Reserve Organization of America

LAW REVIEW[1] 26032
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Important First Circuit Case about USERRA.
By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.2—USERRA forbids discrimination.
1.4—USERRA enforcement.

Velasquez-Garcia v. Horizon Lines of Puerto Rico, Inc., 473 F.3d 11 (1st Cir. 2007).

This is a 2007 decision of the United States Court of Appeals for the First Circuit, the intermediate federal appellate court that sits in Boston

[1] I invite the reader's attention to https://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.

and hears appeals from district courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island. As is always the case in the federal appellate courts, the case was assigned to a panel of three judges. In this case, the three judges were Judge Juan R. Torruella,[3] Judge Jeffrey R. Howard,[4] and Judge Norman R. Stahl.[5] Judge Stahl wrote the opinion and was joined by the other two judges in a unanimous panel decision.

The plaintiff, Carlos Velasquez-Garcia (CVG), was employed by Horizon Lines of Puerto Rico, Inc. (Horizon) until he was fired. CVG sued Horizon in the United States District Court for the District of Puerto Rico, claiming that the firing violated section 4311 of the Uniformed Services Employment and Reemployment Rights Act (USERRA) because the firing was motivated by CVG's service in the United States Marine Corps Reserve (USMCR).

CVG's case was assigned to Judge Juan Pieras, Jr. The defendant, Horizon, filed a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure (FRCP). In an unpublished decision, Judge Pieras granted the motion. CVG made a timely appeal to the 1st Circuit.

Horizon's policy for employees who served in the Reserve Components of the armed forces and who needed to be away from their Horizon jobs for military training or service was to give those employees time off with pay but later, after they returned to work, to deduct from their

[3] Judge Torruella was an active judge of the First Circuit in 2007. He died in 2020.
[4] Judge Howard was an active judge of the First Circuit in 2007. He took senior status in 2022.
[5] Judge Stahl was a senior-status judge of the First Circuit in 2007, having taken senior status in 2001. He died in 2023.

Horizon compensation the compensation they earned from the military during that time period.[6] CVG was away from his Horizon job, and after he returned to work, he was required to pay Horizon for the military pay that he received during the time he was away from his Horizon job.

In his appellate decision, Judge Stahl set forth the facts as follows:

> Around September 2004, Horizon finished recouping the salary that it was owed for the periods when Velazquez was performing his military duties. On September 21, 2004, seven months after he began his side business, Velazquez was observed cashing checks by Horizon's operations manager, Roberto Batista, one of Velazquez's supervisors and one of the people Velazquez described as having trouble with his military schedule. Batista reported this to several other Horizon managers, and on September 23, 2004, Batista fired Velazquez. The termination letter did not state a reason, but Velazquez was told that his check-cashing side business was in violation of Horizon's Code of Business Conduct ("Code"). He was given no warnings or other prior discipline and had an otherwise clean record as a good employee.
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> Velazquez brought suit under USERRA, alleging that his firing constituted illegal discrimination due to his military service. Horizon moved for summary judgment, which the district court granted. The district court held that Velazquez had not shown sufficient discriminatory animus, nor had he shown that the

[6] This Horizon policy was not required by USERRA, but neither was it unlawful. Of course, if the employee makes more money from the military than he or she would have made from Horizon, the employee cannot be required to pay differential pay to the employer.

