

LAW REVIEW 750

(October 2007)

1.19: USERRA Enforcement

Target Hit

National Guard member wins USERRA case plus tort damages under state law.

By CAPT Samuel F. Wright, JAGC, USN (Ret.)

Patton v. Target Corp., 2007 U.S. Dist. LEXIS 20712 (District of Oregon March 21, 2007).

In August 2000, MAJ James Patton, ARNG, was hired by Target Corp. as a warehouse group leader (GL) at the company's distribution center in Albany, Ore. In 2002, Target promoted Mr. Patton to GL-II rank and assigned him as a production controller at the distribution center. The next step up in the Target rank structure is senior group leader (SGL), and as late as April 2003 Mr. Patton's supervisors at Target told him he was progressing well and was "promotable" to the SGL rank.

Exercising his rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA), Mr. Patton took leave from his Target job to participate in National Guard training from June 13 to July 6, 2003. According to court records, as soon as he reported back to work on Monday, July 7, he was directed to report to the office of his Target supervisor and was informed that he had been demoted from GL-II to GL because he had not "progressed" as a GL-II. The supervisor also told Mr. Patton that the demotion was a setback and that the supervisor "fully expected" Mr. Patton to resign.

Mr. Patton sent out an e-mail informing about 35 Target employees (those with whom he had been doing business) of the demotion and that e-mails sent to him in his former GL-II position should be sent to the new person in that position at the Albany distribution center. The text of the e-mail is included in the court's published decision. The e-mail is professional and matter-of-fact in tone-it does not make allegations against Target or insinuate that the demotion was a violation of law. Nonetheless, Target asserted that the e-mail was the reason for firing Mr. Patton.

Shortly after the demotion, Mr. Patton contacted the National Committee for Employer Support of the Guard and Reserve (ESGR), the Department of Defense organization whose mission is to gain and maintain the support of civilian employers for the men and women of the National Guard and Reserve. An ESGR representative contacted the Target supervisor on July 10, but the supervisor was unresponsive and rude to the ESGR representative. The ESGR representative advised Mr. Patton to contact the U.S. Department of Labor's Veterans Employment and Training Service (DOL-VETS), and Mr. Patton did that immediately. On July 11, a DOL-VETS investigator initiated a conference call with Mr. Patton and his Target supervisor. The supervisor was upset about the "third party representation" in the employment dispute.

On July 15, Target fired Mr. Patton and escorted him out of the building by a circuitous route that led him past his former co-workers. On Dec. 11, 2003, Mr. Patton filed suit against Target in the U.S. District Court for the District of Oregon. The matter was stayed between September 2004 and July 2006 while Mr. Patton was on active duty in Iraq.

In his lawsuit, Mr. Patton alleged that demoting him and then firing him violated section 4311(a) and 4311(b) of USERRA, 38 U.S.C. 4311(a) and (b). Section 4311(a) makes it unlawful for an employer to deny a person "retention in employment" (among other things) because of the person's "obligation to perform service in the uniformed services" (among other protected factors). Section 4311(b) makes it unlawful for an employer to "discriminate in employment against or take any adverse employment action against any person because such person has (1) taken an action to enforce a protection afforded any person under this chapter." Firing Mr. Patton because he sought "third party representation" from ESGR and DOL-VETS could be a violation of section 4311(b).

Section 4311(c) of USERRA, 38 U.S.C. 4311(c), provides that a violation of 4311(a) and/or 4311(b) is established if

it is shown that one of the protected factors under those two subsections was *a motivating factor* (not necessarily the sole reason) for the employer's action. I discuss section 4311 in detail in Law Reviews 11, 35, 36, 61, 64, 122, 135, 150, 162, 198, 205, 0609, 0616, 0621, 0631, 0642, 0701, 0702, 0706, 0707, 0713, and 0731, all available at www.roa.org/law_review.

In addition to his complaint under USERRA, Mr. Patton also alleged that Target's actions constituted the tort of "wrongful discharge" under Oregon common law. As I explain in Law Review 0713, when you are properly in federal court under a federal law, you can also bring state law claims under the "pendent jurisdiction" of the U.S. District Court.

Target filed a motion for summary judgment, asserting there was "no material issue of fact" and that Target was entitled to judgment as a matter of law. On March 21, 2007, U.S. District Court Judge Anna J. Brown denied the motion for summary judgment, holding that the plaintiff (Mr. Patton) had shown sufficient facts so that a reasonable jury could rule in his favor.

With the summary judgment motion out of the way, the case proceeded to trial, and Mr. Patton won. The jury awarded Mr. Patton \$84,970 in lost wages and other economic damages, and \$900,000 in punitive damages on the state law claim. Under Oregon law, 60 percent of the punitive damages, or \$540,000, must be paid to the Oregon Crime Victims Assistance Fund.

Mr. Patton, now an ROA member, sought assistance from ESGR and DOL-VETS, but he retained private counsel to file and prosecute his case against Target. This is most fortunate. If DOL-VETS had referred this case to the U.S. Department of Justice (DOJ), in accordance with USERRA, DOJ might well have represented Mr. Patton, but DOJ would not have sought punitive damages under Oregon law. DOJ considers itself limited to USERRA remedies. In a case of this nature, the plaintiff is usually better off with private counsel, if the plaintiff can find competent counsel willing to undertake the case on a contingent fee basis. In this case, Mr. Patton was represented by Mark A. Turner of Ater Wynne LLP, in Portland, Ore.

It is unclear at press time whether Target will appeal to the U.S. Court of Appeals for the Ninth Circuit.