LAW REVIEW 15017[1]

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USERRA Applies to Local Police Department as Employer

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1.1.1.7—USERRA applies to state and local governments
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***Brandasse v. City of Suffolk, Virginia,* 72 F. Supp. 2d 608 (E.D. Va. 1999).[3]**

At the time this case arose, and at the time this decision was written, Gerald L. Brandasse was a Sergeant First Class (SFC) in the Army Reserve (USAR). As a civilian, he worked as a police officer for the City of Suffolk, Virginia.[4] During the third quarter of 1998, Suffolk Police Chief Jimmy L. Wilson announced that sometime in late 1998 or early 1999 the police department would administer promotional examinations to enable Suffolk police officers to be promoted to the police department rank of Sergeant or Lieutenant.

The examination consisted of two parts: first a written test, followed by an "assessment center evaluation." A police officer wishing to be considered for promotion was required to complete both components of the examination. On or about January 22, 1999, the police department announced that the written exam would be conducted on March 10 and the assessment center evaluation would be conducted during the week of March 22.

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[1] We 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 this column in 1997, and we add new articles each week.

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[3] This is a published decision of Judge Rebecca Beach Smith of the United States District Court for the Eastern District of Virginia. The citation means that you can find this case in Volume 72 of *Federal Supplement, Second Series,* starting on page 608. *LEXIS* (a computerized legal research service) shows no subsequent history for this case, and that would seem to indicate that the parties reached a settlement after Judge Smith refused to dismiss the plaintiff's case.

[4] The City of Suffolk is a political subdivision of the Commonwealth of Virginia. As is explained in Law Review 15011 (January 2015), political subdivisions of states (counties, cities, school districts, etc.) do *not* have immunity from suit in federal court under the 11th Amendment of the United States Constitution, but some political subdivisions have asserted 11th Amendment immunity and some courts (not all) have agreed with that assertion. There is no indication that the City of Suffolk asserted 11th Amendment immunity in this case, and Judge Smith's decision does not address the 11th Amendment.

In December 1998, SFC Brandasse received permission from his USAR commanding officer to meet his 1999 annual training requirement by attending a military training school. On or about March 8, 1999, SFC Brandasse received Army orders directing him to report to Fort McCoy (in Wisconsin) for an Army training school scheduled to start on March 21 and end on April 2.

The confluence in timing between the Officer Brandasse's selection process for promotion within the police department and SFC Brandasse's USAR annual training was most unfortunate. In a local police department, the opportunity to be considered for promotion only arises infrequently. Missing out on a police department promotion opportunity would be much more than a minor career setback.

Under the Total Force Policy (adopted by the Department of Defense in 1973, when Congress abolished the draft and established the All-Volunteer Military), our nation is more dependent than ever before on the Reserve Components[5] for national defense. The Total Force Policy has come into full implementation after the terrorist attacks of September 11, 2001, the "date which will live in infamy" for our time.

The Department of Defense publishes a weekly report on Reserve Component mobilizations since September 2001. The most recent report shows that as of February 3, 2015 a total of 905,045 Reserve Component personnel have been called to the colors since September 2001, including 25,322 currently activated. The terrorist attacks occurred after Officer Brandasse's problem with the Suffolk Police Department, but the full implementation of the Total Force Policy really began in earnest in August 1990, when Saddam Hussein's Iraq invaded and occupied Kuwait and President George H.W. Bush drew "a line in the sand" and pledged to protect Saudi Arabia and liberate Kuwait. As part of his forceful military response to Saddam Hussein's outrageous act of aggression, President Bush directed the call-up of Reserve Component members, in the first significant Reserve Component call-up since the Korean War of 1950-53.

Congress has long recognized that protecting the civilian jobs of those who serve our country in uniform (whether they are drafted or whether they volunteer to serve) is essential if the armed forces are to obtain and retain the services of qualified young men and women in the Active Component and the Reserve Component of the armed forces. As is explained in Law Review 104 and other articles, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) and President Bill Clinton signed it into law (Public Law 103-353) on October 13, 1994. USERRA was a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA).[6] As originally enacted in 1940, the VRRA only applied to draftees, but in 1941 (as part of the Service Extension Act) Congress amended the VRRA to make it apply to voluntary enlistees as well as draftees.