> stated reason for his firing, the Code violation, was mere pretext. This appeal followed.[7]

In his appellate decision, Judge Stahl explained the rationale for overturning the summary judgment for the defendant as follows:

> We review a district court's summary judgment *de novo*. *Velez* v. *Janssen Ortho, LLC*, 467 F.3d 802, 806 (1st Cir. 2006). In doing so, we recognize that "[w]hen a motion for summary judgment is made . . . an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e)
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> The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (emphasis in original). An issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party," *id.* at 248, and a fact is material if it has the "potential to affect the outcome of the suit," *Santiago-Ramos* v. *Centennial P.R. Wireless Corp.*, 217 F.3d 46, 52 (1st Cir. 2000) (internal quotation marks omitted) (quoting *Sanchez* v. *Alvarado*, 101 F.3d 223, 227 (1st Cir. 1996)). Neither wishful thinking . . . nor

[7] *Velasquez-Garcia,* 473 F.3d at 14-15.

conclusory responses unsupported by evidence will serve to defeat a properly focused Rule 56 motion." *Griggs-Ryan* v. *Smith*, 904 F.2d 112, 115 (1st Cir. 1990) (citation omitted).

A. USERRA Actions

We have not previously addressed the mechanism of proving discrimination claims under USERRA. Thus, we first turn to the statute and its history. USERRA provides, in relevant part, that:

(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--(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.

38 U.S.C. § 4311.

The statute was passed in response to the Supreme Court's decision in *Monroe* v. *Standard Oil Co.*, 452 U.S. 549, 101 S. Ct. 2510, 69 L. Ed. 2d 226 (1981), in which the Court held under the predecessor of USERRA, the Veterans' Reemployment Rights Act ("VRRA"), that claims for anti-military employment discrimination would lie only if the employee could show that the discrimination was "motived *solely* by reserve status." *Id.* at 559 (emphasis added).

This, in effect, kept the burden on the employee to show that any offered reason by the company was actually a pretext. In the House report accompanying passage of USERRA, Congress said that *Monroe* "misinterpreted the original legislative intent," which was to place "the burden of proof . . . on the employer, once a prima facie case is established." H.R. Rep. No. 103-65, at 24 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2457. The House report called instead for application of the burden shifting framework of *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 103 S. Ct. 2469, 76 L. Ed. 2d 667 (1983). *Id.*

Under *Transportation Management*, which addresses claims of unfair labor practices under the National Labor Relations Act, "the employee first has the burden of showing, by a preponderance of the evidence, that his or her protected status was 'a substantial or motivating factor in the adverse [employment] action'; the employer may then avoid liability only by showing, as an affirmative defense, that the employer would have taken the same action without regard to the employee's protected status."

Leisek v. *Brightwood Corp.*, 278 F.3d 895, 898-99 (9th Cir. 2002) (alterations in original) (quoting *Transp. Mgmt.*, 462 U.S. at 401).

The circuit courts that have addressed the issue of burden-shifting under USERRA are unanimous in adopting this "substantial or motivating factor" test, rather than the "sole motivating factor" test of *Monroe*, and in putting the burden on the employer to show lack of pretext. *See Coffman* v. *Chugach Support Servs., Inc.*, 411 F.3d 1231, 1238-39 (11th Cir. 2005); *Gagnon* v. *Sprint Corp.*, 284 F.3d 839, 853-54 (8th Cir. 2002); *Leisek*, 278 F.3d at 899; *Hill v. Michelin N. Am., Inc.*, 252 F.3d 307, 312 (4th Cir. 2001); *Sheehan* v. *Dep't of Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001); *Gummo* v. *Vill. of Depew, N.Y.*, 75 F.3d 98, 106 (2d Cir. 1996).

We agree. The language of the statute and the legislative history make clear that the employee need only show that military service was "*a* motivating factor" in order to prove liability, unless "the employer can prove that the [adverse employment] action *would* have been taken" regardless of the employee's military service. 38 U.S.C. § 4311(c) (emphasis added). Therefore, we hold that "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 [employer] action, upon which the [employer] must prove, by a preponderance of evidence, that the action would have been taken despite the protected status." *Sheehan*, 240 F.3d at 1014.

