

# LAW REVIEW 758

(November 2007)

1.19: USERRA Enforcement

## **Taking the Leap**

*Employer cover-up fools DOL, but not the jury.*

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

Gerald Delay, a staff sergeant in the Air Force Reserve, was hired by Ace Heating of Seattle in August 2000. He was called to active duty in February 2003 and served in Iraq, Afghanistan, and other countries, as an Air Force loadmaster.

SSgt Delay came off active duty after two years and made a proper and timely application for reemployment at Ace Heating. He returned to work, but the company reduced his hours to only 30 per week, whereas he had been working a full 40-hour week before he was called to the colors. He requested advice and assistance from an Air Force legal assistance attorney at McChord AFB, Wash., and the attorney sent a letter to Timothy Hayes, the owner of Ace Heating. The letter explained that Ace Heating had violated the Uniformed Services Employment and Reemployment Rights Act (USERRA) by denying SSgt Delay reinstatement into the full-time job he had before mobilization and almost certainly would have retained but for the mobilization.

Mr. Hayes fired SSgt Delay an hour after receiving the letter. SSgt Delay complained to the U.S. Department of Labor's Veterans' Employment and Training Service (DOL-VETS), which conducted an investigation. Mr. Hayes contended that he had fired SSgt Delay because of his substandard work performance and because he had rejected work assignments. Mr. Hayes submitted to DOL-VETS the Ace Heating business records of problems with SSgt Delay leading up to the firing. Those records convinced DOL-VETS that SSgt Delay was properly fired for insubordination, and the agency closed its case without action.

After DOL-VETS turned him down, SSgt Delay hired a private attorney, James Beck with the firm of Gordon Thomas Honeywell Malanca Peterson & Daheim LLP of Tacoma. He discovered that Mr. Hayes created the records only after SSgt Delay complained to DOL-VETS, and then backdated them. A tip-off was that one record was dated Feb. 29, 2005, a non-leap year.

Mr. Hayes acknowledged creating the records after-the-fact and backdating them, but he insisted they accurately reflected problems with SSgt Delay's work performance after he returned from active duty.

The jury did not buy that argument and awarded SSgt Delay \$146,000 in lost pay and economic damages, plus another \$146,000 in liquidated damages, because the jury found the USERRA violation to have been willful. The jury also awarded SSgt Delay another \$250,000 for the defamation of the fraudulent documents accusing him of insubordination and shoddy work. As of this writing, Mr. Hayes had not yet determined if he would appeal.

Ace Heating is a small business, with only eight employees. That does not matter, because the reemployment statute has never had a threshold based on company size or the number of employees. You only need one employee to be an employer for purposes of the reemployment statute. *See Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992).