# Law Review 12118

December 2012

## DOJ Sues NYC Internet Business for Violating USERRA

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

1.1.2.1—USERRA applies to part-time, probationary, and at-will employment
1.2—USERRA prohibits discrimination
1.3.1.1—Left job for service and gave prior notice
1.4—USERRA enforcement

On December 10, 2012, the United States Department of Justice (DOJ) filed suit against Cohere Communications (CC) and its founder and chairman, Steven Francesco, on behalf of William Pfunk, an Army Reserve Staff Sergeant. CC is an Internet business in Midtown Manhattan, just a short subway ride from "Ground Zero."

Pfunk is a student at the Manhattan campus of Hunter College of the City University of New York. In November 2011, he took a part-time job at CC. The Uniformed Services Employment and Reemployment Rights Act (USERRA) most definitely applies to part-time as well as full-time employment.

In April of this year, the Army Reserve ordered Pfunk to report to duty with just two days of notice. Pfunk immediately notified Francesco by e-mail. Francesco responded, writing: "This last-minute notice has raised some real issues to your ability to contribute on a consistent basis. I run a business which counts on everybody's active participation." Francesco immediately fired Pfunk.

When Pfunk mentioned USERRA and threatened to contact an attorney, Francesco went ballistic, writing: "You are welcome to pursue any course of action you deem appropriate—but if you want a war I can impact your life more than you can screw with mine."

Firing Pfunk because of his Army Reserve service and because he invoked his USERRA rights constitutes an egregious violation of 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. This refers to section 4311 of title 38 of the United States Code.

The immediate proximity in time between Pfunk's military service and the firing plus the e-mail record of the employer's remarks makes this a "slam dunk" USERRA violation, but most employers aren't that stupid. It is possible to prove a section 4311 violation without this kind of "smoking gun" evidence. In a very recent case, the United States Court of Appeals for the Sixth Circuit[1] laid out how to prove such a case:

"Discriminatory motivation may be inferred from a variety of considerations, including proximity in time between the employee's military activity and the adverse employment action, inconsistencies between the employer's conduct and the proffered reason for its actions, the employer's expressed hostility toward military members 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. If Bobo carries the initial burden to show by a preponderance [of the evidence] that his protected status was a motivating factor in his discharge from employment, the burden shifts to UPS to prove affirmatively that it would have taken the same employment action in the absence of Bobo's protected status." Bobo v. United Parcel Service, Inc., 665 F.3d 741, 754 (6th Cir. 2012).

As I explained in Law Review 1281[2] and other articles, an individual who is away from his or her civilian job for service in the uniformed services must meet five conditions to have the right to reemployment under USERRA:

Must have left a civilian position of employment for the purpose of performing voluntary or involuntary service in the uniformed services (active duty, active duty for training, inactive duty training, initial active duty training, funeral honors duty, etc.).
Must have given the civilian employer prior oral or written notice.
Cumulative period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment, must not have exceeded five years.[3]
Must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge.
Must have been timely in reporting back to work or applying for reemployment, after release from the period of service.
As a condition for getting his job back, Pfunk was required to give advance notice to his civilian employer, and he did so. It seems clear that the lateness of the notice (just two days in advance) set off Francesco, but Pfunk could not give his employer more notice than the Army had given him.

It would certainly promote good employer-reservist relations if the Army Reserve and the other Reserve Components could provide more notice to individual reservists and their civilian employers. Accordingly, I have brought this situation to the attention of Lieutenant General Jeffrey W. Talley, the Chief of Army Reserve.

Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which dates back to 1940. The 1994 legislative history of USERRA addresses succinctly the issue of the amount of notice that should be given to the civilian employer:

"The Committee [House Committee on Veterans' Affairs] believes that the employee should make every effort, when possible, to give timely notice. The issue of timely notice should be considered on a case-by-case basis. In the event that an employee is notified by military authorities at the last minute of impending military duty, resulting short notice given to the employer should be considered timely. On the other hand, last-minute notice, which could have been given earlier by the employee but was unjustifiably not given, and which causes severe disruption to the employer's operation, should be viewed unfavorably. Lack of a timely notification which does not result in harm to the employer should not be a sufficient basis to deny reemployment rights."

House Report No. 103-65, 1994 United States Code Congressional & Administrative News 2449, 2459 (emphasis supplied).

After CC fired him, Pfunk promptly complained to the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), in accordance with section 4322(a) of USERRA, 38 U.S.C. 4322(a). DOL-VETS investigated his complaint, in accordance with 38 U.S.C. 4322(d), and found it to have merit. DOL-VETS tried to persuade CC and Francesco to come into compliance, but the employer was unwilling to comply. DOL-VETS then referred the case to DOJ, in accordance with 38 U.S.C. 4323(a). DOJ agreed that the case had merit, and DOJ filed suit on behalf of Pfunk on December 10, 2012.

In some prior Law Review articles[4] I have criticized DOL-VETS and DOJ for slowness, so let me congratulate them for the expeditiousness with which they have handled the Pfunk case. This lawsuit was filed just eight months after CC fired Pfunk.

_____

[1] The 6th Circuit is the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee.

[2] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 818 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform. You will also find 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.

[3] All involuntary service and some voluntary service (including reserve training) are exempted from the computation of the five-year limit. Please see Law Review 201 for a definitive discussion of what counts and what does not count.

[4] See, e.g., Law Review 12108 (November 2012).

## Update—June 2016

William Pfunk and DOJ prevailed in this lawsuit. Please see Law Review 16050 (June 2016).