

LAW REVIEW¹ 26033**July 2026****Section 4311 of USERRA Makes it Unlawful for an Employer To Deny Promotions on the Basis of Military Service. How To Prove a Case.
By Captain Samuel F. Wright, JAGC, USN (Ret.)²****1.2—USERRA forbids discrimination.****1.4—USERRA enforcement.*****Porter v. Trans States Holdings, Inc.*, 2025 U.S. App. LEXIS 34105, 2025 WL 3772561 (10th Cir. Dec. 31, 2025).**

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 (VRRRA—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 VRRRA 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 VRRRA 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.



This is a recent decision of the United States Court of Appeals for the 10th Circuit, the intermediate federal appellate court that sits in Denver and hears appeals from federal district courts in Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. 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 included Judge Timothy M. Tymkovich, Judge Gregory A. Phillips, and Judge Carolyn B. McHugh. Judge McHugh wrote the opinion and was joined by the other two judges in a unanimous panel decision.

Kenneth Porter, the plaintiff and appellant, is a Navy Reserve officer and aviator. He worked for Trans States Holdings (TSH) as a pilot from 3/26/2001 until 1/16/2015. TSH is a privately owned airline holding company that operates GoJet Airlines, which operates feeder service for United Airlines under the United Express brand name.

While employed by TSH, Porter was promoted from first officer to captain. Several times, he applied for promotion to management positions, but he was not selected for any of the promotion opportunities. During the 14 years that he worked for TSH, he was frequently absent from work for training and service in the Navy Reserve. All of his “military leave” periods were protected by the Uniformed Services Employment and Reemployment Rights Act (USERRA).³

³ See *generally* Law Review 24047 (October 2024) for a detailed discussion of the five conditions that a person must meet to have the right to reemployment after a period when the person has been away from his or her civilian job for voluntary or involuntary uniformed service. It seems clear that Porter met these conditions for each period when he was away from his job for service.

Porter sued TSH in the United States District Court for the District of Colorado. The case was heard by Magistrate Judge Susan Prose. After discovery was completed, TSH filed a motion for summary judgment (MSJ), under Rule 56 of the Federal Rules of Civil Procedure (FRCP), and Judge Prose granted the motion.⁴ Porter appealed to the 10th Circuit.

Under Rule 56, a judge should grant a motion for summary judgment only if he or she can say, after careful review of the evidence, that there is *no evidence, beyond a mere scintilla*, in support of the non-moving party's claim or defense and that no reasonable jury could find for the nonmoving party.

In his lawsuit, Porter claimed that he was not selected for one of the promotion opportunities because the employer was annoyed with him for his absence from work to perform training and service in the Navy Reserve and that his nonselection violated section 4311 of USERRA. That section 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.

(b)

⁴ *Porter v. Trans States Holdings, Inc.*, 2024 U.S. Dist. LEXIS 203346, 2024 WL 4710633 (D. Colo. Nov. 7, 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.⁵

As is typical in section 4311 cases, Porter did not have overwhelming evidence that TSH unlawfully considered Porter's Navy Reserve service and his absences from work necessitated by that service when deciding not to select Porter for promotion, but Porter did have one powerful piece of evidence supporting his case. During a deposition, Porter testified under oath about a private conversation that he had with Randall Zehnder, who served at the time as TSH's Flight Manager and Chief System Pilot. Porter reported to Zehnder as part of his chain-of-command during most of his career at TSH. Zehnder also was a military reservist himself.

During a private conversation, Porter asked Zehnder "why have I not been promoted?" Zehnder responded: "Well, you also do a lot of military duty." Judge Prose found, as a factual matter, that the conversation did happen as Porter stated and that Zehnder made the statement attributed to him.

⁵ 38 U.S.C. § 4311 (emphasis supplied). See generally Law Review 17016 (March 2017) for a detailed discussion of the case law under section 4311.

Judge Prose characterized the Zehnder statement as a “stray remark” and held that it did not constitute evidence that TSH had violated section 4311 and did not preclude her from granting TSH’s motion for summary judgment. The 10th Circuit disagreed. In her scholarly opinion for the court, Judge McHugh wrote:

Examining the evidence in the light most favorable to Mr. Porter, as we must do at this stage, Mr. Zehnder's statement appears to be an admission that Mr. Porter's military service was a motivating factor in TSH's decision not to promote him. Because the statement tends to show that TSH "acted on [its] discriminatory beliefs" in making an adverse employment action, *see Ramsey v. City & Cnty. of Denver*, 907 F.2d 1004, 1008 (10th Cir. 1990), and does not require inference or presumption, *see Fassbender*, 890 F.3d at 883, the statement constitutes direct evidence of discriminatory intent.

