LAW REVIEW 0611

Does USERRA Provide for Interest on Back Pay Awards?

By CAPT Samuel F. Wright, JAGC, USNR

Q: I was on active duty for five years, from June 1995 to June 2000, when I was released from active duty under honorable conditions. I gave my employer prior written notice before leaving my job in June 1995, and I made a proper and timely application for reemployment on Sept. 1, 2000, within the 90-day time limit. I did not exceed the five-year time limit on the duration of my periods of uniformed service, relating to that employer relationship. I was entitled to reemployment in September 2000. The employer refused to reemploy me because my job had been filled in my absence, and the employer was quite satisfied with the new employee.

I complained to the Veterans' Employment and Training Service, U.S. Department of Labor (DOL-VETS) in October 2000. Finally, in early 2006, DOL-VETS seems to be bringing this case to resolution. The employer has finally agreed to reemploy me, 5 1/2 years late, and to compensate me for the pay and benefits I lost because of the long delay in complying with the Uniformed Services Employment and Reemployment Rights Act (USERRA). The DOL-VETS investigator has computed what I would have earned from this employer, pay period by pay period, if the employer had properly reemployed me in September 2000, as required by law. The investigator subtracted from the back pay award the pay that I have earned from the jobs that I have found on my own and the short periods of additional military duty that I have performed since September 2000.

The employer, through its attorney, has agreed to pay this substantial back pay award but has balked at paying interest on the back pay. The employer's attorney claims that USERRA does not mention interest and does not authorize an employer to pay interest on a back pay award. Is the attorney correct?

A: No. I invite your attention to my Law Review 206, a comprehensive article on USERRA remedies. I mention interest in that article, but I have decided to write a separate article on interest, because I have received several inquiries on this point.

"The court may require the employer to compensate the person [claimant] for any loss of wages or benefits suffered by reason of the employer's failure to comply with the provisions of this chapter" [38 U.S.C. 4323(d)(1)(B)]. Paying you in 2006 without interest for a loss that you suffered beginning in 2000 does not come close to compensating you for the loss, for two reasons. First, inflation has degraded some of the value of that pay. Second, the employer's USERRA violation caused you to lose the opportunity to invest the money and earn interest. Economists refer to this concept as the "time value of money."

It is true that section 4323(d)(1)(B) does not specifically mention interest, but Congress did mention interest in another provision in the same subsection. "A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section" [38 U.S.C. 4323(d)(3)]. It is clear that Congress intended that interest would be routinely awarded in cases like yours, just as it is routinely awarded in employment cases generally.

As I have explained in several published articles, Congress enacted USERRA in 1994 as a complete rewrite of the Veterans' Reemployment Rights (VRR) law, which can be traced back to 1940. While employed at DOL as an attorney, I largely drafted USERRA, along with one other DOL attorney (Susan M. Webman). The whole point of USERRA was to improve upon the VRR law's protections, not to diminish them. Congress was certainly aware that prejudgment interest was routinely awarded in VRR cases, and in employment law cases generally.

"[T]he only way the wronged party can be made whole is to award him interest from the time he should have received the money," stated the ruling in *Louisiana & Arkansas Railway v. Export Drum Co.,* 359 F.2d 311, 317 (5th Cir. 1966), cited in *Hembree v. Georgia Power Co.,* 637 F.2d 423, 430 (5th Cir. 1981). See also *Reopell v. Commonwealth of Massachusetts,* 936 F.2d 12 (1st Cir. 1991).

"Thus, in furtherance of our duty to liberally construe the Act for those 'called to the colors' we hold that the district court's denial of prejudgment interest, based upon AMC's [the defendant employer's] apparent 'good faith' and 'closeness of the liability question' without any apparent regard for the policy to 'make whole' a returning veteran, rises to an abuse of discretion" [*Hanna v. American Motors Corp.,* 724 F.2d 1300, 1311-12 (7th Cir.), *cert. denied,* 467 U.S. 1241 (1984)].

I have also found a much more recent case, under USERRA, wherein interest was awarded as part of the make-whole remedy. "Prejudgment interest serves to compensate for the loss of money due as damages from the time a claim accrues until judgment is entered, thereby achieving full compensation for the injury these damages are intended to redress. … [T]o the extent that the damages awarded to the plaintiff represent compensation for lost wages, it is ordinarily an abuse of discretion not to include prejudgment interest. … A court may not decline to award interest by reason of a belief that the jury's award is excessively generous" [*Fink v. City of New York,* 129 F. Supp. 511, 525-26 (E.D.N.Y. 2001) (internal citations omitted)].

In view of the great delay in resolving your case, interest is an essential part of the make-whole remedy, in my view.

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