



N.J. Human Resources Law Alert

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Sean R. Kelly, Esq. and DanaLynn Colao, Esq., Co-Editors
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Article Author: Sean R. Kelly, Esq.

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U.S.E.R.R.A. PROTECTS ONLY AGAINST DISCRIMINATION BASED ON MILITARY SERVICE, NOT MILITARY DISABILITY

A federal district court in New Jersey recently issued two decisions in a single case that are favorable to employers concerning the obligations imposed under the Federal Uniformed Services Employment and Reemployment Rights Act (USERRA).

In *Carroll v. Delaware River Port Authority*, 13-cv-02833 (D.N.J. July 29, 2014), *reconsideration denied* (March 2, 2015), the court held that although USERRA prohibits an employer from discriminating against a returning veteran based on his military service, the employer is not obligated to re-employ a veteran if the veteran suffers from a disability that prevents him from performing the essential tasks of his former job – even if the veteran incurred that disability in the course of his military service.

USERRA, 38 U.S.C. § 4311(a), generally requires an employer to re-employ a returning veteran in the position he held before his military service. In this case, the employee had worked for the Delaware River Port Authority as a police officer before being called to active military duty in Iraq. He was injured in combat, returned to the U.S., and determined by the Social Security Administration to be totally disabled and eligible for benefits.

After several years of separation from the Port Authority, and notwithstanding his continuing disability, the employee applied for a promotion to the position of sergeant with the Port Authority police department. The Port Authority declined his application in light of the employee's physical inability to perform the duties of the job.

The employee sued the Port Authority in federal court, claiming that the Port Authority had violated his USERRA rights on three separate occasions. The employee did, however, admit that he would be unable to perform the job responsibilities of the job for which he was applying until he completes a program of reconstructive surgery on his shoulder for an injury he suffered during his military service.

The employee moved for partial summary judgment in his favor on the claim arising out of one particular instance of alleged discrimination – *i.e.*, the decision not to promote him. The federal district court issued its initial decision denying that motion in July 2014, and issued a more detailed decision in March 2015 in response to the employee’s motion for reconsideration.

The court explained that “claims of discrimination based on a disability arising from military service are not cognizable under USERRA.” In reaching that conclusion, the court rejected the employee’s argument that “USERRA does not require him to plead or prove that he was ‘qualified’ for the positions he sought.” To the contrary, the court held that the employee’s physical abilities “*are* relevant to the question of whether the employer acted for a nondiscriminatory reason.”

The court further explained that “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.” This is because USERRA prohibits discrimination based on “performance of service”, “service in a uniformed service”, and “performance of duty in a uniformed service”; the statute does not prohibit discrimination based on disability.

The court therefore denied the employee’s motion for partial summary judgment, because “a reasonable juror could find that Defendant did not select Plaintiff for promotion because of his absences connected to his service-related disability, which, this Court holds, is not actionable under USERRA.”

The Takeaway

As a veteran disabled in combat, the former employee in this case would likely have the sympathy of the jury if the case were to go to trial. However, before a case reaches trial, both the claims and the defenses must be adequate to survive the careful scrutiny of a judge on a motion for summary judgment.

Here, the former employee moved for partial summary judgment because he believed USERRA protected him as a disabled veteran, and that there was therefore no legal merit to the Port Authority’s defense based on his disability. The judge’s two decisions explain that the law is otherwise, and that the employee’s physical ability to perform the essential functions of the job is indeed an appropriate factor for the employer to consider.

If you have questions about employment discrimination claims, please contact [Sean R. Kelly](#) or [DanaLynn Colao](#).

About the Co-Editors

For over 30 years, [Sean R. Kelly](#) has focused his practice on counseling employers and defending employment cases, and has successfully tried many employment cases to verdict. He is certified by the Supreme Court of New Jersey as a Civil Trial Attorney, has been repeatedly included in New Jersey Monthly Magazine’s list of New Jersey “Super Lawyers,”

holds the highest rating awarded by the Martindale-Hubbell Lawyers Directory, has been named a Master of two separate American Inns of Court, and is included on the New Jersey Superior Court roster of court-approved mediators.

[DanaLynn Colao](#) focuses her practice on business litigation with an emphasis on employment issues. She counsels and provides training for clients on a wide array of issues that arise in the workplace including medical leaves of absence, wage and hour claims, employment agreements and non-compete agreements. Strategic thinking and affirmative measures enable DanaLynn to significantly reduce potential liability for her clients. DanaLynn was selected to the *New Jersey Law Journal's* list of leading lawyers in the "Forty Under 40" selection and she has been listed since 2009 in NJ Super Lawyers.

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