LAW REVIEW 1173
September 2011

Another Great USERRA Appellate Case

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***Fryer v. A.S.A.P.* Fire & Safety Corp., Inc., 658 F.3d 85 (1st Cir. 2011).**

This is a very recent decision of the United States Court of Appeals for the First Circuit (1st Circuit). This is the federal appellate court that sits in Boston and hears appeals from federal district courts in Massachusetts, Maine, New Hampshire, Puerto Rico, and Rhode Island. In this case, the 1st Circuit affirmed the judgment of the United States District Court for the District of Massachusetts in favor of the plaintiff.

As with federal appellate cases generally, this case was decided by a panel of three federal judges, and those three judges affirmed unanimously. There are only two steps left to the defendant (and unsuccessful appellant). That party can ask the 1st Circuit for rehearing *en banc,* and the party can petition the Supreme Court for a writ of *certiorari.* I predict that neither step will be successful and that this case will soon be final as a victory for the plaintiff.

The plaintiff, Stephen F. Fryer, was hired by the A.S.A.P. Fire & Safety Corporation (ASAP) in January 2006. He had previously served in the Marine Corps and Marine Corps Reserve, but he had no military affiliation at the time he was hired by ASAP. He enlisted in the Army National Guard in January 2007, and just a month later the Army notified him that he was being mobilized for deployment to Iraq. He shared that information with ASAP as soon as he received it.

USERRA overrides the interests of the replacement.

Fryer reported to active duty on May 1, 2007 and was released from active duty a year later. ASAP filled his position with a new employee and was unwilling to displace that new employee in order to reemploy Fryer. As I explained in Law Review 0829 (June 2008) and Law Review 0962 (December 2009),[1] the rights of the returning veteran under the Uniformed Services Employment and Reemployment Rights Act (USERRA) override the interests of the replacement employee. There are cases where the employer is required to displace the replacement in order to reemploy the returning veteran in the appropriate position of employment, and this was clearly such a case.

Fryer was entitled to reemployment under USERRA.

As I explained in Law Review 0766 and other articles, a returning veteran must meet five eligibility criteria to have the right to reemployment under USERRA:

a. Must have left a position of employment for the purpose of performing service in the uniformed services.

b. Must have given the employer prior oral or written notice.

c. Cumulative period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment, must not have exceeded five years.[2]

d. Must have been released from the period of service without a punitive (by court martial) or other-than-honorable discharge that disqualifies the individual under section 4304 of USERRA, 38 U.S.C. 4304.

e. Must have made a timely application for reemployment, after release from the period of service.

Fryer clearly met these conditions when he was released from active duty in May 2008. ASAP violated Fryer's USERRA rights in three ways:

a. Failure to reemploy Fryer *promptly.*

b. Failure to reemploy Fryer in the appropriate position of employment.

c. Firing Fryer on October 22, 2008.

Fryer was entitled to *prompt* reemployment.

Fryer returned from active duty in early May 2008 and notified ASAP that he wanted to return to work on May 12. ASAP responded, saying that Fryer's position had been filled and that there were no vacancies for Fryer to fill. On May 22, Fryer sent a letter to ASAP, restating his application for reemployment and stating that he planned to report for work on June 30, which he did. When Fryer came to the ASAP jobsite, the company reiterated its position that his position had been filled and that he would not be reemployed. ASAP agreed to reemploy Fryer, but in a position that was clearly inferior to the position to which he was entitled under USERRA.

Section 4331 of USERRA (38 U.S.C. 4331) gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers, and DOL utilized that authority in December 2005. The DOL USERRA regulations are codified in Title 20, Code of Federal Regulations, Part 1002 (20 C.F.R. Part 1002). The regulations provide as follows about the right to prompt reemployment after military service: "'Prompt reemployment' means as soon as practicable under the circumstances of each case. Absent unusual circumstances, reemployment must occur within two weeks of the employee's application for reemployment." 20 C.F.R. 1002.181.

Fryer was entitled to reemployment as of mid-May. ASAP delayed his reinstatement until early July and thus violated the law. The company must compensate him for the pay and benefits that he lost because of the delay.

Fryer was entitled to reemployment in the position he would have attained if continuously employed, or another position of like seniority, status, and pay.

Because Fryer met the USERRA eligibility criteria, ASAP was required to reemploy him "in the position of employment in which the person [Fryer] would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform." 38 U.S.C. 4313(a)(2)(A).

ASAP hired Fryer as a "sprinkler service/sales representative" and he was still in that position when he was called to the colors in May 2007. When Fryer departed, ASAP hired another person to fill the position, and the replacement was still in the position when Fryer returned from service a year later. The evidence clearly establishes that Fryer would have remained a sprinkler service/sales representative if his career at ASAP had not been interrupted by service.

After he returned from Iraq, Fryer became a "sprinkler helper" at ASAP, because the company was unwilling to displace the replacement and no other sales representative position was available. The court decision outlines several ways in which the helper position was inferior in status and pay (including the opportunity to earn commissions on sales of sprinklers) to the sales representative position to which Fryer was entitled.

ASAP violated USERRA by firing Fryer.

USERRA provides: "A person who is reemployed under this chapter shall not be discharged from such employment, except for cause—within one year after the date of such reemployment, if the person's period of service before the reemployment was more than 180 days." 38 U.S.C. 4316(c)(1). ASAP fired Fryer on October 22, 2008, allegedly for absenteeism during the period of reemployment. Because the one-year period of special protection had not expired[3], ASAP has the burden of proving that the discharge was for cause, and the company was unable to do that. The jury found that the employer's stated reasons for the discharge were pretextual.

