

LAW REVIEW 860

(December 2008)

CATEGORY: 1.2 Discrimination Prohibited

1.4 USERRA Enforcement

Harassment Is a Cognizable Claim under USERRA

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***Dees v. Hyundai Motor Manufacturing Alabama*, 2008 U.S. Dist. LEXIS 40952 (Middle District of Alabama May 21, 2008).**

SSG Jerry Leon Dees Jr. is with the military police in the Alabama Army National Guard. He began working for Hyundai Motor Manufacturing Alabama (HMMA) in November 2005 and was fired in February 2007 for “intentional sleeping” on the job. He sued HMMA in the U.S. District Court for the Middle District of Alabama, alleging that the firing was motivated, at least in part, by his National Guard service and that the firing violated section 4311 of the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4311. In a separate count of his complaint, he alleged that HMMA violated section 4311 by means of severe and oppressive harassment by his HMMA supervisors because of his National Guard service.

SSG Dees was mobilized and deployed to Iraq twice, both times before he started working for HMMA in November 2005. During his HMMA employment, his supervisors, Greg Prater and Kevin Hughes, “began to harass Dees almost immediately upon learning about his military service. In particular, Prater required that Dees provide nonexistent military orders for Guard monthly weekend training, forbade Dees from missing work for training, made derogatory comments about the Guard in the presence of Dees and other employees, and attempted to coerce Dees’s coworkers to state, falsely, that Dees had violated company policies and procedures. Additionally, Prater and Hughes assigned Dees to difficult and dangerous work more frequently than they did the other employees. In an effort to stem the harassment, Dees asked the sergeant of his Guard unit to send a letter to HMMA’s human resources department that explained the lack of monthly military orders. The sergeant did so and also offered to confirm Dees’s presence at the weekend meetings. Instead of quelling the harassment, however, the sergeant’s letter caused the harassment to escalate.” *Dees*, at page 1.

The HMMA production manager found SSG Dees sleeping in an isolated part of the plant, while on the clock, and reported him. HMMA considers “intentional sleeping” a serious offense, meriting dismissal, and “unintentional sleeping” a less serious offense meriting discipline short of dismissal. SSG Dees was charged with intentional sleeping because it appeared, based on where he was found, that he had attempted to hide himself in an isolated part of the plant before dozing off.

HMMA filed a motion for summary judgment on SSG Dees’s lawsuit that alleged the firing was motivated by his National Guard service, and the court granted that motion. Several facts seemed to demonstrate that SSG Dees’s claim about the firing could not hold up. The supervisor who found and reported him for sleeping was not one of the supervisors who had harassed him about his Guard service. The committee that upheld the firing only discussed the facts of the sleeping and the indicia that it was intentional, not SSG Dees’s National Guard service. The company could show a history of firing employees for intentional sleeping, including employees who were not National Guard or Reserve members.

SSG Dees’s separate cause of action for the harassment fared much better. Section 4311(a) of USERRA [38 U.S.C. 4311(a)] provides that an employee may not be denied (among other things) a “benefit of employment” because of the employee’s membership in a uniformed service, application to join a uniformed service, performance of uniformed service in the past, or application or obligation to perform service in the future. Section 4303(2) [38 U.S.C. 4303(2)] defines the term “benefit of employment” broadly. The court held that the opportunity to perform one’s work without intentional and severe harassment based on having performed uniformed service is a “benefit of

employment” protected by USERRA and that SSG Dees had presented sufficient evidence to preclude granting summary judgment for the employer on the harassment count.