This two-pronged burden-shifting analysis is markedly different from the three-pronged burden-shifting analysis in Title VII

actions. Under the *McDonnell Douglas* framework, the burden of persuasion in Title VII actions always remains with the employee. Therefore, after the employee establishes a prima facie case of discriminatory animus, the employer only has the burden of producing "some legitimate, nondiscriminatory reason for the employee's [termination]." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Then the burden shifts back to the employee to show that "the employer's stated reason for terminating him was in fact a pretext." *Hodgens* v. *Gen. Dynamics Corp.*, 144 F.3d 151, 161 (1st Cir. 1998).

By contrast, under USERRA, the employee does not have the burden of demonstrating that the employer's stated reason is a pretext. Instead, the employer must show, by a preponderance of the evidence, that the stated reason was *not* a pretext; that is, that "the action *would* have been taken in the absence of [the employee's military] service." 38 U.S.C. § 4311(c) (emphasis added).

B. Analysis

1. Discriminatory Motivation

The district judge held that Velazquez failed to produce sufficient evidence for a reasonable jury to believe that Velazquez's military service was at least "a motivating factor" in Horizon's decision to fire him. That is, the judge ruled that Velazquez was unable to

show that Horizon at least partially based its decision to fire him on his military service.

The district judge gave three principal reasons for this ruling. First, he discounted Velazquez's testimony of anti-military remarks made by his co-workers, in part because he had not reported any harassment to Horizon. Second, he said that the evidence of the timing of his firing close to a return from training was of no probative value because he had returned from several other training sessions without being fired. Third, he noted that other Horizon employees in the military had not been demoted or fired. Although the district judge correctly cited the "motivating factor" test of *Sheehan*, we believe, after carefully reviewing the record, that the judge committed error on each of these three points.

First, the court discounted Velazquez's testimony of anti-military remarks because it was his own self-serving testimony and because he had not previously reported it or made a formal complaint. Here, the distinction in Rule 56 between "specific facts" and "mere allegations" is important. Fed. R. Civ. P. 56(e).

Had Velazquez merely rested on allegations of military discrimination, this would be a different case. Instead, he provided deposition testimony presenting specific instances of anti-military remarks, as well as complaints and pressure from his superiors, and it is for the jury, not the judge, to determine his credibility. *See Anderson*, 477 U.S. at 255 ("[c]redibility determinations, the weighing of the evidence, and the drawing of

legitimate inferences from the facts are jury functions, not those of a judge").

Moreover, whether a nonmovant's deposition testimony or affidavits might be self-serving is not dispositive. It is true that testimony and affidavits that "merely reiterate allegations made in the complaint, without providing specific factual information made on the basis of personal knowledge" are insufficient. *Santiago-Ramos*, 217 F.3d at 53 (citing *Roslindale Coop. Bank* v. *Greenwald*, 638 F.2d 258, 261 (1st Cir. 1981)). However, a "party's own affidavit, containing relevant information of which he has first-hand knowledge, may be self-serving, but it is nonetheless competent to support or defeat summary judgment." *Santiago-Ramos*, 217 F.3d at 53 (internal quotation marks omitted) (quoting *Cadle Co.* v. *Hayes*, 116 F.3d 957, 961 n.5 (1st Cir. 1997)).

Therefore, provided that the nonmovant's deposition testimony sets forth specific facts, within his personal knowledge, that, if proven, would affect the outcome of the trial, the testimony must be accepted as true for purposes of summary judgment. *See Napier* v. *F/V Deesie, Inc.*, 454 F.3d 61, 66 (1st Cir. 2006); *Simas* v. *First Citizens' Fed. Credit Union*, 170 F.3d 37, 50-51 (1st Cir. 1999).

On appeal, Horizon argues that the anti-military comments were just "stray remarks," and as such cannot be sufficient evidence of discriminatory animus. If true, that would undermine Velazquez's argument that the issues raised are "genuine." *See Anderson*, 477 U.S. at 248. But Horizon's argument oversimplifies the analysis.