TSH resists this conclusion, contending that the "single comment . . . made during a personal conversation between Porter and Zehnder on an unidentified date and time" is a "stray remark" that "cannot create an issue of fact regarding discriminatory intent." Appellee's Br. at 11-12.

We have held that "stray remarks," or "[i]solated comments, unrelated to the challenged action, are insufficient to show discriminatory animus in termination decisions." *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 531 (10th Cir. 1994). This is true even when the statements reflect overt bias toward a

particular group. *See, e.g., Starr*, 655 F. App'x at 646 ("[E]ven if the comments had revealed a hostility toward service-members, isolated remarks, unrelated to the disputed employment action, are insufficient to demonstrate discriminatory animus." (internal quotation marks and brackets omitted)). But remarks are only "stray" when they lack a nexus to the challenged employment decision. *See Cone*, 14 F.3d at 531-32; *see also Sims v. KCA, Inc.*, 28 F.3d 113, 1994 WL 266744, at *4 (10th Cir. June 17, 1994) (unpublished table decision).

If "a nexus exists between the allegedly discriminatory statement and the company's [adverse employment] decision," that statement can support an inference of discrimination. *See Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1140 (10th Cir. 2000); *see also Cone*, 14 F.3d at 531. This court's decisions in *Danville v. Regional Lab Corp.*, 292 F.3d 1246 (10th Cir. 2002), and *Tomsic v. State Farm Mutual Automobile Insurance Co.*, 85 F.3d 1472 (10th Cir. 1996), illustrate this distinction.

In *Danville*, a member of a committee charged with selecting interview candidates stated in a committee meeting that the plaintiff "might not be around very long." 292 F.3d at 1251. We held that the comment was "circumstantial evidence from which an inference of discriminatory intent might be drawn," rather than a stray remark. *Id.* We reasoned, "While the remark may be 'ambiguous' in the sense of being susceptible to more than one interpretation, and 'isolated' in the sense that it was only made once, this is not a 'stray' remark in the sense that it lacks a nexus to the employment decision." *Id.* Since the remark "referred

directly to the plaintiff and was made during the committee meeting at which interview candidates were selected," we concluded there was enough evidence for a jury to find that the remark explained why the plaintiff was not selected for an interview. *Id.*

Similarly, in *Tomsic*, we considered remarks from a supervisor suggesting that one plaintiff might "lack motivation because her husband earned a substantial income" and that the other plaintiff might "encounter problems in her marital relationship . . . because her husband would probably become uncomfortable with her earning more than he." 85 F.3d at 1477-79. We held that these comments were not stray remarks because they "were directed to the plaintiffs individually" and were made to the decisionmaker. *Id.* at 1479. The statements thus, taken in context, permitted a jury to infer that "unlawful bias was a motivating factor in defendant's decision" to terminate the plaintiffs. *Id.* We distinguished the case from *Cone*, where a comment that "long term employees have a diminishing return" was considered a "stray remark[]" because it was not directed at the plaintiff and was made by a non-decisionmaker, and thus lacked a nexus to the employer's allegedly discriminatory decision. *Id.* (quoting *Cone*, 14 F.3d at 531).

Here, viewing the facts in the light most favorable to Mr. Porter, there is a clear nexus between Mr. Zehnder's statement and the challenged employment decisions. Mr. Zehnder's statement was made in direct response to Mr. Porter's question about why TSH passed him over for promotions. So, like the statements in

Danville and Tomsic, Mr. Zehnder's statement referred to Mr. Porter. And the context of the statement in the broader conversation implies that it was an explanation for Mr. Porter's non-promotion. Thus, Mr. Zehnder's statement supports the assertion that Mr. Porter's military duty was a motivating factor in TSH's decisions not to promote him.

TSH contends, however, that Mr. Zehnder's remark is not probative of discriminatory intent because there was "no evidence that Zehnder was the decisionmaker with regard to the promotional decisions." Appellee's Br. at 12. And because there was no evidence that Mr. Zehnder was a decisionmaker, TSH argues that Mr. Porter has not shown a causal nexus between the statement and the adverse employment actions.

Mr. Porter counters that he has raised a genuine issue of material fact as to whether Mr. Zehnder was the decisionmaker with respect to the challenged decisions. Mr. Porter points to two pieces of evidence found in the record. First, he identifies the following exchange in his deposition:

Q. Do you recall who you followed up with in email [about your application for Line Check Airman]?

[Mr. Porter]. Most likely with Randy Zehnder.

Q. Was Randy Zehnder in charge of hiring into that position?

[Mr. Porter]. I believe he was.

App. Vol. III at 339.

