

LAW REVIEW 863

(December 2008)

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USERRA Applies to Salespersons on Commission

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

***Serricchio v. Wachovia Securities LLC*, 556 F.Supp.2d 99 (D. Conn. Mar. 14, 2008).**

In 2001, Michael Serricchio was doing very well financially. He worked as a financial advisor for Prudential Securities in Stamford, Connecticut. Although compensated solely by commission, he earned more than \$200,000 per year. But Mr. Michael Serricchio was also SGT Michael Serricchio, USAFR. After the terrorist attacks of Sept. 11, 2001, he was among the first Reservists called to active duty, from September 2001 until October 2003.

Through hard work over several years, Mr. Serricchio had built up a base of 237 customer accounts with assets worth many millions of dollars and generating six-figure annual commission income for Mr. Serricchio. He was called to active duty with only a few days of notice. He made arrangements with Prudential for his accounts and customers to be served by a trusted Prudential colleague.

By the time Mr. Serricchio returned from active duty two years later and applied for reemployment, his workplace had undergone major changes. Prudential sold its brokerage business to Wachovia Corp., which moved the Stamford operation to Westport, Conn. Mr. Serricchio's trusted colleague had been terminated, and all but a handful of the 237 customers had retained financial advisors with other firms. Moreover, Wachovia had changed the business model, to deal with less-wealthy and lower-volume clients via a national telephone customer service center, rather than through individual brokers.

Section 4303 of the Uniformed Services Employment and Reemployment Rights Act (USERRA) defines 16 terms used in this law, including the term "employer." That definition specifically includes the "successor in interest" to the pre-service employer. See 38 U.S.C. 4303(4)(a)(iv). Wachovia clearly qualified as the successor in interest to Prudential, and Wachovia had a duty to reemploy Mr. Serricchio—the same duty that Prudential would have had if it had still been in business. It is irrelevant that Wachovia was probably unaware of Mr. Serricchio and his potential claim for reemployment at the time Wachovia purchased Prudential. See 20 C.F.R. 1002.35, 1002.36.

Mr. Serricchio met the five eligibility criteria for reemployment under USERRA. He left his position of employment for the purpose of performing service in the uniformed services. Although paid solely by commission, he clearly held a position of employment for USERRA purposes. He gave his employer (Prudential) prior notice that he was leaving his job for the purpose of performing uniformed service.

Because the service was involuntary, it did not count toward his five-year limit and, in any case, he had not exceeded that limit. He was released from active duty in October 2003, without having received a punitive (by court martial) or other-than-honorable discharge that would disqualify him under section 4304 of USERRA, 38 U.S.C. 4304. He made a timely application for reemployment with Wachovia (successor in interest to Prudential), within 90 days after he was released from active duty.

Wachovia challenged the sufficiency of Mr. Serricchio's application for reemployment, which was made by means of a letter from his lawyer sent on Dec. 1, 2003. The court rejected the employer's claim that the application for reemployment was insufficient, pointing out that the first sentence of the letter stated that Mr. Serricchio "has now

completed his active service with the Air Force and seeks reinstatement to his Financial Advisor position ... with full reemployment rights guaranteed by USERRA.” *Serricchio*, page 3. The court held that this application met the USERRA requirement to put the employer on notice of the returning veteran’s desire to return to work with the pre-service employer, citing *Martin v. Roosevelt Hospital*, 426 F.2d 155, 159 (2nd Cir. 1970).

While it is unusual for an attorney to apply for reemployment, on behalf of the returning veteran, there is nothing in the statute to preclude this procedure. I also invite the reader’s attention to the electronic attachment immediately following Law Review 77, for a sample application for reemployment letter. All of the Law Review articles are available at www.roa.org/law_review.

Because Mr. Serricchio met the five eligibility criteria, Wachovia had a legal duty, under USERRA, to reemploy him promptly (generally within two weeks after his application) in the position of employment that he would have attained if he had been continuously employed or another position, for which he was qualified, that was of like seniority, status, and pay. In some cases, including this case, the position that the returning veteran *would have held* if continuously employed is different from the position that he or she held when called to the colors. USERRA does not exempt Mr. Serricchio from the workplace changes that occurred while he was on active duty, because it is clear that those changes would have applied to him (along with his Prudential colleagues) if he had been continuously employed. While the job to which Mr. Serricchio was entitled in late 2003 was not identical to the job he left in September 2001, there is no reason to believe that Mr. Serricchio would have lost his job even if he had not been on active duty at the time Wachovia bought Prudential. Other Prudential financial advisors moved from Prudential to Wachovia after the purchase.

