LAW REVIEW 906

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1.2 USERRA Discrimination
1.4 USERRA Enforcement

When Long Service Equals No Promotion
You Don't Need a Smoking Gun to Win a Section 4311 Case Under USERRA

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***Wagner v. Novartis Pharmaceuticals Corp.,* 565 F. Supp. 2d 940 (E.D. Tenn. 2008).**

In 1991, Robert Wagner was hired by a pharmaceutical company called Ciba-Geigy as a sales professional. Ciba-Geigy was later taken over by Novartis Pharmaceuticals, and Mr. Wagner remained with the new company. Mr. Wagner joined the Air Force Reserve in 1998. In the 20012005 time frame, he applied for several management positions with Novartis, but he was not interviewed or selected for those positions. In January 2006, Mr. Wagner resigned his Novartis job to take a management position with Sanofi-Aventis, another pharmaceutical company. He filed this lawsuit in April 2007, alleging that Novartis had violated the Uniformed Services Employment and Reemployment Rights Act (USERRA) by denying him the promotions and by "constructively discharging" him.

Section 4311 of USERRA (38 U.S.C. 4311) makes it unlawful for an employer to deny an employee or prospective employee hiring, retention in employment, or a promotion or benefit of employment because of the individual's membership in a uniformed service, application to join a uniformed service, performance of uniformed service, or application or obligation to perform future service. Section 4311(c) provides that if the individual's membership in a uniformed service or one of the other protected factors was *a motivating factor* (not necessarily the only reason) for the employer's unfavorable personnel decision, then the unfavorable decision is a violation of section 4311 unless the employer can *prove* (not just say) that it would have made the same decision in the absence of the protected factor.

Mr. Wagner claimed that Novartis had considered his Air Force Reserve service, and the absences from work his service necessitated, in deciding to deny him the promotion opportunities for which he had applied and in constructively discharging him. After the discovery process had been completed, Novartis filed a motion for summary judgment, contending that no trial was necessary because the evidence adduced thus far showed that there was no material issue of fact yet to be decided by a judge or jury. Novartis denied that it had constructively discharged Mr. Wagner, and it also claimed that it had not considered Mr. Wagner's Air Force Reserve service when it denied his applications for promotion opportunities. Novartis pointed out that Mr. Wagner had not presented any direct or "smoking gun" evidence that the company had considered his Air Force Reserve service during its consideration.

U.S. Magistrate Judge H. Bruce Guyton denied the employer's summary judgment motion with respect to the promotion opportunities. "The absence of direct evidence of improper motivation is not fatal to Wagner's case. Discriminatory motive may be proven by either direct or circumstantial evidence. 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 and other actions of the employer, an employer's expressed hostility toward members protected by 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. … In the instant case, the Court finds that Wagner has established a *prima facie* case that Novartis failed to promote Wagner, and otherwise retaliated against him, because of his military service. The Court finds the combination of factors present in this case, including, but not limited to, Wagner's delayed progress through the management training program, Novartis' reliance on unspecified requirements in its promotion decisions, Novartis' failure to follow its procedures by properly notifying Wagner of the status of the positions he had applied for, Novartis' refusal to interview Wagner for any of the positions he had applied for, and Novartis' apparent refusal to even consider Wagner's military management experience as a valid

replacement for the alleged prior pharmaceutical management experience. Based upon these, as well as other allegations presented by Wagner, he has met his initial burden."

Judge Guyton did grant the employer's motion for summary judgment on the "constructive discharge" claim. He stressed that there is a heavy burden to show intolerable treatment, to support a constructive discharge claim, and Mr. Wagner's allegations of discrimination with respect to promotion opportunities, even if true, did not amount to a constructive discharge.

Judge Guyton also granted the employer's summary judgment motion with respect to alleged USERRA violations that occurred more than four years before Mr. Wagner filed this lawsuit in April 2007. The judge applied the four-year "default" statute of limitations enacted by Congress in 1990, and codified at 28 U.S.C. 1658(a). Although USERRA expressly precludes the application of *state* statutes of limitations, it does not preclude statutes of limitations imposed by other federal laws. Section 1658(a) provides that a four-year statute of limitations shall apply to all causes of action arising under congressional enactments after December 1990, when section 1658(a) was enacted.

In *Akhdary v. City of Chattanooga,* 2002 U.S. Dist. LEXIS 26898 (E.D. Tenn. May 22, 2002), the same court (Eastern District of Tennessee) had held that section 1658(a) did not apply to USERRA cases because, although Congress enacted USERRA in 1994, it is a recodification of the Veterans' Reemployment Rights Act, which can be traced back to 1940. Judge Guyton held that *Akhdary* is inconsistent with a later Supreme Court case, *Jones v. R.R. Donnelly & Sons Inc.,* 541 U.S. 369 (2004).

I think that it is becoming increasingly clear that the four-year statute of limitations under 28 U.S.C. 1658(a) applies to USERRA cases. I strongly advise that you should retain a lawyer and file suit (if your lawyer so advises), well within this four-year time limit. If you sleep on your rights, you are likely to find that you have no enforceable rights when you wake up.

On Oct. 8, President George W. Bush signed into law the Veterans' Benefits Improvement Act of 2008. Section 311(f) of that law amended USERRA by adding a new section (section 4327). The new section makes clear that *no* statute of limitations (federal or state) applies to USERRA cases. I invite the reader's attention to Law Review 0724 update.