Because the special protection period was still in effect at the time of the firing, the burden of proof is on ASAP, not Fryer. Fryer does not need to prove that the firing was motivated by his military service, or by his complaints about the untimeliness and insufficiency of his reemployment, but it appears that there is ample evidence that the firing was so motivated.

Section 4311 of USERRA provides:

(a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person

(1) has taken an action to enforce a protection afforded any person under this chapter,

(2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter,

(3) has assisted or otherwise participated in an investigation under this chapter, or

(4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c) An employer shall be considered to have engaged in actions prohibited—

(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

(2) under subsection (b), if the person's

(A) action to enforce a protection afforded any person under this chapter,

(B) testimony or making of a statement in or in connection with any proceeding under this chapter,

(C) assistance or other participation in an investigation under this chapter, or

(D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312 (d)(1)(C) of this title.

38 U.S.C. 4311.

During the trial, Fryer testified that Joseph Sheedy (one of ASAP's owners) had told Fryer that he "needed to prove himself" after returning from military service because his deployment had "left [the employer] in the lurch" and that the employer "had suffered because of it." Fryer also testified that he had received "an extremely angry telephone call" from Brian Cote, another owner of the company. Cote told Fryer that he "needed to shut his mouth" about his request for reinstatement in his pre-service position because another employee "was in the job." When Fryer insisted that he had the right to the sales representative job, Cote responded "that's not going to f…..g happen." This evidence was used to prove that ASAP's USERRA violation was willful. If necessary, it also could have been used to prove that the firing was motivated by Fryer's service and his assertion of his USERRA rights.

Fryer is entitled to double damages because ASAP violated USERRA willfully.

USERRA provides as follows concerning the remedies available in federal court in a case against a state or local government or private employer: "In any action under this section, the court may award relief as follows: (A) The court may require the employer to comply with the provisions of this chapter. (B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter. (C) The court may require the employer to pay the person an amount equal to the amount referred to in subsection (B) [and in addition to that amount] as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful." 38 U.S.C. 4323(d)(1).

The evidence amply established, to the satisfaction of the jury, that ASAP and its owners *willfully* violated USERRA. They were aware of their legal obligations[4] or, at a minimum they proceeded in reckless disregard of their legal obligations. The District Court and the 1st Circuit upheld the finding of willfulness. The court decision contains an excellent scholarly discussion of how to prove willfulness under USERRA, including citations to Supreme Court and Court of Appeals decisions.

Fryer is entitled to additional relief under state law.

USERRA's second section provides: "Nothing in this chapter [USERRA] shall supersede, nullify or diminish any Federal or *State law* (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that *establishes a right or benefit that is more beneficial to, or is in addition to,* a right or benefit provided for such person under this chapter." 38 U.S.C. 4302(a).

When you bring a civil case in federal court under a federal law like USERRA, it is possible to bring at the same time closely related state law claims, in the same federal lawsuit. This is known as "supplemental jurisdiction."[5] Accordingly, Fryer brought Massachusetts state law claims as part of his federal lawsuit, and he prevailed on his claims. He was awarded $289,000 in emotional distress damages under Massachusetts anti-discrimination law[6] and $5,260 as compensation for earned commissions and $4,240 for lost overtime, under the Massachusetts Wage Act. The 1st Circuit upheld these awards.

On appeal, ASAP argued that USERRA preempts state law claims of this nature and that the 1st Circuit should overturn these awards, but ASAP acknowledged that its attorney had not explicitly made this preemption argument in the district court. Fryer argued that ASAP's failure to raise the preemption argument in the district court amounted to a waiver of the argument, and the 1st Circuit agreed. But even if ASAP had properly preserved the argument, the appellate court clearly would have rejected it. This is exactly the sort of situation that Congress had in mind when it enacted section 4302(a). The Massachusetts law provides a veteran like Fryer *greater or additional rights,* and USERRA does not preempt these state laws.

This case is costing ASAP a whole bunch.

The district court awarded Fryer $42,234 in back pay and a like amount in liquidated damages, based on the finding that ASAP violated the law willfully. The court ordered ASAP to pay Fryer $105,000 in front pay (future wages). As noted, the judgment also included $289,000 in emotional distress damages, $4,240 for lost overtime, and $5,260 as compensation for earned commissions. The total judgment was $505,748 plus $33,533 in prejudgment interest.

USERRA provides: "In any action or proceeding to enforce a provision of this chapter by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses." 38 U.S.C. 4323(h)(2). In accordance with this provision, the district court awarded Fryer $199,204 in attorney fees.

All of this relief was affirmed by the 1st Circuit.

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[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 800 Law Review articles, plus a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. We recently created this new website for the Service Members Law Center (SMLC), because we had outgrown the main ROA website, www.roa.org.

[2] All involuntary service and some voluntary service are exempted from the computation of the individual's five-year limit. Please see Law Review 201 for a definitive discussion of what counts and what does not count.

[3] Because Fryer was not *properly* reemployed (in that he was in the inferior helper position), the one-year special protection period never started running. Thus, even if ASAP had waited a year and a day to fire Fryer, it still would have had the burden of proving that the discharge was for cause. *See O'Mara v. Peterson Sand & Gravel Co.*, 498 F.2d 896, 898 (7th Cir. 1974).

[4] In his testimony, one of ASAP's owners acknowledged that a Department of Labor investigator had told the owner that the company was required to reinstate Fryer in such a way that he could "pick up where he left off" when he was called to the colors.

[5] *See* 28 U.S.C. 1367(a). Please see Law Review 0909 for a discussion of supplemental jurisdiction in USERRA cases.

[6] Under USERRA, the court is authorized to order the employer to "compensate the person [plaintiff] for any lose of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter." 38 U.S.C. 4323(d)(1)(B). USERRA apparently does not authorize damages for non-pecuniary damages, like emotional distress.