improve their lives must frequently overcome great barriers—including increasing inequality, insidious discrimination, and the lack of access to opportunity—in the arduous path to success. In a world where inequities often go unchecked, the judiciary stands as a beacon of hope to ensure that justice and the values and principles that form the bedrock of democracy do not become a mere afterthought.
>
> Honest and hardworking members of our military aspiring to improve their lives deserve to be treated with equality and respect under the law, regardless of social status or the scope of their military service or related duties. That is the overarching purpose of the USERRA, which pays homage to all our military service members who, day in and out, help to strengthen the backbone of our country through their countless contributions.
>
> For the reasons set forth in this opinion, we hold that the Board erred in denying Beck's claim for corrective action under § 4311(c) of the USERRA. We remand the case to the Board with instructions to enter corrective action that is consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.[19]

Kudos to Beck's attorney.

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[19] *Beck,* 997 F.3d at 1190-92.

Attorney Kevin Edwin Byrnes of the Virginia law firm FH&H represented Chief Beck in this case. I congratulate Mr. Byrnes on his imaginative, diligent, and effective representation.

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