

LAW REVIEW 713
(March 2007)

**Willful USERRA Violation:
Judge determines company's denial of wrongdoing is not credible.**

By CAPT Samuel F. Wright, JAGC, USNR

CATEGORY: USERRA Generally

PepsiAmericas of Minneapolis, a large bottler of Pepsi and other products, hired Kevin Koehler in June 2000 as a delivery driver in the Cincinnati area. He signed a direct deposit authorization for his paycheck. Shortly after the terrorist attacks of Sept. 11, 2001, Mr. Koehler enlisted in the Army Reserve. Because he had no prior military experience, Mr. Koehler was ordered to 24 weeks of initial active duty training from March to August 2002.

PepsiAmericas' published policy is to make up the difference in pay for its employees in the National Guard or Reserve called to active duty. The company, however, initially refused that differential pay for Mr. Koehler's initial active duty training, insisting its policy did not apply to a person who "voluntarily enlisted" in the armed forces after going to work for the company.

The company assesses points for unexcused absences with termination resulting from an employee's accumulation of eight points. During the early months of 2003, Mr. Koehler accumulated 6.5 points, some due to absences to perform Army Reserve training.

In March 2003, Mr. Koehler filed a grievance with PepsiAmericas. After the company failed to act on the grievance, he filed a formal complaint with the U.S. Department of Labor's Veterans' Employment and Training Service (DOL-VETS). The complaint dealt with Mr. Koehler's periods of absence during 2003 and the company's failure to pay him differential pay during the initial active duty training. A DOL-VETS investigator contacted PepsiAmericas' human relations director at its Cincinnati plant.

The parties attempted to resolve their differences at a meeting June 17, 2003. The meeting included Mr. Koehler, a union representative, and a captain from the Reserve unit. For PepsiAmericas, Mr. Koehler's direct supervisor and two other company officials attended. DOL-VETS did not send a representative, and Mr. Koehler did not have a lawyer at the time.

U.S. District Court Judge Michael R. Barrett found that the meeting resulted in an agreement (*Koehler v. PepsiAmericas*, 2006 U.S. Dist. LEXIS 48726, S.D. Ohio July 18, 2006). Mr. Koehler's employment record was to have two absent days expunged; he would be given a floating holiday; and he would receive his appropriate differential pay for his initial active duty training. In turn, Mr. Koehler was to dismiss his complaint with DOL-VETS, which he did shortly after the meeting.

The differential pay was computed at \$16,962.58, or \$10,820.22 after tax withholding. Pepsiamericas deposited the latter amount in Mr. Koehler's bank account on July 3, 2003. Four days later, the money was withdrawn from the account at the company's request and without Mr. Koehler's authorization. The court characterized this action as an unlawful conversion of Mr. Koehler's money.

"Upon learning of the withdrawal, Plaintiff contacted [the HR director's] office and spoke to her subordinate . . . who informed Plaintiff in language that approximated ,we have changed our minds; you can let your attorney speak to our attorney," Judge Barrett found. Mr. Koehler then retained an attorney and sued.

After a two-day trial without a jury, Judge Barrett found for Mr. Koehler and awarded damages of \$16,962.58, the amount of the differential pay that should have been paid in 2002. According to Section 4323(c)(1)(A)(iii) of the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4323(c)(1)(A)(iii), liquidated damages in the amount of the actual damages can also be awarded if the court finds that the employer's violation was willful; Judge Barrett did so, awarding an additional \$16,962.58, thus doubling the award.

In Law Review 0642 (December 2006), I discussed the doctrine of "pendent jurisdiction," which promotes judicial economy: It would be wasteful to force Mr. Koehler to bring two lawsuits, arising out of essentially the same facts. Exercising pendent jurisdiction to decide Mr. Koehler's claims under Ohio law, the court awarded substantial additional damages: "Based on the clear and convincing evidence admitted at trial, the Court finds that Pepsi's actions demonstrate malice, egregious fraud, oppression and insult and the Court awards punitive damages in the amount of \$50,000." The judge also ordered the Pepsiamericas to pay Mr. Koehler's attorney's fees and litigation expenses, in accordance with 38 U.S.C. 4323(h).

As is typical in civil cases, there was sharply conflicting testimony, and the judge (as finder of fact) was required to make credibility determinations. He determined that Mr. Koehler and Army Reserve capatin accompanying him to the meeting were credible witnesses but that the Pepsiamericas employees were not.

The key lesson here is that it is possible to win a USERRA case without an employer admission of wrongdoing. Mr. Koehler was fortunate to have diligent and competent counsel, William Henry Blessing of Cincinnati.

Military title shown for purposes of identification only. The views expressed herein are the personal views of the author and not necessarily the views of the Department of the Navy, the Department of Defense, or the U.S. government.