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Another Recent Case on the Burden of Proof in USERRA

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Velazquez-Garcia v. Horizon Lines of Puerto Rico Inc., 2007 U.S. App. LEXIS 114 (1st Cir. Jan. 4, 2007).

Horizon Lines of Puerto Rico Inc., the defendant, is in the business of ocean shipping and operates a marine terminal in San Juan, Puerto Rico. Carlos Velazquez-Garcia, the plaintiff, went to work for CSX Lines, the defendant's predecessor, in September 1999 and remained at the terminal after Horizon Lines took over. As a middle manager, Mr. Velazquez-Garcia had supervisory authority over the line's stevedores.

He enlisted in the Marine Corps Reserve in December 2002 and immediately reported for six months of basic training. He returned to work after his basic training but continued to report to the Marine Corps one weekend per month and two weeks per year. Because Mr. Velazquez-Garcia was a shift employee and frequently had to work weekends, Horizon Lines had to adjust his work schedule around his military training schedule.

In his deposition, the plaintiff testified that his superiors at Horizon often complained and pressured him about the difficulty of rescheduling his shifts. He also testified that he was frequently the butt of jokes at work, being called "GI Joe," "little lead soldier," and "Girl Scout."

Prior to 2001, Horizon paid its stevedores their daily wages in cash, but in that year the company changed its procedures and started paying the stevedores by check instead. Seeing a business opportunity, Mr. Velazquez-Garcia started in about February 2004 a side business wherein he cashed these checks for the stevedores for a fee. He did this almost exclusively during his off-duty hours, and near but not on company property; but in his deposition he acknowledged cashing "one or two" checks while on duty.

On Sept. 21, 2004, seven months after Mr. Velazquez-Garcia began his check-cashing side business, Horizon's operations manager observed him cashing checks near the marine terminal and advised other Horizon managers. The firing came three days later. The termination letter did not state a reason, but Mr. Velazquez-Garcia was told that his check-cashing side business was in violation of Horizon's code of business conduct. The plaintiff was given no warnings or other prior discipline, and he had an otherwise clean record as an employee.

Mr. Velazquez-Garcia filed suit against Horizon in the U.S. District Court for the District of Puerto Rico, alleging that the firing constituted illegal discrimination for his military service, in violation of section 4311 of the Uniformed Services Employment and Reemployment Rights Act (USERRA). Horizon moved for summary judgment, which the district court granted, holding that the plaintiff had not shown sufficient discriminatory animus and had not shown that the stated reason for the firing (the check-cashing service) was mere pretext.

The U.S. Court of Appeals for the First Circuit overturned the summary judgment, holding that the plaintiff had presented enough evidence to avoid a summary judgment for the defendant. This means the case will go back to the district court for a trial, potentially by a jury. It is also possible that the parties will reach a settlement and avoid a trial.

It appears that the people who made jokes about the plaintiff's Marine Corps service were not the people who participated in the decision to fire the Mr. Velazquez-Garcia. Said the court of appeals: "Here, the remarks that Velazquez testified to were not made by those who participated in the decision to fire him, and this does limit their probativeness. See *McMillan,* 140 F.3d at 301. But at least one such speaker, Juan Carrero, was shift marine manager and appears to be superior to Velazquez. Carrero was also in part responsible for scheduling, which was the source of Horizon's problems with Velazquez. Thus, his remarks could carry some weight with a jury. Furthermore,

stray remarks by nondecisionmakers, while insufficient standing alone to show discriminatory animus, may still be considered 'evidence of a company's general atmosphere of discrimination,' and thus can be relevant. *Santiago-Ramos,* 217 F.3d at 55 (citing *Sweeney v. Board of Trustees of Keene State College,* 604 F.2d 106, 113 (1st Cir. 1979)). 'Such evidence ... does tend to add color to the employer's decisionmaking processes and to the influences behind the actions taken with respect to the individual plaintiff.'" *Velazquez-Garcia,* at page 5. Also, please see Law Review 0631 on harassment as a USERRA violation.

The court of appeals pointed to other evidence from which a reasonable jury might infer that the firing of Mr. Velazquez-Garcia was motivated, at least in part, by his Marine Corps Reserve service and that the stated reason for the discharge (the check-cashing service) was a pretext seized upon by the employer in an attempt to disguise the unlawful discrimination.

This is an important case about the allocation of the burden of proof under section 4311 of USERRA. I think the facts of the case should also serve as an object lesson for National Guard and Reserve personnel. If you think your employer is annoyed with you over your military-related absences from work and is looking for an excuse to fire you, the last thing that you want to do is give the employer any such excuse. My advice to National Guard and Reserve personnel is that in your relationship with your civilian employer you should strive for excellence and avoid any conduct that might be claimed, even unreasonably, to constitute grounds for discharge. See Law Reviews 150 and 0702, available at www.roa.org.