First, it is only true that "'stray workplace remarks' . . . normally are insufficient, *standing alone*, to establish . . . the requisite discriminatory animus." *Gonzalez* v. *El Dia, Inc.*, 304 F.3d 63, 69 (1st Cir. 2002) (emphasis added); *see Straughn* v. *Delta Air Lines, Inc.*, 250 F.3d 23, 36 (1st Cir. 2001).

Here, Velazquez points not only to the remarks by co-workers, but also to complaints by Batista and others about the difficulty of adjusting Velazquez's work schedule, and to the timing of his firing (which we address below). *See McMillan* v. *Mass. Soc'y for Prevention of Cruelty to Animals*, 140 F.3d 288, 300-01 (1st Cir. 1998) ("stray remarks may properly constitute evidence of discriminatory intent for the jury to consider in combination with other evidence"); *cf. Santiago-Ramos*, 217 F.3d at 55 (decisionmaker's comments and timing of firing are material facts for a jury to consider).

Here, the remarks that Velazquez testified to were not made by those who participated in the decision to fire him, and this does limit their probativeness. *See McMillan*, 140 F.3d at 301. But at least one such speaker, Juan Carrero, was shift marine manager and appears to be superior to Velazquez. Carrero was also in part responsible for scheduling, which was the source of Horizon's problems with Velazquez. Thus, his remarks could carry some weight with a jury.

Furthermore, stray remarks by nondecisionmakers, while insufficient standing alone to show discriminatory animus, may still be considered "evidence of a company's general atmosphere

of discrimination," and thus can be relevant. *Santiago-Ramos*, 217 F.3d at 55 (citing *Sweene* v. *Bd. of Trustees of Keene State Coll.*, 604 F.2d 106, 113 (1st Cir. 1979)), [S]uch evidence . . . does tend to add 'color' to the employer's decisionmaking processes and to the influences behind the actions taken with respect to the individual plaintiff." *Cummings* v. *Standard Register Co.*, 265 F.3d 56, 63 (1st Cir. 2001) (internal quotation marks omitted) (quoting *Conway* v. *Electro Switch Corp.*, 825 F.2d 593, 597 (1st Cir. 1987)).

Finally, the fact that Velazquez failed to report the remarks earlier is not dispositive. *Cf. Faragher* v. *City of Boca Raton*, 524 U.S. 775, 808, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) (holding that plaintiff's failure to report sexual harassment is not an affirmative defense to a Title VII claim where plaintiff was discharged).

In an atmosphere such as a working seaport, it is reasonable for a person to avoid making a scene over such behavior, or even to believe that the behavior is only in jest, only to discover too late that it was a harbinger of worse discrimination to come. Velazquez's failure to report the behavior may be considered by a jury in judging his credibility, but it is evident to us that a jury could reasonably decide to place no weight on his prior silence. Thus, it is a jury that should ultimately decide.

The district judge next discounted the timing of Velazquez's firing, saying that the fact that he was fired after returning from his military service is of no probative value, given that he had returned from other periods of service without being fired. But the emphasis of Velazquez's argument is elsewhere. The

important factor, he argues, is not the time of his return from service, but rather the time of his final recoupment of the salary differential that he owed to Horizon. Horizon, according to Velazquez, waited until Velazquez had paid back the money, he owed Horizon for the periods when his civilian salary was supplemented by his military salary. Once he had repaid the overage, he claims, Horizon then found the pretext to fire him.

Such facts, if true, could be considered evidence of discriminatory animus. The other USERRA cases that address the timing of firing look at "proximity in time between the employee's military activity and the adverse employment action." *Sheehan*, 240 F.3d at 1014; *see Maxfield* v. *Cintas Corp. No. 2*, 427 F.3d 544, 552 (8th Cir. 2005). But that is not an exclusive test, and there is no reason to limit ourselves to looking only at the proximity of the adverse employment action to military activity. The proximity to other military-related events may also be probative. If what Velazquez alleges is true, Horizon should not escape liability for making the tactical decision to wait until it recouped the salary it was owed before using a pretext to fire Velazquez.

