LAW REVIEW 15015[1]

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Proving a USERRA Discrimination Case. Is it Lawful To Require the unsuccessful USERRA Plaintiff to Pay Court Costs?

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1.1.1.7—USERRA applies to state and local governments
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***Chance v. Dallas County Hospital District,* 1998 U.S. Dist. LEXIS 5110 (N.D. Tex. April 6, 1998), *affirmed in part and reversed in part and remanded,* 176 F.3d 294 (5th Cir. 1999).[3]**

How this case arose

Plaintiff Nickie Christopher Chance was a Navy Reservist and an employee of defendant Dallas County Hospital District[4] when he was fired in January 1996, shortly after he returned from a short period of Navy duty. Chance sued the hospital district in the United States District Court

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[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1,300 "Law Review" articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated the "Law Review" column in 1997 and adds new articles each week.

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[3] This is a decision of the United States District Court for the Northern District of Texas (Dallas). The plaintiff lost in district court and appealed to the Court of Appeals for the Fifth Circuit. The 5th Circuit is the federal appellate court that sits in New Orleans and hears appeals from district courts in Louisiana, Mississippi, and Texas. The appellate citation means that you can find this decision in Volume 176 of *Federal Reporter, Third Series,* and the decision starts on page 294.

[4] The Dallas County Hospital District is apparently a political subdivision of the State of Texas. As I explained recently in Law Review 15011 (January 2015), *political subdivisions of a state* (like counties, cities, school districts, and special purpose districts like hospital districts) are not immune from suit in federal court under the 11th Amendment of the United States Constitution, but *arms of the state* (like state universities and departments of the state government) do have 11th Amendment immunity. Some political subdivisions have tried to argue that they have 11th Amendment immunity and some courts (not all) have accepted that argument. In this case, there is no evidence that the defendant claimed 11th Amendment immunity, and neither the district court nor the appellate court addresses the 11th Amendment issue.

for the Northern District of Texas, asserting that the firing was unlawful under a variety of legal theories, including the theory that the firing was motivated by his Navy Reserve service and that the firing violated section 4311 of the Uniformed Services Employment and Reemployment Rights Act (USERRA), which provides as follows:

> § 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited
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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.
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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--
> (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.
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> (d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.

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

In December 1995, Chance volunteered to serve on active duty for a few days[5] because his Navy Reserve unit was asked to provide volunteers to fill in for Navy civilian employees at a Navy base after the civilians were "furloughed" for a few days because of a deadlock in Congress over the federal budget. On December 11, Chance notified his civilian employer that he would be on military duty starting just two days later, on December 13.[6]

Chance had the right to time off from his job for military duty, even if the employer found it inconvenient.

The timing of Chance's military duty and the very short notice caused serious problems for the employer, because the hospital department was already short-handed due to other employees scheduled for leave for the Christmas holiday season. But such employer inconvenience is *not* a defense to the employer's obligations under USERRA.

Section 4312(h) of USERRA provides:

> In any determination of a person's entitlement to protection under this chapter, the timing, frequency, and duration of the person's training or service, or the nature of such training or service (including voluntary service) shall not be a basis for denying protection of this chapter if the service does not exceed the limitations set forth in subsection (c) [the five-year limit] and the notice requirements established in subsection (a)(1) [prior notice to the employer] and the notification requirements established in subsection (e) [timely application for reemployment] are met.

38 U.S.C. 4312(h).

As I explained in Law Review 104 and other articles, Congress enacted USERRA (Public Law 103-353) in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which dates from 1940. USERRA's 1994 legislative history explains the purpose and effect of section 4312(h) as follows:

> Section 4312(i) [later renumbered 4312(h)] is a codification and amplification of the Supreme Court's ruling in *King v. St. Vincent Hospital,* 112 S. Ct. 570 (1991), which held that there was no limit as to how long a National Guardsman could serve on active duty for training and still have reemployment rights under the former section 2024(d) of title

[5] As I have explained in detail in Law Review 161 (March 2005) and Law Review 1019 (February 2010), the federal reemployment statute applies without regard to whether the individual volunteered to serve or was called up involuntarily. In a larger sense, all military service is now voluntary, because no one has been drafted by our government since 1973.