[5] The seven Reserve Components are the Army Reserve, the Army National Guard, the Air Force Reserve, the Air National Guard, the Navy Reserve, the Marine Corps Reserve, and the Coast Guard Reserve.

[6] The STSA is the law that led to the drafting of millions of young men, including my late father, for World War II.

As enacted in 1940, the VRRA applied to the Federal Government and to private employers, regardless of size. In 1974, as part of the Vietnam Era Veterans Readjustment Assistance Act, Congress amended the VRRA to make it apply to state and local governments as well. Applying the reemployment statute to state and local governments is most important because 10% of Reserve Component members have civilian jobs for state governments and another 11% are employed by local governments.[7]

Officer Brandasse asked the Suffolk Police Department for an accommodation with respect to the assessment center portion of the promotion exam, so that he (Brandasse) could meet his USAR annual training requirement and still be considered for promotion within the police department. His police department superiors informed him that such an accommodation "could not" be made and that it was his responsibility to arrange his military obligations around his civilian job obligations, rather than the other way around.

In this assertion, the police department superiors were clearly wrong. USERRA clearly supersedes and overrides state laws, local ordinances, employer policies and practices, collective bargaining agreements, and other matters that purport to limit USERRA rights or that impose additional prerequisites on the exercise of USERRA rights.[8] Under the United States Constitution, federal statutes clearly trump conflicting state statutes and constitutions and local ordinances: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[9]

Section 4331 of USERRA gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. The Department of Labor (DOL) published proposed USERRA Regulations in the *Federal Register* in September 2004. After considering the comments received and making a few adjustments, DOL published the final regulations in the *Federal Register* on December 19, 2005. The regulations are published in title 20 of the Code of Federal Regulations, at Part 1002. 20 C.F.R. Part 1002. The pertinent section is as follows:

> (b) If an opportunity for promotion, or eligibility for promotion, that the employee missed during service is based on a skills test or examination, then the employer should give him or her a reasonable amount of time to adjust to the employment position and then give a skills test or examination. No fixed amount of time for permitting adjustment to reemployment will be deemed reasonable in all cases. However, in determining a

[7] Please see the article titled "Too Much to Ask? Supporting Employers in an Operational Reserve Era." The article was written by Susan M. Gates, PHD, and was published in *The Officer* (ROA's bi-monthly magazine) in November-December 2013, at pages 32-40.

[8] 38 U.S.C. 4302(b).

[9] United States Constitution, Article VI, Clause 2—commonly called the "Supremacy Clause." Yes, it is capitalized just that way, in the style of the late 18th Century. Local officials in Virginia and other former Confederate states sometimes need to be reminded that General Ulysses S. Grant did not surrender to General Robert E. Lee at Appomattox Courthouse.

> reasonable amount of time to permit an employee to adjust to reemployment before scheduling a makeup test or examination, an employer may take into account a variety of factors, including but not limited to the length of time the returning employee was absent from work, the level of difficulty of the test itself, the typical time necessary to prepare or study for the test, the duties and responsibilities of the reemployment position and the promotional position, and the nature and responsibilities of the service member while serving in the uniformed service. If the employee is successful on the makeup exam and, based on the results of that exam, there is a reasonable certainty that he or she would have been promoted, or made eligible for promotion, during the time that the employee served in the uniformed service, then the promotion or eligibility for promotion must be made effective as of the date it would have occurred had employment not been interrupted by uniformed service.

20 C.F.R. 1002.193(b).

The DOL USERRA Regulations were not in effect at the time of the dispute between Officer Brandasse and the Suffolk Police Department. Nonetheless, under USERRA the civilian employer (the police department) was required to make accommodations for SFC Brandasse's military obligations. SFC Brandasse and the USAR were not required to make accommodations for the convenience of the civilian employer, relating to SFC Brandasse's military obligations.

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 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).

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 the Suffolk Police Department was required to make accommodations for SFC Brandasse's military obligations, rather than the other way around.

