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KIA and USERRA: A claim can survive the death of the plaintiff

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CATEGORY: USERRA—Enforcement

I have found a recent Uniformed Services Employment and Reemployment Rights Act (USERRA) case that is both interesting and important. *McLaughlin v. Newark Paperboard Products*, 2006 U.S. Dist. LEXIS 62936 (W.D. Pa. Sept. 5, 2006).

In September 1998, Newark Paperboard Products hired Michael E. McLaughlin, a lieutenant colonel in the Pennsylvania Army National Guard, as manager of its plant in Greenville, Pa. LTC McLaughlin worked for Newark Paperboard continuously until he was fired Aug. 27, 2001, when he returned to work following two weeks of National Guard duty.

LTC McLaughlin sued Newark Paperboard on Oct. 28, 2004, alleging that the firing violated section 4311 of USERRA (38 U.S.C. 4311) because it was motivated at least in part by his activities and obligations in the National Guard. Interestingly, LTC McLaughlin was represented by Assistant U.S. Attorney Christy C. Wiegand of the U.S. Attorney"s Office in Pittsburgh. We are finally seeing the U.S. government provide free legal representation in some USERRA cases as Congress intended. I found 11 published USERRA cases decided in 2002 and 2003, and in all 11 cases the plaintiff was represented by private counsel, not by the U.S. Department of Justice (see Law Review 127 at www.roa.org).

LTC McLaughlin was on active duty in Iraq from June 2005 until Jan. 5, 2006, when he was killed in action. On March 3, 2006, the court ordered the substitution of Tamera J. McLaughlin—his widow and administratrix of his estate—as the plaintiff.
As Congress intended, this case was not put on hold when LTC McLaughlin went to Iraq. USERRA's legislative history includes the following statement: "If the employee is unlawfully discharged under the terms of this section [section 4311] prior to leaving for military service, such as under the Delayed Entry Program, that employee would be entitled to reinstatement for the remainder of the time the employee would have continued to work plus lost wages. Such a claim can be pursued before or during the employee's military service, and processing the claim should not await completion of the service, even if for only lost wages" (House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News*, pages 2456-57; see Law Review 35 at www.roa.org).

LTC McLaughlin's death rendered moot any discussion of his right to reemployment with Newark Paperboard, but it does not render moot his claim for back pay for the period between his firing and his mobilization. See Law Reviews 206 and 0611 for a comprehensive discussion of the computation of damages under USERRA.

Newark Paperboard filed a motion for summary judgment, contending the plaintiff had not established a *prima facie* case that LTC McLaughlin's military service was a motivating factor in the decision to fire him. Newark Paperboard also argued that it had established, sufficiently for summary judgment, that it would have terminated LTC McLaughlin regardless of his military service to save the plant's relationship with a major customer, American Brass. Newark Paperboard's "customer preference" defense presents an interesting issue. As I explained in Law Review 0609, customer preference is never a valid defense to a violation of U.S. equal employment opportunity laws, including USERRA.

Judge Terrence F. McVerry of the U.S. District Court for the Western District of Pennsylvania denied the motion for summary judgment, pointing out the proximity in time between LTC McLaughlin's military service and the firing; in fact, the firing was communicated to him the day he returned from his two-week Guard training. The judge also pointed to a history of statements by LTC McLaughlin's Newark Paperboard supervisors, expressing irritation about his time away for Guard service.
Furthermore, Judge McVerry held, "The absence of direct evidence of improper motivation is not fatal to the plaintiff's case," citing *Tagget v. Eaton Corp.*, 2001 U.S. Dist. LEXIS 18389 (E.D. Mich. 2001). (See Law Review 0701 in THE OFFICER, January 2007, and at www.roa.org.) Judge McVerry also cited and relied upon *Maxfield v. Cintas*, 427 F.3d 544 (8th Cir. 2005), a case I discuss in detail in Law Review 205.

The case did not go to trial, because the parties reached a settlement, as frequently happens in cases of this kind—it is referred to as "settling on the courthouse steps." I don't know the amount of money that changed hands, because that figure is covered by a confidentiality agreement, but suffice it to say that Mrs. McLaughlin is satisfied. ROA congratulates the U.S. Department of Justice and the U.S. Attorney for the Western District of Pennsylvania for their excellent work in this case.

In another new case, the U.S. Court of Appeals for the 9th Circuit overturned a summary judgment for the defendant employer granted by the district court. The employer claimed, and the district court agreed, that the plaintiff (a Marine Corps Reservist) had lost his job in a reduction-in-force (RIF) and that there was no material issue of fact. The appellate court reversed, pointing to statements by the plaintiff's supervisors, prior to the RIF, to the effect that the plaintiff was "skating on thin ice" with management because he insisted on taking leave to "play soldier" (*Simmons v. Herbalife International of America*, 2005 U.S. App. LEXIS 12323; 9th Cir. June 14, 2005). The appeals court also held that a question of an employer's intent is always a question of fact that cannot be decided on summary judgment based solely on the employer's declarations, citing *Gifford v. Atchison, Topeka and Santa Fe Railroad*, 685 F.2d 1149, 1156 (9th Cir. 1982).

The point is that it is possible to make a prima facie case of a section 4311 violation without an employer admission or a "smoking gun." Employers are becoming more sophisticated and "lawyered up." We are seeing more cases where there is no direct evidence that a decision to

fire or lay off an employee was motivated by the employee's service in the National Guard or Reserve. Competent and diligent counsel can establish the improper motivation by circumstantial as well as direct evidence.

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