[6] Under section 4312(a)(1) of USERRA, 38 U.S.C. 4312(a)(1), either the individual who is to perform service in the uniformed services or an appropriate officer of the uniformed service in which the service is to be performed must provide advance notice to the civilian employer, but no particular amount of advance notice is required. Moreover, under section 4312(b) [38 U.S.C. 4312(b)] advance notice is not required if the giving of such notice is precluded by military necessity or otherwise impossible or unreasonable. Please see Law Review 91 (September 2003).

> 38. This new section makes clear the Committee's [House Committee on Veterans' Affairs] intent that no "reasonableness" test be applied to determine reemployment rights and that this section prohibits consideration of timing, frequency, or duration of service so long as it does not exceed the cumulative limitations under section 4312(c) and the servicemember has complied with the requirements under sections 4312(a) and (e).
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> The Committee believes, however, that instances of blatant abuse of military orders should be brought to the attention of the appropriate military authorities (*see Hilliard v. New Jersey Army National Guard,* 527 F. Supp. 405, 411-412 (D. N.J. 1981)), and that voluntary efforts to work out acceptable alternatives could be attempted. However, there is no obligation on the part of the servicemember to rearrange or postpone already-scheduled military service nor is there any obligation to accede to an employer's desire that such service be planned for the employer's convenience. Good employer-employee relations dictate, however, that voluntary accommodations be attempted by both parties when appropriate.

House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2463.

Thus, it is clear beyond any question that Chance's right to time off work for military training and service was not limited by what the employer or even the court considered to have been "reasonable" under the circumstances.

I believe that Chance clearly had the right to time off from his civilian job (without pay) under these circumstances, even though there was very little notice and the timing of the Navy duty was inconvenient for the civilian employer. I also think that the Navy could have and should have handled this situation in a different manner. In the 13-plus years since the terrorist attacks of September 11, 2001, more than 900,000 Reserve and National Guard members have been called to the colors, and more than 350,000 of them have been called up more than once. We are clearly pressing our luck and taxing the patience of civilian employers. We should avoid annoying them further with short-notice call-ups like this one.

Chance was not required to provide documentation to the employer when notifying the employer of impending military service.

When Chance initially gave notice of his impending military duty on December 11, he did not provide his supervisor a copy of written Navy orders, probably because he did not yet have written orders in his possession. As I have explained in detail in Law Review 91, *there is no documentation requirement on the front end,* when giving notice to the employer of an impending period of service, but there is a documentation requirement on the back end (when applying for reemployment) under some circumstances. Nonetheless, I strongly recommend that Reserve and National Guard members provide copies of orders or other reasonably available documentation when giving notice to civilian employers of impending military service.

The point here is to minimize problems with your civilian employer, not to "make a federal case" out of the documentation that you are *not* required to provide.

The employer did not violate USERRA when it contacted Navy authorities to verify Chance's military duty.

On December 14 (one day after his Navy duty had started), Chance provided written orders to the employer. The form of the written orders caused the employer to be suspicious, because the orders were printed on plain white paper rather than Navy letterhead. A hospital district supervisor contacted the Navy base and spoke to "Officer Black," who confirmed the validity of the orders.

Chance became upset when he learned that his supervisors had made several telephone calls to Navy officials to verify the validity of Chance's orders, but *it is not unlawful for a civilian employer to contact military authorities in this way.* This is a recurring problem, and I want to emphasize to Reserve and National Guard personnel that the civilian employer is not required to accept your assertions about military duty at face value. I am aware of documented cases wherein individuals have falsely claimed to have been on military duty, just to get away from their civilian jobs for a few days.

Leaders of the Reserve Component should assist individual reservists and National Guard members in dealing with civilian employers.

