

## Returning to Police Officer Job with PTSD

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

1.1.1.7—USERRA applies to state and local governments

1.1.2.1—USERRA applies to persons holding part-time, temporary, probationary, or at-will jobs

1.2—USERRA forbids discrimination

1.3.2.9—Accommodations for disabled veterans

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

***Roth v. West Salem Police Department*, 2015 U.S. App. LEXIS 10708 (6<sup>th</sup> Cir. June 19, 2015).**

In February 2001, Kenneth Roth was hired as a part-time police officer<sup>3</sup> in the West Salem (Ohio) Police Department. Roth was also an enlisted member of the United States Marine Corps Reserve (USMCR). As a reservist, he was twice called to active duty and deployed to Iraq, where he served in combat. During the second deployment, Roth was considered for promotion to sergeant in the police department but not promoted. Shortly after he returned to work following the second deployment, Roth was suspended by the police department pending completion of anger management classes and passing a psychological examination. He did not pass the examination, and ultimately the police department terminated his employment.

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<sup>1</sup> We invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find more than 1,350 "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.

<sup>2</sup> Captain Wright was the Director of ROA's Service Members Law Center (SMLC), as a full-time employee of ROA, from June 2009 through May 2015. During that six-year period, he received and responded to more than 35,000 e-mail and telephone inquiries. He is continuing the SMLC on a part-time, volunteer basis, as a member of ROA. He will respond to e-mails and telephone calls on Wednesday and Thursday evenings, at ROA headquarters. His e-mail is [SWright@roa.org](mailto:SWright@roa.org) and the telephone number is (800) 809-9448, extension 730. Please understand that Captain Wright is a volunteer, and he will not necessarily be able to respond to your e-mail or telephone call on the same day.

<sup>3</sup> Roth's part-time status was in no way an impediment to his right to reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA). As is explained in Law Review 104 and other articles, Congress enacted USERRA (Public Law 103-353) and President Bill Clinton signed it into law on October 13, 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRRA), which was originally enacted in 1940. The VRRRA and USERRA have always applied to part-time as well as full-time jobs.

Roth sued the police department in the United States District Court for the Northern District of Ohio, asserting that the department violated section 4311 of the Uniformed Services Employment and Reemployment Rights Act (USERRA) when it passed him over for promotion and when it ultimately terminated his employment. 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 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.<sup>4</sup>

Roth also asserted that his termination violated Ohio disability discrimination law. USERRA's second section provides: "Nothing in this chapter [USERRA] shall supersede, nullify or diminish any Federal or *State law* (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that *establishes a right or benefit that is more beneficial to, or is in addition to*, a right or benefit provided for such person under this chapter."<sup>5</sup>

When you bring a civil case in federal court under a federal law like USERRA, it is possible to bring at the same time closely related state law claims, in the same federal lawsuit. This is known as "supplemental jurisdiction."<sup>6</sup> Accordingly, Roth was able to bring and did bring his state law claim together with his federal law (USERRA) claim in federal court. Unfortunately, the district court rejected all his claims and the appellate court affirmed.

After discovery was completed, the defendant police department made a motion for summary judgment, in accordance with Rule 56 of the Federal Rules of Civil Procedure. The defendant asserted and the court agreed that reviewing the record as a whole there was not sufficient evidence in the record under which a reasonable jury could find for the non-moving party (Roth). The district court granted summary judgment for the defendant. Roth appealed, and a three-judge panel of the Sixth Circuit<sup>7</sup> affirmed the district court.

Under section 4311(c)(1) of USERRA,<sup>8</sup> Roth was required to prove that his membership in the USMCR, his performance of uniformed service, and/or his obligation to perform future service constituted *a motivating factor* in the employer's decision to promote Dozier Hendershot (another West Salem patrol officer) over Roth for sergeant in the police department. If Roth proves motivating factor he wins, unless the employer can prove that Roth would not have been promoted in any case, even if he had not been a member of the USMCR.

The three-judge appellate panel acknowledged that there was some evidence to support a jury finding of motivating factor but then held that the department had shown by uncontradicted evidence that Roth would not have been promoted anyway:

The decision to promote Hendershot over Roth had been made by Chief Sims, in consultation with Captain Leiby. Chief Sims and Captain Leiby considered Hendershot, Roth, and a few other patrolmen. Chief Sims saw Hendershot as the best choice for a number of reasons. Comparing Roth and Hendershot, Chief Sims claimed that

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<sup>4</sup> 38 U.S.C. 4311 (emphasis supplied).

<sup>5</sup> 38 U.S.C. 4302(a) (emphasis supplied).

<sup>6</sup> 28 U.S.C. 1367(a).

<sup>7</sup> The 6<sup>th</sup> Circuit is the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee.

<sup>8</sup> 38 U.S.C. 4311(c)(1).

Hendershot was easier to work with, had incurred no citizen complaints, and could be relied upon to follow orders, whereas this was not always the case with Roth. Chief Sims also noted that Hendershot was the only patrolman who did not have any other job and was willing to take on a large amount of hours, which Chief Sims interpreted as a sign of loyalty.

Roth's return to his civilian job after his second deployment was short-lived. He worked only three non-consecutive shifts over the course of a few days. Chief Sims instructed Roth not to return to patrol pending Roth's completing an anger management class and passing a psychological examination. After months of delay, Roth was examined by Dr. John Jorden, a physician selected by the department. Dr. Jorden's report indicated that Roth "had temper and control issues" and "showed signs of unresolved grief and PTSD." Dr. Jorden did not approve of Roth's returning to active police work but indicated that he might be able to return at some point in the future.

More months passed, and Roth did not respond to letters that Chief Sims sent him. Ultimately, the department treated his failure to respond as a resignation. The district court and appellate court affirmed, thus avoiding the need to determine if Roth was denied "retention in employment" based on his service, in violation of section 4311.

Section 4313(a)(3) of USERRA provides:

(3) In the case of a person who has a *disability incurred in, or aggravated during, such service*, and who (after *reasonable efforts by the employer to accommodate the disability*) is not qualified due to such disability to be employed in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service--

(A) *in any other position* which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer; or

(B) if not employed under subparagraph (A), in a position which is the nearest approximation to a position referred to in subparagraph (A) in terms of seniority, status, and pay consistent with circumstances of such person's case.<sup>9</sup>

If Roth had reported (upon reemployment) that he was suffering from a disability incurred or aggravated during his recent period of uniformed service, the employer (Village of West Salem) would have been required to make accommodations to enable Roth to return to the police officer job. Of course, some disabilities cannot be reasonably accommodated in some kinds of jobs. A blinded veteran cannot return to the cockpit of an airliner. It is quite possible that a person who is suffering from Post-Traumatic Stress Disorder (PTSD) cannot return to a job as a police officer.

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<sup>9</sup> 38 U.S.C. 4313(a)(3) (emphasis supplied).

If Roth's PTSD precluded his return to the police officer job, even with reasonable accommodations, the employer was required to reemploy him in some other position for which he was qualified or could become qualified with reasonable employer efforts. The employer was the Village of West Salem, not just the police department. There likely were positions in the village government that Roth could have qualified for with reasonable employer efforts, but all of this discussion is moot because Roth did not report a service-sustained disability, did not request an accommodation, and did not allege a violation of section 4313(a)(3) in this lawsuit.

I think that the services and their Reserve Components need to do a better job of advising and assisting departing service members (especially those who served in heavy combat) in returning to their civilian communities and jobs.