Finally, the district judge held that the fact that the company had not fired other employees who served in the military demonstrated that they did not fire Velazquez for discriminatory reasons. As an initial matter, the failure to treat all members of a class with similar discriminatory animus does not preclude a claim by a member of that class who is so treated. *Cf. Conn*. v. *Teal*, 457 U.S. 440, 455, 102 S. Ct. 2525, 73 L. Ed. 2d 130 (1982) ("Title VII does not permit the victim of a facially discriminatory policy to be

> told that he has not been wronged because other persons of his or her race or sex were hired"); *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 579, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978) ("A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination.").
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> Furthermore, the district court failed to address Velazquez's argument that the other employees were not shift employees, and that therefore their military service did not cause as much scheduling conflict as his did. A reasonable jury could conclude that the different situations of these employees could result in Horizon firing Velazquez for his military service, while tolerating the other employees serving in the military.
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> For these reasons, we find that Velazquez has presented sufficient facts to withstand summary judgment on the question of whether his military status was at least a motivating factor in his dismissal. The issue is one for a jury.[8]

Thus, the three-judge panel of the 1st Circuit reversed the summary judgment for the defendant, Horizon, and remanded the case to the District Court for trial. It is unclear what happened on remand.

Q: What do you think of CVG's side-hustle check cashing service?

A: If CVG had contacted me at the time, I certainly would have counseled him against engaging in any such activity.[9] But the issue

[8] *Velasquez,* 473 F.3d at 15-20.

[9] *See* Law Review 12106 (November 2012). The title of that article is "Don't Give the Employer an Excuse To Fire You."

here is not whether CVG's side hustle was permissible, advisable, or even whether the employer had the "right" to fire CVG for this questionable activity.

Since CVG had provided evidence that his military service and the absence from work that his service necessitated were *a motivating factor* in Horizon's decision to fire him, the issue was whether Horizon had proven, as an affirmative defense, that it *would have fired CVG anyway even in the absence of his military service and obligations.*

Q: This case was decided 19 years ago. How has this case held up as a precedent?

A: This case has been cited and relied upon in more than 100 subsequent published court decisions.[10]

Q: Where can I find a lawyer or law firm that fully understands laws like the Servicemembers Civil Relief Act (SCRA), the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Uniform Code of Military Justice (UCMJ), and other laws that are especially pertinent to those who serve our country in uniform?

A: As of 5/1/2026, I have come out of retirement and have joined Maher Legal Services in an "of counsel" role. This firm has a great

[10] *See, e.g., Porter v. Trans States Holdings, Inc.,* 2025 U.S. App. LEXIS 34105 (10th Cir. Dec. 31, 2025); *Beck v. Department of the Navy,* 997 F.3d 1171 (Fed. Cir. 2021); *Hackett v. City of South Bend,* 956 F.3d 504 (7th Cir. 2020); *Savage v. Federal Express Corp., 856 F.3d 440* (6th Cir. 2017); *Arroyo v. Volvo Group North America LLC,* 805 F.3d 273 (7th Cir. 2015); *Bradberry v. Jefferson County,* 732 F.3d 540 (5th Cir. 2013); *Murphy v. Radnor Township,* 542 Fed. Appx. 173 (3d Cir. 2013); *Vega-Colon v. Wyeth Pharmaceuticals,* 625 F.3d 22 (1st Cir. 2010); *Crews v. City of Mount Vernon,* 567 F.3d 860 (7th Cir. 2009); *Madden v. Rolls Royce Corp.,* 563 F.3d 636 (7th Cir. 2009); *Sandoval v. City of Chicago,* 560 F.3d 703 (7th Cir. 2009); *Clegg v. Arkansas Department of Corrections,* 494 F.3d 922 (8th Cir. 2007).

team, headed by attorneys John Maher and Kevin Mikolashek, both of whom have served as Army judge advocates for many years. These attorneys and this firm have a great record, and I am proud to join their team.

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