On or about March 12, 1999, during his USAR weekend training, SFC Brandasse learned that the Fort McCoy training school had been canceled by the Army. By the time that SFC Brandasse learned that his USAR orders had been canceled, the March 10 written exam for police department promotion had already been conducted, and Officer Brandasse had missed it. The police department had told him not to take the written exam if he were not going to be available for the assessment center evaluation during the week of March 22.

Officer Brandasse asked for an accommodation to allow him to participate in the 1999 promotion opportunity, because his USAR Fort McCoy orders had been canceled. The police department denied his request. Brandasse then retained an attorney, and his attorney contacted the City Attorney and asserted that Brandasse had the right, under USERRA, to participate in the promotion opportunity. Eventually, Brandasse completed both parts of the promotion exam and was rated third out of 47 applicants, with likely nine applicants to be promoted.

After Officer Brandasse scored well on both parts of the promotion exam, the police department put him "under investigation" by the department's Internal Affairs Division (IAD), and under the police department's policy an officer who is "under investigation" is not to be promoted until the investigation has been completed. In this lawsuit, Officer Brandasse claimed that the "investigation" was in bad faith, for the purpose of reprising against him for his USAR activities and for having retained an attorney to assert his USERRA rights. The plaintiff claimed that his treatment by the police department violated section 4311 of USERRA, which provides:

§ 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

(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) 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.

(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.

38 U.S.C. 4311.

The City of Suffolk asked the court to dismiss Officer Brandasse's lawsuit as unripe and nonjusticiable, because he had not yet been denied a promotion. In her opinion, Judge Smith eloquently addressed and rejected the City's assertion as follows:

> Each defendant seems to argue that Mr. Brandasse has not yet been injured, so that the suit would not lie until he received an injury, namely, actual denial of promotion. The court disagrees. To give credence to defendants' argument would be to find that Mr. Brandasse's claim potentially would never be ripe because defendants could simply never consider him one way or the other for promotion. Moreover, the court would have to find that plaintiff has alleged no injury under USERRA in claiming retaliation for exercise of his federal rights under that statute. The court finds to the contrary. In this case, plaintiff's alleged injury is his claim of retaliation for exercising his federal rights under USERRA by placing him "indefinitely" under "investigation," thereby prohibiting even his consideration for

> promotion. Under the standard set forth by the Supreme Court in *Texas v. United States*, 118 S. Ct. at 1259, plaintiff's claims do not rest upon "contingent future events," but rather upon events that have already occurred, *see Arch Mineral Corp.*, 104 F.3d at 665, and constitute a claim under Section 4311(a) and (b) of USERRA.
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> Although the police department has not *actually* denied Mr. Brandasse a promotion, the court finds that plaintiff has adequately pleaded a *constructive* denial of promotion such that it acts as a violation of Section 4311(a) which is actionable and thus ripe for review. Plaintiff argues that, although he has not been officially informed of an adverse promotional decision on the part of the police department, his employers have effectively denied him the opportunity to be promoted because: (1) he was not allowed to attend the Sheriff's Training School in Virginia Beach; and (2) he has been placed under what he alleges is a bad faith investigation that does not allow for promotion during the pendency of the investigation. The court finds, for the purposes of a 12(b)(1) motion, that plaintiff has demonstrated a constructive denial of promotion such that the claim is presently ripe for review.

Brandasse, 72 F. Supp. 2d at 614-15 (emphasis in original).

In addition to suing the City of Suffolk, Officer Brandasse also sued Jimmy L. Wilson (the City's Police Chief) and Marie Dodson (the City's Director of Personnel). USERRA's definition of "employer" includes "a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities."[10] Chief Wilson and Ms. Dodson sought to be dismissed as defendants in this case, but Judge Smith refused to dismiss them. It is important to note that a supervisor who violates USERRA, on behalf of the employer, can potentially be held *personally liable* for the violation.

This is an important case showing that local governments, as employers, are responsible for complying with USERRA, and supervisory employees who violate the USERRA rights of their subordinates can be held personally accountable for violating USERRA.

[10] 38 U.S.C. 4303(4)(A)(i).