In Law Review 14009 (January 2014), I urged the leadership of each Reserve Component to provide an officer at the highest level, or at least an intermediate level, to notify civilian employers of upcoming military duty to be performed by Reserve and National Guard personnel and to deal with employer questions and complaints. We should not leave the individual Reserve or National Guard member (especially a junior enlisted member) "out to dry"—having to deal with the employer's wrath about the inconvenience sometimes caused by military duty, especially duty performed on short notice. The designated person assigned to deal with civilian employers needs to be *above the level of the unit commanding officer.* The unit commanding officer is himself (or herself) a traditional reservist or Guard member, and we certainly don't want to add to that officer's problems with his or her own civilian employer.

USERRA does not give the individual reservist or Guard member the right to be insubordinate or unprofessional at the civilian job. Chance would have been fired anyway, even if he had not been a member of the Navy Reserve.

Chance completed his Navy duty and reported back to work on January 4, 1996. Just four days later, Chance got involved in a very heated verbal altercation with several supervisors about a work-related issue that was not directly related to his recent military duty. Two supervisors testified that Chance physically blocked a supervisor from leaving a cubicle and that he used obscene language and gestures that they called "street stuff" and that they genuinely feared that Chance would hit them. Chance was fired four days later, on January 12.

Chance sued the hospital district under several legal theories,[7] claiming discrimination, harassment, retaliation, and civil rights violations. All of Chance's claims were dismissed prior to trial, except for his USERRA claim. The case was heard by a jury on December 8-11, 1997. The jury found that plaintiff's Navy Reserve status was a motivating factor in the defendant's decision to fire him and that the defendant would not have fired the plaintiff in the absence of his Navy Reserve status. The jury awarded the plaintiff damages in the amount of $6,627.78.

The defendant made a motion for judgment as a matter of law, in spite of the jury's verdict, on the ground that there was no evidence to support the jury's findings, and the district court granted that motion. The district court also ordered the plaintiff to pay the defendant's court costs,[8] in spite of section 4323(h)(1) of USERRA, which provides: "No fees or court costs may be charged or taxed against any person claiming rights under this chapter." 38 U.S.C. 4323(h)(1).[9] The district court held that section 4323(h)(1) did not apply because Chance had asserted claims under several federal and state statutes, not just USERRA.

Proving a violation of section 4311

Under section 4311(c) of USERRA, 38 U.S.C. 4311(c), Chance was not required to prove that the firing was caused *solely* by his Navy Reserve service. It was sufficient for Chance to prove that his Navy Reserve service was *a motivating factor* in the employer's decision to fire Chance. If Chance proves motivating factor, he wins, unless the employer *proves* (not just asserts) that it *would have fired Chance anyway.*[10]

The district court found as a matter of law, in spite of the jury's verdict, that Chance's Navy Reserve service was not a motivating factor in the employer's decision to fire Chance and that, in any case, "The evidence also conclusively establishes that defendant would have fired plaintiff without regard to his military status." I disagree with the court about motivating factor—I think that the proximity in time between Chance's short-notice military duty and the firing is sufficient to support a jury finding of motivating factor. But I agree with the court's finding that the defendant would have fired the plaintiff anyway, based upon his obscene language and gestures and unprofessional conduct during the altercation on January 8, 1996. I especially agree with the district court's observation that "Nothing in USERRA compels an employer to tolerate this type of misconduct in the workplace."

A word to the wise for Reserve Component members

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[7] Chance asserted claims under the Texas Commission on Human Rights Act, the Texas Whistleblower Act, the Equal Pay Act of 1963, the Civil Rights Act of 1964, and the Civil Rights Act of 1871, as well as USERRA.

[8] Court costs include items like the costs of transcribing depositions, the cost of traveling to depositions, etc.

[9] Please see Law Review 1082 (November 2010), by Thomas G. Jarrard, Esq., for a scholarly discussion of section 4323(h)(1).

[10] *See Sheehan v. Department of the Navy,* 240 F.3d 1009 (Fed. Cir. 2001). I discuss *Sheehan* in detail in Law Review 0904 (January 2009).