Second, he points to the 2013 email chain in which Mr. Scott asked a group of individuals, including Mr. Zehnder, for input about whether to promote Mr. Porter. Mr. Porter argues that Mr. Zehnder's inclusion on this email chain shows that he was at least involved in the decision-making process.

Although Mr. Porter's evidence of Mr. Zehnder's status as a decisionmaker is not robust, there is no evidence in the record contradicting it. Indeed, in his sworn declaration, Mr. Zehnder did not deny that he was involved in the decision not to promote Mr. Porter. Moreover, even if Mr. Zehnder were not a decisionmaker, the facts identified by Mr. Porter raise a genuine dispute about whether Mr. Zehnder was privy to the reasons for Mr. Porter's non-promotion. Mr. Zehnder stated in his declaration that he was "aware of . . . management's perception of [Mr. Porter] as an employee." *Id.* at 363. And indeed, TSH relied on Mr. Zehnder's declaration to support its allegation that TSH declined to promote Mr. Porter for nondiscriminatory reasons—*i.e.*, because Mr. Porter was "antagonistic," "often talked negatively about the Company and management," "routinely complained about the Company," "and posed a threat to employee morale." *Id.* Together, these facts suggest that Mr. Zehnder was, if not directly involved in the promotion decisions, at least aware of TSH's reasoning for declining to promote Mr. Porter.

Regardless of whether Mr. Zehnder was a decisionmaker or simply knew about the reasons for Mr. Porter's non-promotion, the causal chain remains unbroken. In either scenario, Mr.

Zehnder's statement tends to show that Mr. Porter's military duty factored into TSH's decisions not to promote him.

Although it is a close case, we find that Mr. Porter has presented sufficient direct evidence to satisfy his initial burden of showing by a preponderance of the evidence that his protected status was a motivating factor in his non-promotion.⁶

Q: Is this case over?

A: No. The 10th Circuit panel reversed the summary judgment and remanded the case to the District Court. There will now need to be a jury trial unless the parties settle.

Kudos to Porter's lawyer.

I congratulate attorney Robert W. Mitchell on his imaginative and diligent representation of Kenneth Porter.⁷

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?

⁶ *Porter*, 2025 U.S. App. LEXIS 34105, at *13-19.

⁷ Mr. Mitchell is a veteran of the United States Marine Corps and a life member of ROA. His office is in Spokane, Washington, and he has a nationwide practice representing service members and veterans. His email is bobmitchellaw@gmail.com. His telephone number is 509-327-2224.



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 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.

Here is a link to the Maher Legal Services website:

<https://www.lawyersdefendingwarriors.com/about>.

Join the Organization That Fights for You.

This article is one of more than 2,000 "Law Review" articles available at <https://roa.org/lawcenter/> — a free legal resource that the Reserve Organization of America (ROA) has built and maintained since 1997, adding new articles every month.

ROA is the only national military organization dedicated exclusively to America's reserve components — all eight of them. From the 6,179 members of the Coast Guard Reserve to the 329,705 soldiers of the Army National Guard, ROA exists to serve the nearly 773,000 men and women who answer the call while maintaining civilian lives. No other organization does what we do for the people we serve.

Our roots run deep. On October 2, 1922, veterans of the Great War gathered at Washington's historic Willard Hotel — at the invitation of General of the Armies John J. Pershing — to build something lasting. One of the junior officers in that room was Captain Harry S. Truman,



who, as President, signed ROA's congressional charter in 1950. That charter gives us a clear mission: advocate for policies that ensure adequate national security. For more than a century, we've made the case that America's Reserve Components and National Guard are among the most cost-effective pillars of our national defense.

Beyond this library of legal resources, ROA files amicus curiae ("friend of the court") briefs in the Supreme Court and federal courts, and actively educates service members, military spouses, attorneys, employers, legislators, and others about the legal rights of those who serve — and how to enforce them. We provide this information to all service members, regardless of membership. But it's ROA members — through their dues and contributions — who make it possible.

Your membership makes the mission possible.

If you are currently serving, or have ever served, in any of America's eight uniformed services, you are eligible to join ROA — and membership starts at just \$20 for a full year, or \$450 for life. Officers and enlisted personnel alike qualify, whether your service was in the Active Component, the National Guard, or the Reserve. ROA has also recently expanded eligibility to include ancestors and lineal descendants of past or present service members, so families can stand with those who serve. Join online at <https://members.roa.org/join/person/mbrtype.html?action=join> or call 800-809-9448.



If you are not eligible for membership but believe in this mission, your financial contribution directly funds this resource and the advocacy work that protects those who serve. Donations may be mailed to:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002