

Update on *Angiuoni v. Town of Billerica*

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- 1.1.1.7—USERRA applies to state and local governments
- 1.1.2.1—USERRA applies to part-time, temporary, probationary, and at-will employees
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***Angiuoni v. Town of Billerica*, 999 F. Supp. 2d 318 (D. Mass. 2014).**³

In Law Review 12119 (December 2012), I discussed the case of *Angiuoni v. Town of Billerica*, 2012 U.S. Dist. LEXIS 139058 (D. Mass. July 16, 2012), *affirmed*, 2012 U.S. Dist. LEXIS 139474 (D. Mass. September 27, 2012). In that article, I promised to keep the readers informed of developments in this interesting and important case, so this article is intended to fulfill that promise.

Factual background

Joseph Angiuoni served in the United States Army Reserve (USAR) from 2003 to 2008 and was recalled to active duty and deployed. He suffered a back injury in the line of duty and was

¹ We invite the reader's attention to 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.

² 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 period, he received and responded to more than 35,000 e-mail and telephone inquiries, and he is the author of approximately 1,200 of the 1,350 articles on the SMLC website. Captain Wright is no longer employed by ROA, and he has returned to Tully Rinckey PLLC, the law firm where he worked before ROA established the SMLC in 2009. Captain Wright is continuing the SMLC on a part-time, volunteer basis, as a member of ROA. He can be reached at SWright@roa.org or by telephone at (800) 809-9448, ext. 730. Please understand that Captain Wright is a volunteer, and he may not be able to respond to your call or e-mail on the same day.

³ This is a 2014 decision of Judge Nathaniel M. Gorton of the United States District Court for the District of Massachusetts. Judge Gorton was appointed by President George H.W. Bush in 1992 and confirmed by the Senate. He graduated from Dartmouth College and was commissioned in the Navy. He served on active duty for several years, in the Pacific. After he was released from active duty, he attended Columbia Law School. The citation means that you can find this case in Volume 999 of *Federal Supplement Second Series*, and the case starts on page 318. A check in LEXIS (a computerized legal research service) shows no subsequent decision in this case. It is possible that the parties have settled and that the case is over.

honorably discharged in 2008. Under Massachusetts law⁴ Anguoni qualified as a disabled veteran. If he had successfully completed his probationary period as a police officer, he would have been entitled to preference over all of the town's other police officers, regardless of seniority, in the event of layoffs.

The basis of the plaintiff's lawsuit

Anguoni was hired by the Town of Billerica (Massachusetts) in 2009, as a probationary (rookie) police officer. He did not complete the probationary period and was fired. He sued the town in the United States District Court for the District of Massachusetts, claiming that the firing violated section 4311 of the Uniformed Services Employment and Reemployment Rights Act (USERRA)⁵, which 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,

⁴ Massachusetts General Laws, chapter 31, sections 26, 34, and 61.

⁵ 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, as part of the Selective Training and Service Act, the law that led to the drafting of millions of young men (including my late father) for World War II. I have been dealing with the VRRRA and USERRA for 33 years, as an attorney for the United States Department of Labor (DOL), as a judge advocate in the Navy and Navy Reserve, as an attorney for Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as the Director of the SMLC, and as an attorney in private practice. USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-4335).

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.⁶

The plaintiff's probationary status does not defeat his case.

Angiuoni's probationary status, at the time of the firing, in no way shields the employer from liability under USERRA. Section 4331 of USERRA⁷ 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 regulations in the *Federal Register* September 20, 2004. After considering comments received and making a few adjustments, DOL published in the December 29, 2005, *Federal Register* the final USERRA regulations. They took effect January 18, 2006. The regulations are published in Title 20, Code of Federal Regulations (CFR), Part 1002 (20 C.F.R. Part 1002). One section of the DOL regulations explains that USERRA applies to temporary, part-time, probationary, and seasonal employment positions:

§ 1002.41 Does an employee have rights under USERRA even though he or she holds a temporary, part-time, *probationary*, or seasonal employment position?

USERRA rights are not diminished because an employee holds a temporary, part-time, *probationary*, or seasonal employment position. However, an employer is not required to reemploy an employee if the employment he or she left to serve in the uniformed services was for a brief, nonrecurrent period and there is no reasonable expectation that the employment would have continued indefinitely or for a significant period. The employer bears the burden of proving this affirmative defense.⁸

How do you prove discrimination under section 4311?

⁶ 38 U.S.C. 4311 (emphasis supplied).

⁷ 38 U.S.C. 4331.

⁸ 20 C.F.R. 1002.41 (bold question in original, emphasis by italics supplied).

I believe that 99% of *meritorious* section 4311(a) cases deal with current National Guard and Reserve members. It is not hard to believe that a civilian employer would be tempted to discriminate against a serving National Guard or Reserve member, who will need to be away from work periodically for military training and service. If the individual is not currently serving, is not subject to recall, and has no recurring military training requirements, why would the employer want to discriminate against such an individual? Unlike most veterans, Angiuoni has a plausible answer to that question.

Angiuoni served in the USAR from 2002 to 2007, when he was honorably discharged with a service-connected back injury. During the eight months that he worked for the Town, he had no weekend drill or annual training requirements and he was not subject to mobilization. Nonetheless, he has made a cognizable claim that the Town fired him because of his 2002-07 active duty and his service-connected disability.

Normally, the employer's animus against a service member is based on the individual's need for time off from work for Reserve Component (RC) training and the possibility that the individual will be called to active duty or will volunteer for active duty. In this case, the animus against the plaintiff (Angiuoni) was not based on the inconvenience to the employer caused by the plaintiff's RC obligations. Rather, the animus against Angiuoni was based on the realization that if he successfully completed the probationary period Angiuoni would be entitled to preference (as a disabled veteran) over other police officers, including those who were charged with training him and evaluating his performance.⁹ The fact that the animus against the plaintiff was atypical did not make it lawful or defensible.

The Town of Billerica tried to get this case dismissed.

In 2012, the Town of Billerica tried to get Angiuoni's case dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure (FRCP). To get a case dismissed under that Rule, a defendant must show that the plaintiff is not entitled to any relief that the court can award *even if all the plaintiff's factual allegations are true*. Judge Gorton properly denied the motion to dismiss.

After discovery was completed, the defendants asked Judge Gorton to grant the defendants' motion for summary judgment under Rule 56 of the FRCP. To get a court to grant a motion for summary judgment, the moving party (usually but not always the defendant) must show that based on the facts adduced in discovery there is no way that a reasonable jury could find for the non-moving party and that the moving party is entitled to judgment as a matter of law. Judge Gorton properly denied the motion for summary judgment. The next step would have been a trial on the merits, but it is likely that the parties settled and that this case is over.

⁹ At the time that Angiuoni worked for the Town of Billerica, the town was having serious budget difficulties, and all police officers were very much aware that budget-based layoffs were very much a possibility.

The Chief of Police can be held personally liable under USERRA.

The plaintiff (Aniguoni) named Daniel Rosa (the Chief of Police) as a defendant in this case, in addition to the Town of Billerica. Judge Gorton refused to dismiss Rosa as a defendant, based on USERRA's definition of "employer." That definition includes "a *person*, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities."¹⁰ Because the Town of Billerica had delegated employment-related responsibilities to the Chief of Police, that individual (Rosa) could conceivably be held personally responsible for violating USERRA.

¹⁰ 38 U.S.C. 4303(4)(A)(i) (emphasis supplied).