

LAW REVIEW 901

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1.4--USERRA Enforcement

Non-Pecuniary Damages Available Under USERRA

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Smith v. United States Postal Service, 2008 U.S. App. LEXIS 18906 (Fed. Cir. Sept. 4, 2008).

Andy L. Smith, a Soldier in the Army Reserve, worked for the United States Postal Service (USPS) as a “flexible mail processing clerk” at the time he was called to active duty in December 2001. He remained on active duty until late 2004. As a flexible clerk, he had no fixed schedule but worked those shifts that were available to him.

While he was on active duty, Mr. Smith bid for a full-time position as a custodian. Based upon his seniority with the USPS, he would have been selected for the full-time position if he had not been on active duty at the time. The Federal Circuit has held that the USPS (or, by inference, any employer) is required to accord to employees who are away from work for military service the opportunity to bid for promotion and transfer opportunities. *See Allen v. United States Postal Service*, 142 F.3d 1444 (Fed. Cir. 1998). I discussed the *Allen* case in detail in Law Review 191, titled “Right to Switch to Day Shift Protected by USERRA.” That article and all previous Law Review articles are available at www.roa.org/law_review.

Mr. Smith was released from active duty under honorable conditions and made a timely application for reemployment with the USPS. He met the eligibility criteria for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA). He returned to work in January 2005, in a part-time flexible position similar to the position he left in December 2001. He remained in the flexible, part-time position until August 2005, when he was promoted to full-time status. He filed a complaint with the Merit Systems Protection Board (MSPB), a quasi-judicial federal agency responsible for adjudicating claims that federal agencies have violated USERRA. See 38 U.S.C. 4324.

The USPS conceded that it had erred and Mr. Smith should have been reinstated in January 2005 into the full-time custodian position, at a higher rate of pay, with more benefits, and with a regular work schedule. The USPS paid him \$1,465 in back pay, representing the additional pay he would have received if he had been promptly reemployed in the correct position. The USPS also reimbursed Mr. Smith \$1,453 in health insurance premiums that he would not have needed to pay if he had been promptly reemployed in the full-time position.

The remaining issue was whether Mr. Smith was entitled to monetary compensation for the inconvenience he suffered by having to work irregular hours during the period between January and August 2005. During that period of time, he sometimes worked “Tour One” (11 p.m. to 6:30 a.m.) and sometimes “Tour Three” (4:30 p.m. to 1:00 a.m.). The MSPB refused to award Mr. Smith monetary compensation for that inconvenience, and he appealed to the U.S. Court of Appeals for the Federal Circuit, a specialized federal appellate court that has nationwide jurisdiction over certain kinds of cases, including appeals from MSPB decisions.

The Federal Circuit reversed the MSPB and held that Mr. Smith was entitled, under USERRA, to compensation for the loss of any “benefit,” and that term is broadly defined by section 4303(2) of USERRA, 38 U.S.C. 4303(2). The Federal Circuit held that the MSPB should have awarded Mr. Smith monetary damages for the loss of the convenience of working a regular, predictable shift. The appellate court remanded the case to the MSPB to determine the reasonable value of the benefit Mr. Smith lost due to the USPS’s failure to comply with USERRA promptly upon his return from three years of active duty.

This is an important case because it presses the envelope on the kind of relief that is to be awarded to the successful USERRA plaintiff. This case is by no means the first time that the Federal Circuit has reversed the MSPB for being

insufficiently protective of USERRA rights. I invite the reader's attention to Law Reviews 189, 191, 206, 0722, 0726, 0729, and 0752, for multiple other examples of Federal Circuit decisions reversing the MSPB.