

LAW REVIEW 753

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1.19: USERRA Enforcement

A 'Motivating Factor'

USERRA case reiterates that military duty need only contribute to termination of employment to be a violation of the law.

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Hance v. Norfolk Southern Railway Co., 2006 U.S. Dist. LEXIS 32276, 179 LRRM 2935 (E.D. Tenn. May 17, 2006); *Hance v. Norfolk Southern Railway Co.*, No. 3:04-DV-160 (March 23, 2007).

Kelly Wayne Hance enlisted in the National Guard in December 1996 and commenced employment with the Norfolk Southern Railway Corp. (NSRC) in May 1999 as a conductor-trainee. After NSRC fired him for alleged insubordination, Mr. Hance sued NSRC in the U.S. District Court for the Eastern District of Tennessee, where Judge Thomas W. Phillips heard the case.

After discovery was conducted, NSRC filed a motion for summary judgment, contending the case should be dismissed because Mr. Hance had not presented any direct evidence that the firing was motivated by his National Guard activities. Judge Phillips denied the summary judgment motion, holding: "The absence of direct evidence of improper motivation is not fatal to the plaintiff's case."

Judge Phillips went further. "Because direct evidence rarely exists, discriminatory motivation may be reasonably inferred from a variety of factors ... [including] proximity in time between the employee's military activity and the adverse employment action, inconsistencies between the proffered reason [for the employment action] and other actions of the employer, an employer's expressed hostility toward members protected by the statute together with knowledge of the employee's military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses." Among the evidence that Mr. Hance offered in support of his case was the testimony of a union official who said Mr. Hance's supervisor had complained he "was off too much on military time."

Judge Phillips emphasized that under section 4311(c) of the Uniformed Services Employment and Reemployment Rights Act (USERRA), Mr. Hance is not required to prove that his military activities, protected by USERRA, were the *sole* reason for the discharge; it is enough for Mr. Hance to prove that his military activities constituted *a motivating factor* in the employer's decision. Judge Phillips held, "The term 'motivating factor' means that if the employer was asked at the moment of the decision what its reasons were and gave a truthful response, one of those reasons would be the employee's military position or related obligations."

In summation, Judge Phillips held that "while the plaintiff may not prevail at trial, the plaintiff's factual theories are not wholly implausible and that a rational trier of fact might resolve the issues raised by defendants' motion in favor of the plaintiff. As such, this matter will proceed to trial."

The case did proceed to trial, and on March 23 Judge Phillips ruled for Mr. Hance, ordering NSRC to reinstate him and to pay him \$352,843.93 in back pay and interest. Judge Phillips did not find the violation to have been willful and did not award liquidated damages on top of the actual damages, but he did order NSRC to pay Mr. Hance's attorneys' fees and litigation expenses.