

LAW REVIEW 15073¹

August 2015

Recent Favorable USERRA Case from Massachusetts

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1.1.1.7—USERRA applies to state and local governments

1.2—USERRA forbids discrimination

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

***Kane v. Town of Sandwich*, 2015 U.S. Dist. LEXIS 108973 (D. Mass. Aug. 18, 2105).**³

Factual background

Timothy J. Kane is a Master Sergeant (E-7) in the Air Force Reserve. He is not a member of the Reserve Officers Association (ROA), but he is certainly eligible, and we are trying to sign him up.

Kane has been a police officer for the Town of Sandwich in Massachusetts since 2006. In 2008, he took the Civil Service Sergeant's Examination (CSSE) offered by the Civil Service Commission of the Commonwealth of Massachusetts, and he had the highest score that year among Town of Sandwich police officers.

In January 2011, Kane learned that he would likely be called to active duty by the Air Force in May of that year, and he immediately shared that information with his employer. As expected, he was called to active duty in May, and he deployed to Iraq, where he was wounded. His active duty assignment was extended by his recovery.

Kane's lawsuit and his claims

Kane filed suit against the Town of Sandwich in the United States District Court for the District of Massachusetts, making claims against the town under section 4311 (discrimination) and

¹ We invite the reader's attention to www.servicemembers-lawcenter.org. You will find about 1,400 "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.

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³ This scholarly decision should be "officially" published in *Federal Supplement, Third Series*, the series of volumes where Federal District Court decisions are officially published. The decision was written by Judge Denise J. Casper of the United States District Court for the District of Massachusetts. She was appointed by President Obama and confirmed by the Senate in 2010. She has her bachelor's degree from Wesleyan University (1990) and her law degree from Harvard (1994).

section 4312 (reemployment) of the Uniformed Services Employment and Reemployment Rights Act (USERRA)⁴ as well as state law claims under statutes enacted by the Commonwealth of Massachusetts and state common law claims.⁵ The Town of Sandwich asked Judge Casper to dismiss Kane's state law claims, but she properly refused to do so.

Section 4312 claim (reemployment)

As I have explained in Law Review 1281 and other articles, a person returning from a period of uniformed service is entitled to reemployment under USERRA if he or she meets five simple conditions:

- a. Left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services.
- b. Gave the employer prior oral or written notice.
- c. Has not exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to that specific employer relationship.⁶
- d. Has been released from the period of service without having received a disqualifying bad discharge from the military.⁷
- e. After release from the period of service, has made a timely application for reemployment.⁸

The record makes clear beyond reasonable dispute that Kane met these five conditions when he returned from active duty. Judge Casper correctly granted Kane's motion for partial summary judgment on his reemployment claim.

⁴ USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35).

⁵ Section 4302(a) of USERRA provides: "Nothing in this chapter 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." 38 U.S.C. 4302(a). If you have a civil case in federal court, based on a federal law like USERRA, and you have closely related state law claims, you can bring your state law claims, along with your federal law claims, in federal court, under the "supplemental jurisdiction" of the federal courts. See 28 U.S.C. 1367(a). See also *Fryer v. A.S.A.P. Fire & Safety Corp.*, 658 F.3d 85 (1st Cir. 2011). The 1st Circuit is the federal appellate court that sits in Boston and hears appeals from district courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island. I discuss *Fryer* in detail in Law Review 1173 (September 2011). In a case like this, state law (statutory or common law) may give the claimant additional remedies (like punitive damages) that are not available under USERRA.

⁶ Please see Law Review 201 (August 2005) for a detailed discussion of what counts and what does not count in exhausting an individual's five-year limit.

⁷ In her opinion, Judge Casper incorrectly stated that the returning service member must have received an "honorable discharge." That is not correct. The requirement is that the service member *not have received* one of the disqualifying bad discharges enumerated in section 4304 of USERRA, 38 U.S.C. 4304. A person with less than fully satisfactory military service, but who did not receive one of the enumerated disqualifying discharges, is entitled to reemployment under USERRA. See *Petty v. Nashville-Davidson County Municipal Government*, 538 F.3d 431 (6th Cir. 2008), *cert. denied*, 556 U.S. 1165 (2009). I discuss *Petty* in detail in Law Review 1275.

⁸ After a period of service of 181 days or more the person has 90 days to apply for reemployment. See 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

Section 4311 claim (discrimination)

In early 2011, shortly after he had informed the town that he expected to be called to active duty in May 2011, Kane sought permanent promotion to Sergeant in the Town of Sandwich Police Department. Although he had the highest score on the most recent CSSE, he was not selected, and Joshua Bound was selected in his stead, despite having a lower examination score.⁹ Kane asserted that the selection of Bound over Kane for Sergeant 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.

⁹ Kane complained also about his non-selection for three other opportunities in the police department. These claims were adjudicated under the same legal standards.