Let this case be a lesson for reservists and National Guard members. *You must keep your cool* and be professional at work, in your relationship with supervisors and colleagues, even (and maybe especially) if the employer is annoyed with you about the inconvenience that your military duty causes to the employer. If the employer is annoyed about your military duty and is looking for an excuse to fire you, the last thing that you should do is to give the employer the excuse that he or she is seeking.[11]

I also submit that this case is a good illustration of the need for the policy that I advocated in Law Review 14009. An officer of the Reserve Component, above the rank of the unit commanding officer, needs to deal with civilian employers concerning issues of this kind.

Chance appeals to the 5th Circuit.

Chance appealed the adverse district court decision to the 5th Circuit. As is always the case in federal civil case appeals, the appeal was heard by a panel of three appellate judges. Judge Reynaldo G. Garza was appointed to the 5th Circuit in 1979 by President Jimmy Carter and confirmed by the Senate. He took senior status on July 7, 1982 but continued to hear cases (including this case) until he died on September 14, 2004. Judge Henry A. Politz was also appointed by President Carter in 1979, and he took senior status on August 10, 1999 and died on May 9, 2002. Judge Rhesa H. Barksdale was appointed by President George H.W. Bush in 1990 and took senior status on August 8, 2009. Judge Politz wrote the decision and was joined by the other two judges.

The district court erred in awarding *all* of the court costs to the defendant employer.

In his scholarly opinion, Judge Politz rejected without much comment Chance's arguments on the merits but addressed in detail his claim that the district court had erred in requiring Chance (the USERRA plaintiff) to pay the court costs on the grounds that he had asserted additional causes of action, not just a USERRA cause of action.

As one of the attorneys who was deeply involved in the drafting of USERRA[12] I can say that the drafters did not contemplate this specific scenario—involving a USERRA plaintiff who also asserted other causes of action. If we had contemplated this scenario, we could have written section 4323(h)(1) more clearly. We could have written that the unsuccessful USERRA plaintiff is not to be taxed for court costs *even if the plaintiff has also asserted other causes of action.* Alternatively, we could have written that court costs are not to be taxed to the unsuccessful

[11] Please see Law Review 12106 about the importance of *not* using the employer's telephone, computer, or time to complain about the employer and to seek advice and assistance in dealing with the employer.

[12] As I have explained in Law Review 104 and other articles, I worked for the United States Department of Labor (DOL) as an attorney for a decade, and together with one other DOL attorney (Susan M. Webman), I largely drafted the interagency task force work product that President George H.W. Bush presented to Congress (as his proposal) in February 1991. The version of USERRA that President Bill Clinton signed on October 13, 1994 (Public Law 103-353) was about 85% the same as the Webman-Wright draft.

USERRA plaintiff *with respect to the USERRA cause of action,* but that costs related to other causes of action may nonetheless be taxed.

The three-judge panel of the 5th Circuit held that Chance could be charged for costs *unrelated to his USERRA claim* but that the district court had erred in awarding *all* the costs to the defendant employer. Judge Politiz's decision ends as follows:

> The trial court taxed all costs of court against Chance. This ruling is overly broad. Only costs not attributable to the filing and advancing of the USERRA claim may be taxed. The trial court must, therefore, closely examine the costs incurred *a quo* and separate out and tax to Chance only those costs not related to his USERRA claim. It may be that some, most, or all costs attributable to other claims are also related to the USERRA claim. That is a matter to be first addressed by the trial court. We express no opinion thereon. But no costs of court directly attributable to the filing and prosecution of the USERRA claim may be assessed against Chance.
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> For the foregoing reasons, we AFFIRM the judgment of the district court in the defendant's favor, VACATE the taxing of all costs, and REMAND for further proceedings consistent herewith.

Chance, 176 F.3d at 297 (all CAPS in original).

I have checked, and there is no further court decision on remand, sorting out the costs as directed by the 5th Circuit. After remand, the hospital district simply dropped the demand for the taxing of costs.