

LAW REVIEW 909

(February 2009)

- 1.2—Discrimination Prohibited
- 1.3.2.12—Special Protection against Discharge, Except Cause
- 1.4—USERRA Enforcement

Another New Case on USERRA Discrimination

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

Anderson v. Sanford L.P., 2008 U.S. Dist. LEXIS 9286 (E.D. Tenn. Feb. 7, 2008).

Alfred C. Anderson is a captain in the Army Reserve. The defendant Sanford L.P. hired Anderson as an injection supervisor on Dec. 18, 2000, and fired him on July 6, 2006. During his employment at Sanford, he was called to active duty and deployed to Iraq twice. The first deployment was from Feb. 5, 2003, until Aug. 15, 2003, and the second deployment was from Aug. 15, 2004, until Jan. 15, 2006. While working for Sanford, he also performed weekend Army Reserve training and annual training sessions. CPT Anderson met the eligibility criteria for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA) after each military-related absence from work. His employer strenuously objected to the military service and the concomitant absences from work.

During CPT Anderson's second active duty period, his employer contacted him twice. The first communication told him to return to work as soon as possible, and the second communication insisted that he return to work immediately. Like many employers, Sanford seems not to understand that the need of the nation to defend itself is more important than the convenience of any civilian employer, and that the civilian employer has no right to veto an employee's absence from work for military service or to insist upon the employee's early return. As Lawrence Peter "Yogi" Berra, Major League Baseball icon and World War II Navy veteran, may have said, "It ain't over until Uncle Sam says it's over."

After returning from his second deployment, CPT Anderson reported to Mr. Rob Shaw, Sanford's operations manager. In June 2006, one month before Sanford fired CPT Anderson, Mr. Shaw told Mr. Robert Conklin (another injection supervisor) that he (Shaw) had issues with CPT Anderson "because he is never here." Mr. Conklin responded, saying CPT Anderson was only gone because of his military duty. Mr. Shaw responded, "But he is still gone. He is always gone due to his military."

Sanford had no problem with CPT Anderson's work performance before his first deployment. On May 19, 2004, after CPT Anderson's first deployment and before his second, Sanford issued CPT Anderson a Performance Optimization Plan listing several alleged performance deficiencies. The plan was apparently still in effect when CPT Anderson was called to active duty the second time in August 2004.

In April 2006, three months after CPT Anderson returned from his second deployment, Sanford put CPT Anderson on a Performance Improvement Plan (apparently a more serious matter than the Performance Optimization Plan imposed in 2004). The plan listed concerns about CPT Anderson's poor performance in the areas of compliance with company policies and procedures, leadership, and commitment to the company. The concerns about CPT Anderson's commitment were related to his absences, most of which were necessitated by his military service.

Sanford terminated CPT Anderson's employment on July 7, 2006, allegedly for his failure to meet the expectations of the Performance Improvement Plan. CPT Anderson filed this lawsuit shortly thereafter, alleging that firing him violated sections 4311(a) and 4316(c) of USERRA, 38 U.S.C. 4311(a), 4316(c).

Section 4311(a) makes it unlawful for an employer to deny an employee "retention in employment" (among other things) 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 future service. Section 4311(c)

provides that if one of these protected factors was *a motivating factor* (not necessarily the sole reason) in the employer's decision to take an adverse action, the adverse action is unlawful, unless the employer can *prove* (not just say) that the employer would have taken the same action anyway in the absence of the protected factor. The court denied the employer's summary judgment motion on the section 4311(a) count, holding that CPT Anderson had presented enough evidence to enable a reasonable jury to conclude that the firing was motivated, at least in part, by CPT Anderson's continuing military obligations. Thus, the court denied the employer's summary judgment motion.

Section 4316(c) provides that an employee who is reemployed after more than 180 days of uniformed service is not to be discharged, except for cause, within one year after the employee's proper reinstatement to the civilian job. CPT Anderson returned to work, after his second deployment, in January 2006. Sanford fired him just six months later, in July 2006. The firing was unlawful under section 4316(c), unless the employer can prove that it was for cause. The judge held that Sanford had not presented sufficient evidence to win that argument at the summary judgment stage.

Section 4302(a) of USERRA [38 U.S.C. 4302(a)] provides that USERRA does not supersede or override a state law that provides the claimant *greater or additional rights*. The nonpreemption of state laws applies to state common law doctrines (law made by court decisions) as well as state statutes.

USERRA does not provide for *punitive damages*, although it does provide for *liquidated damages* (double damages) for *willful* USERRA violations. 38 U.S.C. 4323(d)(1)(C). Some states (including Tennessee) provide for punitive damages that may be far more than double the actual damages.

When you bring a claim in federal court, under a federal law like USERRA, you can simultaneously bring *closely related* state law claims, under the *supplemental jurisdiction* (formerly called pendent jurisdiction) of the federal court. *See* 28 U.S.C. 1337(a). The Tennessee Supreme Court has recognized the Tennessee common law tort of "retaliatory discharge" and has authorized the awarding of punitive damages for that tort. *See Crews v. Buckman Labs International, Inc.*, 78 S.W.3d 852, 862 (Tenn. 2002).

In addition to his USERRA claims, CPT Anderson also sought punitive damages under Tennessee state law for the common law tort of retaliatory discharge. Sanford filed a motion for summary judgment, asking the court to dismiss this state law claim. The court denied the motion, holding that CPT Anderson had presented sufficient evidence to support a reasonable jury verdict in his favor on this claim.

I also invite the reader's attention to Law Reviews 0642, 0713, 0750, and 0758, concerning obtaining additional remedies under state law in USERRA cases. All of the Law Review articles are available at www.roa.org/law_review.