

Law Review 1267

July 2012

Is Harassment a Cognizable Claim under USERRA—(Continued)

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1.2—USERRA-Discrimination Prohibited

1.4—USERRA Enforcement

1.8—Relationship between USERRA and other Laws/Policies

***Dees v. Hyundai Motor Manufacturing Alabama, LLC*, 368 Fed. Appx. 49; 2010 U.S. App. LEXIS 4064; 187 L.R.R.M. 3452 (11th Cir. Feb. 26, 2010).**

In Law Review 0860 (December 2008) [\[1\]](#) I discussed the case of *Dees v. Hyundai Motor Manufacturing Alabama, LLC*, 2008 U.S. Dist. LEXIS 40952 (M.D. Ala. May 21, 2008). It has come to my attention that Jerry Leon Dees, Jr. appealed to the United States Court of Appeals for the Eleventh Circuit, [\[2\]](#) which affirmed the summary judgment for the employer, Hyundai Motor Manufacturing Alabama, LLC.

Dees was a Staff Sergeant in the Alabama National Guard. He was called to active duty twice, but both times were before he began his employment at Hyundai, in November 2005. He worked for Hyundai until February 2007, when he was fired for “intentional sleeping” on the job. He sued the employer in the United States District Court for the Middle District of Alabama. He claimed that the firing and also the alleged harassment that preceded the firing violated section 4311 of USERRA, which provides as follows:

“(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.

Under Rule 56 of the Federal Rules of Civil Procedure, a party (usually the defendant) can make a *motion for summary judgment* after the discovery process is over. If the court grants the motion, the case is over, before a trial has been held. If the court finds (based on the evidence produced in the discovery process) that there is *no material issue of fact* and that the moving party is entitled to judgment as a matter of law, the court will grant the motion for summary judgment, thus ending the case, at least as to that count of the complaint. To avoid a summary judgment for the defendant, the plaintiff must show that there is *some evidence* (beyond a "mere scintilla") from which a reasonable jury could rule for the plaintiff on an issue as to which the plaintiff has the burden of proof.

During the 15 months that Dees worked for Hyundai, he was mercilessly harassed (according to Dees' testimony) about his Army National Guard service by his two direct supervisors, Greg Prater and Kevin Hughes. But Dees was fired after Hyundai's production manager (not one of the supervisors who had harassed Dees about the National Guard) caught him sleeping, while on the clock, in an isolated part of the plant. Dees was charged with "intentional sleeping"[\[3\]](#) and was fired, after a disciplinary hearing.

The District Court concluded that the firing was not unlawful under section 4311 of USERRA. There are two alternative theories here. First, one can argue that Hyundai fired Dees only for the intentional sleeping—the disciplinary hearing did not address his National Guard service or the times that he had been away from work for National Guard drill weekends. Thus, Dees' National Guard service was not "a motivating factor" in the decision to fire him. Alternatively, even if Hyundai did consider the National Guard service, Hyundai had made out the affirmative defense under section 4311(c)(1). Hyundai had conclusively

shown that Dees was guilty of the intentional sleeping and that the company routinely fired employees for intentional sleeping, even if they were not members of the National Guard or Reserve.

The District Court did not grant summary judgment for Hyundai on the harassment count of the complaint. The Court reasoned that the harassment, before the firing, could constitute a separate violation, and that perhaps there could be a remedy for the harassment even after the lawfulness of the firing had been affirmed. On appeal, the 11th Circuit held that Dees lacked standing to maintain the harassment claim after the lawfulness of the firing had been upheld.

Section 4323 of USERRA provides as follows concerning the relief that a Federal District Court can award against a state or local government or private employer found to have violated USERRA:

“(d) Remedies.—

(1)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 subparagraph (B) 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).

If Dees still worked for Hyundai, and if he were to prove that he had been harassed by Hyundai supervisors because of his National Guard service, he could get a court order commanding the company and the supervisors to cease the harassment. Since he no longer works for Hyundai, and since the lawfulness of his firing has been upheld, such a court order is not available and would be considered moot. The 11th Circuit also held that money damages are not available under USERRA for *non-pecuniary* damages, like the emotional distress caused by employer harassment.[\[4\]](#)

Title VII of the Civil Rights Act of 1964 made it unlawful for an employer to discriminate, in employment, on the basis of race, color, sex, religion, or national origin. The Civil Rights Act of 1991 (Public Law 102-166) made some important amendments to Title VII. [\[5\]](#) One amendment expanded the kind of damages that can be awarded for a proven Title VII violation. Between 1964 and 1991, the damages that could be awarded were limited to pecuniary damages, like lost pay. The 1991 amendment expanded the remedies provision to authorize the awarding of non-pecuniary damages, like emotional distress, as well as punitive damages for egregious violations.[\[6\]](#)

We need a USERRA amendment, based on this 1991 amendment to Title VII. In a case like this, a plaintiff like Dees should be able to receive money damages for the harassment itself, even if the harassment did not result in actual lost pay. We will keep the readers

informed of developments on this important issue.

[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 767 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week.

[2] The 11th Circuit is the federal appellate court that sits in Atlanta and hears appeals from district courts in Georgia, Florida, and Alabama.

[3] Hyundai concluded that Dees had slept intentionally because he went to an isolated part of the plant before he dozed off. Hyundai considered intentional sleeping to be a firing offense even on the first offense, while unintentional sleeping merited a lesser punishment for the first offense.

[4] In Law Review 1211 (January 2012), I addressed section 251 of Public Law 112-56, signed into law by President Obama on November 21, 2011. That new law amended USERRA's definition of "benefit of employment" in order to make it clear that harassment based on military service is a violation of USERRA. But that is a different question from the question presented in *Dees*. The *Dees* question is whether *money damages* can be awarded for harassment. Unfortunately, the 2011 USERRA amendment does not address that question. We need a further statutory amendment to authorize money damages for emotional distress and other non-pecuniary damages.

[5] 42 U.S.C.A. §1981a(a)(1) states that a plaintiff may recover compensatory and punitive damages for unlawful intentional discrimination.

[6] In egregious cases of sexual harassment, the damages for emotional distress and the punitive damages can run to six or even seven figures.