LAW REVIEW 1106

Important New Case on USERRA Discrimination

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

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***Vega-Colon v. Wyeth Pharmaceuticals,* 2010 U.S. App. LEXIS 22277 (1st Cir. Oct. 28, 2010).**

This is an important new case on the application of section 4311 of the Uniformed Services Employment and Reemployment Rights Act (USERRA). This case was decided by the United States Court of Appeals for the First Circuit. This is the federal appellate court that sits in Boston and hears appeals from Federal District Courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.

Angel A. Vega-Colon sued Wyeth Pharmaceuticals in the United States District Court for the District of Puerto Rico. The District Court case is *Colon v. Wyeth Pharmaceuticals,* 611 F. Supp. 2d 110 (D.P.R. 2009). District Judge Francisco A. Bosesa granted Wyeth's motion for summary judgment, and Vega-Colon appealed. The First Circuit affirmed in part and reversed in part.

The Federal Rules of Civil Procedure (FRCP) provide for a period of discovery, prior to trial. During the discovery period, each party has the opportunity to obtain information, testimony, records, etc. from the other party by means of interrogatories, depositions, requests for admissions, etc. Rule 56 of the FRCP provides for either party to file a motion for summary judgment after the discovery process has been completed and before the trial has started.

The purpose of Rule 56 is to weed out cases that do not require further expenditure of the court's precious time, because the federal court dockets are crowded and it can take years to get a federal civil case to trial. The party seeking summary judgment (usually the party that does not have the burden of proof) must show (based on the information from the discovery process) that there is no material issue of fact remaining and that the moving party is entitled to judgment as a matter of law. When the plaintiff's complaint contains multiple counts (separate allegations as to how the law was violated), the court can grant summary judgment for some counts and deny it as to other counts.

When the district court grants summary judgment, the non-moving party can appeal to the Court of Appeals. If the Court of Appeals finds that there was a material issue of fact and that the District Court should not have granted summary judgment as to that count, the Court of Appeals remands the case back to the District Court for a trial. That is what happened here, as to one count of Vega-Colon's complaint.

The facts in this article come from the Court of Appeals decision. The First Circuit wrote: "We recite the facts in the light most favorable to Vega, the non-moving party, drawing all reasonable inferences in his favor." That is the practice of an appellate court in reviewing a summary judgment.

In 2002, Wyeth (a pharmaceutical company located in Puerto Rico) hired Vega-Colon as a packaging equipment supervisor. Vega-Colon was an active member of the Army Reserve when hired, and until 2004, when he went to an inactive status in the Army Reserve. In February 2007, Vega-Colon returned to an active status[1] and was promoted to Captain. He took several short military leaves of absence from Wyeth during the 2002-04 period and after he returned to active status in February 2007. Vega-Colon and his unit were called to active duty in November 2007.[2]

In April 2006, the "reliability engineer" position at Wyeth became available, and Vega-Colon applied, along with several other internal candidates. Wyeth chose an outside candidate instead. Vega-Colon filed a complaint with the Veterans' Employment and Training Service of the U.S. Department of Labor (DOL-VETS)

about his non-selection for the reliability engineer position. Vega-Colon alleged that the non-selection was motivated by his Army Reserve affiliation and activities.[3] DOL-VETS found no merit to the claim.

In February 2007, Vega-Colon received his Wyeth performance evaluation for the 2006 year. Wyeth ranks employees on a 1-5 scale, with 5 being the most favorable rating. Although Vega-Colon had received a 3 ("solid performer") in prior years, his rating for 2006 was 2 ("needs improvement"). In accordance with Wyeth policy, Vega-Colon was placed on the Performance Improvement Plan (PIP) because he had received an evaluation lower than 3. Vega-Colon successfully completed the PIP, but the PIP was extended as it was scheduled to end in November 2007, when Vega-Colon was called to active duty.

On May 7, 2007, Vega-Colon met with Wyeth's employee relations director and site director. Wyeth contends that the meeting was called to discuss the results of Wyeth's internal investigation of Vega-Colon's allegation that his 2006 performance evaluation was improperly downgraded, but Vega-Colon denied that any such discussion occurred at the meeting. Wyeth also alleged that during the meeting Vega-Colon made a threatening remark to the effect that Wyeth's site director made it easy for one to understand why massacres like the one at Virginia Tech take place.[4] Vega-Colon denied having said any such thing.