(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.¹⁰

In her opinion, Judge Casper wrote as follows concerning Kane's section 4311 claims:

USERRA prohibits employment discrimination based on military status. [38 U.S.C. § 4301](#). An employer may not deny a member of a uniformed service "initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership." *Id.* [§ 4311\(a\)](#). Massachusetts law also prohibits an employer from denying "initial employment, reemployment, retention in employment, promotion or any benefit of employment to a person who is a member of, applies to perform, or has an obligation to perform, service in a uniformed military service of the United States, including the National Guard, on the basis of that membership, application or obligation." [Mass. Gen. L. c. 151B, § 4\(1D\)](#).

USERRA discrimination claims require a "two-pronged burden-shifting analysis." [Velázquez-García v. Horizon Lines of P.R., Inc., 473 F.3d 11, 17 \(1st Cir. 2007\)](#). Under this standard, a plaintiff bears the initial burden to show "that military service was 'a motivating factor'" behind the employer's adverse action. *Id.* (quoting [38 U.S.C. § 4311\(c\)](#)) (emphasis in original). As a "motivating factor," military service need not be "the sole cause of the adverse employment action." [Kelley v. Maine Eye Care Associates, P.A., 37 F. Supp. 2d 47, 54 \(D. Me. 1999\)](#) (citing [Robinson v. Morris Moore Chevrolet-Buick, Inc., 974 F. Supp. 571, 575 \(E.D. Tex. 1997\)](#)); see [Velázquez-García, 473 F.3d at 17](#). Instead, a plaintiff needs only to show that his military service was "one of the factors that a truthful employer would list if asked for the reasons for its decision." [Kelley, 37 F. Supp. 2d at 54](#). Thus, military service is a motivating factor if the employer "'relied on, took into account, considered, or conditioned its decision' on the employee's military-related absence or obligation." [Erickson v. U.S. Postal Serv., 571 F.3d 1364, 1368 \(Fed. Cir. 2009\)](#) (quoting [Petty v. Metro. Gov't of Nashville-Davidson Cnty., 538 F.3d 431, 446 \(6th Cir. 2008\)](#)).

The factual question of discriminatory motivation or intent may be proven by either direct or circumstantial evidence." [Sheehan v. Dep't of Navy, 240 F.3d 1009, 1014 \(Fed. Cir. 2001\)](#). A plaintiff may offer a variety of evidence to show discriminatory motivation, including "proximity in time between the employer's military activity and the adverse employment action, inconsistencies between the proffered reason and other actions of the employer, an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses." [Conners v. Billerica Police Dep't., 679 F. Supp. 2d 218, 226 \(D. Mass. 2010\)](#) (quoting [Sheehan, 240 F.3d at 1014](#)) (internal quotation marks omitted).

Once a plaintiff meets his initial burden, the burden shifts to the employer. The

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

employer bears the burden to prove by a preponderance of the evidence that the adverse employment action "would have been taken" regardless of the employee's military status or service. [Velázquez-García, 473 F.3d at 17](#) (quoting [38 U.S.C. § 4311\(c\)](#)) (internal quotation mark omitted). Thus, unlike the [McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 \(1973\)](#), burden-shifting standard in Title VII cases, USERRA places the burden on the employer to show that the stated reason was not a pretext for discrimination. [Velázquez-García, 473 F.3d at 17](#).

Here, Kane has met his initial burden of showing that his military status was a motivating factor in the Town's refusal to promote him over a three-year period. First, a jury could infer that the Town consistently declined to promote Kane because it disliked having to spend more money to cover the absences of officers on military leave. Chief Wack, who wielded significant influence over all of Kane's promotions, has publicly complained that his officers' military service was straining the budget. D. 48 ¶ 11; D. 52 ¶ 11.

Second, a jury could also infer that the Town improperly considered his military status based on the close temporal proximity between Kane's military activities and the Town's adverse employment actions. Kane sought his first promotion in early 2011, around the same time he informed the Town that he would soon head to Iraq. D. 38 ¶¶ 17, 35; D. 49 ¶¶ 17, 35. Two months later, and two months before Kane's deployment, the Town denied Kane the promotion to permanent sergeant, despite that Kane scored higher on his Sergeant's Exam than Bound, who received the position. D. 48 ¶ 31; D. 52 ¶ 31.

Summary

Kane has survived the employer's summary judgment motion and has achieved partial summary judgment on some of his claims. This case will likely go to trial in late 2015 or early 2016, and the prospects look good for Kane. I urge the Town of Sandwich to stop throwing good money after bad and to settle.

I congratulate attorney Joseph Napiltonia (a life member of ROA) for his imaginative, diligent, and effective representation of this and other USERRA plaintiffs. We will keep the readers advised of developments in this interesting and important case.