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Does Section 4311 of USERRA Outlaw Employer Discrimination Based on a Service-Connected Disability?

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1.2—USERRA forbids discrimination
1.3.2.9—Accommodations for disabled veterans
1.8—Relationship between USERRA and other laws/policies

***Carroll v. Delaware River Port Authority,* 2015 U.S. Dist. LEXIS 24455 (District of New Jersey March 2, 2015).**

As part of a well-written and scholarly decision, Judge Joseph E. Irenas[3] of the United States District Court for the District of New Jersey wrote: "More to the point, a USERRA plaintiff has the initial burden of demonstrating that his military *service,* as distinct from a *disability resulting* from service, was a substantial or motivating factor in the employer's decision." (Emphasis in original) If we are speaking specifically of section 4311 of the Uniformed Services Employment and Reemployment Rights Act (USERRA), I agree with Judge Irenas' statement.

Section 4311 provides as follows:

§ 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

[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.
[2] Captain Wright was the Director of ROA's Service Members Law Center (SMLC) from June 2009 to May 2015.
[3] Joseph E. Irenas was born in 1940 and graduated from Princeton University in 1962. He received his law degree *cum laude* from Harvard University in 1965. He was practicing law as a partner at McCarter & English in Newark, New Jersey when he was appointed by President George H.W. Bush in 1991. He was confirmed by the Senate in 1992. He took senior status in 2002, but he continues to hear cases actively.

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.[4]

Under section 4311(a), it is unlawful for an employer to discriminate[5] on the basis of membership in a uniformed service, application to join a uniformed service, performance of uniformed service, or application or obligation to perform uniformed service. Section 4311(b) makes it unlawful for an employer to discriminate against or taken an unfavorable employment action against an individual based to the individual having taken an action to enforce a USERRA protection, testified or made a statement in or in connection with any USERRA proceeding, assisted or otherwise participated in a USERRA investigation, or exercised a USERRA right. There is no mention of a prohibition of discrimination based on having suffered a service-connected disability.

This is a good case for the invocation of the legal doctrine of *expressio unius est exclusio alterius* (expression of one thing is the exclusion of another). Section 4311 specifically outlaws discrimination on ten specific grounds. It is clear that discrimination on other grounds is not forbidden by section 4311.

[4] The citation means that this is section 4311 of title 38 of the United States Code. USERRA is codified at sections 4301 through 4335 of title 38.
[5] Section 4311 makes it unlawful for an employer to discriminate in initial employment (hiring), retention in employment (firing), promotions, and benefits of employment.

The classic example of *expressio unius est exclusio alterius* comes in the early Supreme Court case, *Marbury v. Madison,* 5 U.S. 137 (1803). Article III, section 2, clause 2 of the Constitution establishes the *original* (as opposed to appellate) jurisdiction of the Supreme Court-cases affecting ambassadors and other public ministers and disputes between states. The statute at issue in *Marbury* expanded the original jurisdiction of the Supreme Court to include cases in which a *writ of mandamus* is sought against a federal official. The Supreme Court held that since the Constitution expressly states the classes of cases for which the Supreme Court has original jurisdiction, a federal statute that adds additional classes of cases to the original jurisdiction of the Supreme Court is unconstitutional.

Section 4313(a)(3) of USERRA makes generous provisions for returning disabled veterans, but only if they are entitled to reemployment with that specific employer under USERRA.[6] If Josephine Smith meets the five USERRA conditions but returns with a disability (temporary or permanent) incurred or aggravated during the period of service, the employer is required to make *reasonable efforts to accommodate the disability.*[7]

Of course, some service-connected disabilities cannot be reasonably accommodated in some employment positions. For example, a blinded veteran cannot return to the cockpit of a commercial airliner. If the disability cannot be reasonably accommodated in the employment position that the individual left and likely would have continued to hold, but for the interruption of civilian employment for military service, the employer is required to reemploy the returning disabled veteran in some other position for which he or she is qualified, or can become qualified with reasonable employer efforts, and that provides like seniority, status, and pay, or the closest approximation thereof consistent with the circumstances of the returning disabled veteran's case. These section 4313(a)(3) provisions are very generous, but this section only applies to a person who left a civilian job *with that specific employer* and who has returned to that employer after release from service and who meets the five USERRA conditions.

For reasons that are not made clear in the opinion, the plaintiff (Anthony J. Carroll) did not allege that his rights under the Americans with Disabilities Act (ADA) had been violated. The ADA forbids covered employers from discriminating against disabled persons (including but not

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[6] As is explained in Law Review 1281 and other articles, a person must meet five conditions to have the right to reemployment under USERRA. The person must have left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services, as defined by USERRA, and must have given the employer prior oral or written notice. The person must not have exceeded the five-year cumulative limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment. The person must have been released from the period of service without having received a disqualifying bad discharge from the military. After release from the period of service, the person must have made a timely application for reemployment with the pre-service employer.

[7] Please see Law Review 0640 (December 2006) and Law Review 0854 (November 2008) for a detailed discussion of the employer's obligations to the returning disabled veteran under section 4313(a)(3).

limited to disabled veterans) and requires employers to make reasonable accommodations for such disabled persons.[8]

USERRA is an important and powerful law, but it is not the only law that must be considered when representing a veteran, especially a disabled veteran. A competent lawyer will consider USERRA along with other federal and state laws and legal doctrines and come up with a legal strategy best calculated to achieve the client's objectives.

In cases of this kind, the client is far better served by private counsel than by the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). Private counsel can consider and apply many statutes and legal theories, while DOL-VETS is limited to USERRA.

[8] Please see Law Review 15004 (January 2015) for a discussion of the application of the ADA to the case of a returning disabled veteran who did not have USERRA rights with the specific employer.