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Misconduct Leads to Mistrial

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

1.2—USERRA forbids discrimination
1.4—USERRA enforcement

***Bobo v. United Parcel Service, Inc.,* 665 F.3d 741 (6th Cir. 2012).**

***Bobo v. United Parcel Service, Inc.,* 2012 U.S. Dist. LEXIS 166429 (W.D. Tenn. Nov. 21, 2012).**

In a most unusual action, the United States District Court for the Western District of Tennessee granted a mistrial during the third day of a trial of a wrongful discharge lawsuit by Walleon Bobo against United Parcel Service, Inc. (UPS). Because the misconduct of UPS and its attorneys necessitated the mistrial, the court ordered UPS to compensate Bobo's attorneys for their attorneys' fees and costs in preparing for and conducting the trial that was short-circuited. The court awarded attorneys Luther Oneal Sutter and Lucien Ramseur Gillham $87,541.56 and attorney Andrew C. Clarke $65,602.20.

Bobo is a recently retired Lieutenant Colonel in the Army Reserve who worked for UPS from 1987 until he was fired on May 22, 2007. In this ongoing litigation, Bobo claims that the firing was unlawful because it was motivated by his Army Reserve service, in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA). He also claimed that the firing was motivated by his race (African American), in violation of Title VII of the Civil Rights Act of 1964.

After he was hired by UPS in 1987, Bobo worked his way up through the hourly ranks and was promoted to a supervisory position. His UPS career was interrupted many times by voluntary and involuntary periods of military service and training. In 2003, he was called to active duty and deployed to Iraq, where he was wounded. In June 2004, after completing his rehabilitation, he returned to his employment as a supervisor at the UPS Oakhaven facility in Memphis, Tennessee. On several occasions after Bobo returned to work in 2004, when he needed and requested time off from work for Army Reserve training, his supervisors made disparaging remarks about his military service and said that "he needed to choose between UPS and the Army." UPS fired Bobo for allegedly falsifying company records, a charge that Bobo vehemently denies.

Section 4311(a) of USERRA provides: "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, service, application for service, or obligation." 38 U.S.C. 4311(a) (emphasis supplied).

Section 4311(c) states: "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." 38 U.S.C. 4311(c)(1) (emphasis supplied).

How does one prove that a firing or other unfavorable personnel action was motivated by the plaintiff's military service or obligation to perform service? The United States Court of Appeals for the 6th Circuit addressed this issue in a most instructive paragraph: "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,* 665 F.3d at 754.

One way to prove a violation of USERRA or another employment law is by the use of "comparators." Through his attorneys, Bobo sought to use the discovery process to find such comparators—other UPS supervisors who were similarly situated but who were not members of the National Guard or Reserve and who were not punished or were punished less harshly for the same misconduct for which Bobo was accused (perhaps falsely).

UPS insisted that there was only one comparator—the other UPS supervisor who was fired as a result of an investigation. But the defendant does not get to decide what evidence is relevant and to withhold other evidence. After a circumscribed discovery process, the District Court granted UPS' motion for summary judgment, finding that there was no material issue of fact and that UPS was entitled to judgment as a matter of law.

Bobo appealed to the United States Court of Appeals for the 6th Circuit, the federal appellate court that sits in Cincinnati and hears appeals from Kentucky, Michigan, Ohio, and Tennessee. The 6th Circuit reversed the summary judgment for the employer on two grounds. First, the appellate court found that the trial court had improperly circumscribed the discovery process, depriving Bobo of the opportunity to obtain evidence that might well have helped him prove his case. The 6th Circuit also found that even with the circumscribed discovery there was enough evidence in the record so that a reasonable jury could find for Bobo.

After the 6th Circuit remanded the case to the District Court, additional discovery was conducted and then the jury trial began. On the third day of the trial, UPS provided to Bobo's attorneys a document that should have been provided much earlier. The judge found that the document was very relevant and that the plaintiff had been prejudiced by the late production, and that it was necessary to grant a mistrial because there was no feasible way to mitigate the prejudice.

This case is still not resolved. Unless the parties settle, there still needs to be a trial. We will keep the readers informed of developments in this important and interesting case. I commend attorneys Andrew C. Clarke, Luther Oneal Sutter, and Lucien Ramseur Gillham for their diligent and resourceful representation of Lieutenant Colonel Walleon Bobo.

Note: On the eve of the retrial, the parties settled this case. The terms of the settlement are confidential, but suffice it to say that LTC Bobo is satisfied.