Wachovia should have reinstated Mr. Serricchio to the payroll within two weeks after his application for reemployment. See 20 C.F.R. 1002.180, 1002.181. But the company waited some months and then offered Mr. Serricchio a “reinstatement” that was clearly inferior to the position that he had held before his active duty and even inferior to the position he would have held if he had been continuously employed.

Wachovia offered Mr. Serricchio the opportunity to make cold calls to the owners of dormant Wachovia investment accounts, and to receive a draw of \$2,000 per month. Any commissions that Mr. Serricchio received from successful cold calling would be applied against the draw. Cold calling is the most difficult and least productive form of selling. It is likely that Mr. Serricchio never would have been able to approach the earnings level that he had before he was called to the colors. Mr. Serricchio rejected Wachovia’s offer and treated it as a constructive discharge, and this lawsuit resulted.

USERRA required Wachovia to offer Mr. Serricchio reemployment in the position of employment that he would have attained if he had been continuously employed, or another position (for which he was qualified) that provided like seniority, status, and pay. As applied to a salesperson on commission, this means a territory or book of business that is reasonably capable of providing similar commission compensation. See *Loeb v. Kivo*, 169 F.2d 346, 348 (2nd Cir. 1948). The cold calling opportunity that Wachovia offered Mr. Serricchio did not even come close to his USERRA entitlement. Wachovia could have met its USERRA requirements by reconstructing for him a book of business comparable to the one he held before he left his job for service, by reassigning one account from each of many other Wachovia financial advisors.

Will other Wachovia financial advisors complain about having to give up a valuable customer account to the returning veteran? Yes, they probably will complain, but their complaints are without merit. As I explained in Law Review 0829 (June 2008), there are circumstances where a co-worker of the returning veteran loses his or her job in order to make room for the returning veteran, because the lack of a current vacancy does not excuse the employer from the obligation to reemploy the returning veteran. Here, no co-worker of Mr. Serricchio will lose his or her job to accommodate the return of Mr. Serricchio. At most, a co-worker could be asked to give up one account.

In its first case construing the reemployment statute, the Supreme Court held, “The act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. *He was, moreover, to gain by his service to his country an advantage which the law withheld from those who stayed behind.*” *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946) (emphasis supplied).

More than 99 percent of the American people have stayed behind for the Global War on Terrorism. The entire U.S. military establishment (Active, National Guard, and Reserve) consists of about 2.5 million people, while the total U.S. population recently rose above 300 million, according to the Census Bureau. Yes, USERRA sometimes imposes burdens on the employers and co-workers of those who serve, but the burdens imposed on others are tiny in comparison to the burdens willingly undertaken by the Michael Serricchios of this generation. I also invite the reader's attention to "The Burden of Freedom"—Law Review 0821, published in May 2008.

Mr. Serricchio filed suit in the United States District Court for the District of Connecticut in 2004, and the case finally came to trial this year. The federal court dockets are crowded. Even 400 years ago, Hamlet complained about "the law's delays" in his famous "to be or not to be" soliloquy contemplating suicide. Hamlet, Act III, Scene I, by William Shakespeare.

After lengthy discovery, Wachovia filed a motion for summary judgment, contending that no material issue of fact remained and that Wachovia was entitled to judgment as a matter of law. Federal District Judge Janet Boyd Arterton denied the defendant's motion for summary judgment on Mar, 14, 2008. The case finally went to trial in June 2008, and Mr. Serricchio won. The jury found that Wachovia violated USERRA and that the violation was willful, thus providing for double damages. See 38 U.S.C. 4323(d)(1)(C). The amount of the damages has yet to be determined but is likely to be in the many hundreds of thousands of dollars.

In 1972, the Department of Defense established the National Committee for Employer Support of the Guard and Reserve (ESGR). The organization's mission is to gain and maintain the support of civilian employers for the men and women of the National Guard and Reserve. ESGR honors employers that go "above and beyond" the requirements of USERRA in supporting employees who are Reserve Component members. The highest ESGR award, conferred at the national level to about a dozen employers per year, is the Freedom Award. In 2005, two years after Wachovia unlawfully denied reemployment to Mr. Serricchio, Wachovia received the Freedom Award. I respectfully submit that ESGR needs to be more careful about giving out its highest award to USERRA violators.

Our congratulations to David S. Golub, Esq. (of Silver, Golub & Teitell in Stamford, Conn.) for his imaginative, diligent, and successful representation of Mr. Serricchio.