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You Must Make an Effort to Mitigate Your Damages

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CATEGORY: USERRA—Generally

I have found another new and instructive Uniformed Services Employment and Reemployment Rights Act (USERRA) case. *Carpenter v. Tyler Independent School District*, 429 F. Supp. 2d 848 (E.D. Tex. 2006). David Carpenter, an Air Force Reservist, was employed as a teacher for the Tyler Independent School District (TISD). He was away from work, for short periods of Air Force Reserve service, several times during late 2003 and early 2004. When his contract with the school district expired at the end of the spring semester, TISD did not offer him a new contract.

Mr. Carpenter retained private counsel and sued, contending that the employer improperly considered his Air Force Reserve service in deciding not to renew his contract. The fact that the district waited until the end of the contract to terminate employment in no way insulates the decision from scrutiny under USERRA. As I explained in Law Review 0616, USERRA protects an employee at will, who has no job tenure at all, so it certainly protects an employee whose contract is not extended at the end of its term. If the evidence establishes that the employer considered the individual's military activities and obligations in deciding not to renew the contract, then the non-renewal is a violation of USERRA, unless the employer can prove that it would not have renewed the contract even if the individual had not been a member of a uniformed service.

The U.S. district court for the Eastern District of Texas conducted a two-day jury trial in March 2006. In response to written questions propounded by the judge, the jury found that the TISD had discriminated against Mr. Carpenter because of his Air Force Reserve service, but that Mr. Carpenter had suffered no financial damage as a result of the violation.

The judge seemed troubled by the jury's verdict but refused to overturn it, finding it impossible to say there was no evidence to support the verdict. After losing his TISD job, Mr. Carpenter had a duty to mitigate his damages by seeking other employment (please see Law Review 206 at www.roa.org). The jury apparently concluded that Mr. Carpenter had made no effort to find other work and that if he had made a reasonable effort he would have found comparable employment for September 2004 (the start of the next school year).

Mr. Carpenter did not go home completely empty-handed. The district judge, exercising his inherent equity powers, ordered TISD to pay \$45,600 in "front pay"—what he would have earned in salary for the next school year. It will be interesting to see if this front pay award holds up on appeal.

Let this case be a lesson: if you lose your job, you need to start looking for another job promptly. Some folks think that looking for another job moots the USERRA claim—quite the contrary, not looking for another job can adversely affect your claim. If the new job you find pays less than the job you unlawfully lost, you are entitled to back pay for the difference. Even if the new job pays more, you are entitled to back pay for the interim period, before you found the new job.

I recognize that in many cases you will not find another job right away. I strongly recommend that you make a detailed record of all your efforts to find employment. If you are later faced with an employer argument that you failed to make a proper effort to mitigate your damages, you can use that record to counter the employer's argument.

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