Shortly after the May 7 meeting, Wyeth restricted Vega-Colon's access to the facility. Vega-Colon was out on military leave at the time and did not immediately learn of the restriction. He learned of the restriction several days later when he tried to enter the plant to deliver a copy of his military orders. A security guard denied him entry and informed him that the Wyeth computer database showed that he had been terminated. Vega-Colon never received a termination letter and continued to receive his salary and benefits. Shortly thereafter, Vega-Colon returned to work and the access restriction was lifted.

In his lawsuit, Vega-Colon complained about the non-selection for the reliability engineer position, the low performance rating for 2006, the resulting 2007 PIP, the extension of the PIP, and the access denial resulting from the alleged Virginia Tech remark. The District Court granted summary judgment for the employer on all of these counts. The Court of Appeals affirmed on all counts except the count involving the PIP extension. Wyeth cited three reasons for extending the PIP, and one of the reasons was Vega-Colon's call to active duty just as the PIP was scheduled to end. The Court of Appeals found that Vega-Colon was entitled to a trial on the question of whether the PIP would have been extended anyway even if Vega-Colon had not been called to active duty.[5]

The Court of Appeals found that it need not resolve the factual dispute as to whether Vega-Colon made the objectionable remark about the Virginia Tech massacre or whether that remark justified the temporary facility access denial. The appellate court found that Vega-Colon was not terminated or denied retention in employment in violation of section 4311 of USERRA. The question of whether Vega-Colon made the Virginia Tech remark is not material because the outcome of the case does not depend upon the answer to that question.

Vega-Colon alleged that Wyeth discriminated against him and took adverse actions against him because of his service in the uniformed services, in violation of section 4311(a) of USERRA. He also alleged that Wyeth violated section 4311(b) by retaliating against him for having filed a complaint with DOL-VETS. "Vega filed a VETS complaint in March 2007. However, Wyeth presented evidence, including an affidavit from its human resources director and the entire VETS file, which established that it did not become aware of Vega's VETS complaint until September 2007. Vega has offered no contradictory evidence. Thus any retaliatory actions necessarily had to take place after this date."

When DOL-VETS receives a USERRA complaint from a veteran or Reserve Component member, one of the agency's first acts is normally to send an opening letter to the employer against whom the complaint has been made. In this case, it appears that DOL-VETS did not send the opening letter until seven months after receiving Vega-Colon's complaint. This tardiness is unsatisfactory.[6]

In addition to his other complaints, Vega-Colon alleged that he had been subjected to negative comments and name-calling, related to his military service, dating back to October 2006. One supervisor expressed disagreement with the wars in Iraq and Afghanistan. Two supervisors allegedly asked Vega-Colon whether his Army training was similar to the "Rambo" movie. Two supervisors repeatedly referred to Vega-Colon with monikers like "soldier," "little soldier," "sergeant," and "Rolandito." Vega-Colon alleged that these comments created a "hostile work environment" in violation of USERRA.

Neither the Supreme Court nor any Court of Appeals has decided whether a hostile work environment claim is cognizable under USERRA, and the First Circuit found it unnecessary to decide that question here. There are several Supreme Court decisions about "hostile work environment" in the sexual harassment context, under Title VII of the Civil Rights Act of 1964.[7] To be actionable under Title VII, the harassing behavior must be severe and pervasive and alter the conditions of employment. The Court of Appeals found that, even accepting Vega-Colon's allegations at face value, and even assuming that "hostile work environment" is a cognizable claim under USERRA, the conduct he alleged did not reach this high standard.

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[1] The appellate decision reflects some confusion about the difference between returning to an active status in the Army Reserve (February 2007) and returning to active duty (November 2007).

[2] The appellate decision does not make clear when the November 2007 active duty period ended, or whether Vega-Colon is still on active duty, or whether he has returned to work for Wyeth.

[3] Vega-Colon was in an inactive status in the Army Reserve between 2002 and February 2007, so it would seem that his claim probably lacked merit.

[4] On April 16, 2007, a lone gunman at Virginia Tech shot and killed 32 students and faculty members.

[5] For another case finding a USERRA violation in the extension of a performance improvement plan, see *Schmauch v. Honda of America Manufacturing, Inc.,* 2003 U.S. Dist. LEXIS 24015 (S.D. Ohio 2003). *Schmauch* is discussed in detail in Law Review 128 (June 2004).

[6] In 2008, Congress amended USERRA by enacting section 4322(f), which provides: "Any action required by subsections (d) and (e) [investigating the complaint and advising the complainant of the results of the investigation] with respect to a complaint submitted by a person to the Secretary [of Labor] under subsection (a) shall be completed by the Secretary not later than 90 days after receipt of such complaint."`

[7] Title VII forbids employment discrimination on the basis of sex, race, color, religion, or national origin.