

## New USERRA Case

By CAPT Samuel F. Wright, JAGC, USNR\*

Readers may be interested in a recent Federal District Court case arising under the Uniformed Services Employment and Reemployment Rights Act (USERRA): *Schmauch v. Honda of America Manufacturing, Inc.*, 2003 U.S. Dist. Lexis 24015 (S.D. Ohio 2003).

Marc Schmauch worked for Honda as a production associate, and he was also a member of the Ohio Air National Guard. Honda's written policy required associates to maintain an attendance rate of at least 98 percent, a rate based on the "number of days available." Associates falling short of that standard are placed in the Attendance Improvement Program (AIP) for six months. An associate missing work (without excuse) while in the AIP is dismissed.

Mr. Schmauch was placed in the AIP because of attendance issues. While in the AIP, he missed workdays because of military training, as permitted by USERRA. Under the Honda policy, those military days were subtracted from the "available days." Thus, the AIP period was extended by the number of days of excused military leave. However, employees who missed workdays during an AIP because of jury duty do not have their AIP periods extended, under Honda's policy. While in this "AIP overtime," Mr. Schmauch missed a day of work without excuse and was fired.

The court addressed the issue of extending Mr. Schmauch's AIP period because of military duty performed during the AIP period: "Defendant [Honda] has not offered to the Court a satisfactory explanation for why it treats associates differently depending on which sovereign—the judicial branch or the executive branch—calls upon them. The Court does not believe there is a justifiable distinction. Both military leave and jury duty are compulsory, beyond the control of the employee, and may last for a comparable amount of time." *Schmauch*, 2003 U.S. Dist. Lexis at 24027. The bottom line is that Honda violated USERRA by extending Mr. Schmauch's AIP period because he exercised his USERRA rights during the period.

It is also interesting to note how this case was brought. Mr. Schmauch retained private counsel (Gary A. Reeve of Worthington, Ohio) after the Department of Labor, Veterans' Employment and Training Service (DOL-VETS) closed his case. Mr. Schmauch is very fortunate to have found a diligent and competent attorney who was willing to take a fresh look at the case and to devise a strategy for success. Retaining private counsel was in Mr. Schmauch's interest because a private lawyer could raise issues under other statutes, including in this case the Family and Medical Leave Act. DOL-VETS and the Department of Justice are limited to USERRA.

\*Military title used for purposes of identification only. The views expressed herein are the personal views of the authors and should not be attributed to the U.S. Marine Corps, the Department of the Navy, the Department of Defense, or the U.S. government. The best way to reach Captain Wright is by e-mail, at samwright50@yahoo.com.