

## Special Protection against Discharge, Except for Cause, After Returning from Military Service

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

1.3.2.12—Special protection against discharge, except cause  
1.4—USERRA enforcement

### ***Bursese v. PayPal, Inc.*, 2007 U.S. Dist. LEXIS 12785 (N.D. Cal. Feb. 12, 2007).**<sup>1</sup>

Scott Bursese began working for PayPal (a division of eBay) in February 2002, as a consultant to automate testing of the PayPal website. On August 2, 2002, Bursese became a “permanent employee” in PayPal’s automation department. On July 24, 2003 (while employed at PayPal), Bursese enlisted in the Army National Guard of Washington State.

Bursese alleged that Paul Montgomery (Bursese’s supervisor at PayPal) denigrated military service and service members when Montgomery became aware of Bursese’s enlistment. Bursese reported that Montgomery said that he had left Texas (and moved to California) “because people there [Texas] were so dense and they were pro-military.” Montgomery also criticized the current administration (the George W. Bush Administration) and the military’s role in it, according to Bursese.

Bursese also claimed that other team members (PayPal employees who reported to Montgomery) taunted him about his military service. These team members reportedly made fun of Bursese’s military haircut and asserted that service members were robotic, unintelligent, unthinking individuals. Other PayPal employees sarcastically asked Bursese if he had ever killed anyone and brought back pictures of corpses, according to Bursese.<sup>2</sup>

Shortly after he enlisted in the Washington Army National Guard, Bursese received orders to report to his initial military training. He informed PayPal management that his last day at work would be August 4, 2003, and that he expected to be back in early October. On or about Bursese’s last day at work, before his military leave, Montgomery (Bursese’s supervisor) allegedly gave an “individual performance plan” that outlined Bursese’s employment duties for the quarter that included his military leave.

On Bursese’s first day back after military leave, Montgomery met with Bursese and reassigned him to more menial tasks than he had been performing before his absence from work for military service. Bursese sought to transfer

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<sup>1</sup> This is a decision by Judge Ronald M. Whyte of the United States District Court for the Northern District of California. There is no subsequent history of this case. It appears that Mr. Bursese and PayPal settled their differences and dismissed this action. Judge Whyte was ruling on summary judgment motions, so the facts in this article are as alleged by the plaintiff.

<sup>2</sup> PayPal is not responsible for censoring the workplace banter of employees, to ensure that they are all supportive of Bursese’s choice to join the Army National Guard. Anti-military statements by Bursese’s PayPal colleagues may be relevant to his USERRA case insofar as those statements were made or encouraged by Bursese’s PayPal supervisors. Please see Law Review 1122 (March 2011), titled “Supreme Court reverses 7<sup>th</sup> Circuit in USERRA case.” I invite the reader’s attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find 932 articles about 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. We added 122 new articles in 2012 and another 110 so far in 2013.

out of his PayPal group to an EBay group. (EBay is PayPal's parent company.) But Montgomery prevented the transfer.

In December 2003, PayPal Vice President Sal Giambanco (from the human resources group) met with Bursese to inform him that he was being asked either to resign or to be placed on a performance improvement plan (PIP). On December 16, 2003, Bursese signed a separation agreement with PayPal. Under the agreement, Bursese was to receive \$25,000 (equivalent to 13 weeks of pay) and to continue his PayPal health insurance benefits for 18 months, with the first six months to be paid by PayPal, as a condition of his signing the separation agreement. The separation agreement included a "release of claims" section under which Bursese released and discharged PayPal from any claims arising out of his PayPal employment and the termination of his employment. Although Bursese was not required to report for work after December 16, 2003, the agreement provided that his PayPal employment would continue until January 30, 2004.

Despite repeated requests, PayPal did not remit the \$25,000 as promised in the separation agreement. It is not clear if PayPal paid the COBRA benefits as promised. On January 24, 2005 (more than a year later), Bursese sent a letter to PayPal's general counsel, informing him that he was rescinding the December 2003 separation agreement. On June 7, 2005, PayPal finally sent Bursese a check<sup>3</sup> for \$30,000 (\$25,000 promised plus \$5,000 in interest), but Bursese did not cash the check.

Bursese retained the services of attorneys G. Whitney Leigh, Juan Enrique Pearce, and Matt Gonzalez of the San Francisco law firm Gonzalez & Leigh LLP. They filed this lawsuit on January 30, 2006. In the complaint, the plaintiff (Bursese) alleged that what had happened to him amounted to a "constructive discharge" and that the discharge violated section 4311(a) and section 4316(c) of the Uniformed Services Employment and Reemployment Rights Act (USERRA). They also challenged the lawfulness of the discharge on other grounds<sup>4</sup>, asserting that Bursese had been terminated as a reprisal for "whistleblowing."<sup>5</sup>

It is fortunate that Bursese had private counsel, rather than the Department of Labor (DOL) and the Department of Justice (DOJ), because DOL and DOJ would have limited themselves to considering possible USERRA causes of action. In most cases, I think that you are better off with private counsel, rather than DOL and DOJ. Your own lawyer will approach the case as an advocate, not a neutral, and will consider all available legal theories, not just USERRA.

Bursese had several arguments as to why the constructive discharge was unlawful, but I think that his strongest argument was that the discharge violated section 4316(c) of USERRA, which provides:

**"(c)** A person who is reemployed by an employer under this chapter shall not be discharged from such employment, *except for cause*—

**(1)** within one year after the date of such reemployment, if the person's period of service before the reemployment was more than 180 days; or

**(2)** within 180 days after the date of such reemployment, if the person's period of service before the reemployment was more than 30 days but less than 181 days."

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<sup>3</sup> In an accompanying letter, PayPal claimed that the lengthy delay in payment was because of an "internal oversight." One would think that a company that specializes in time and accurate payment transactions would do better in timely paying its own obligations.

<sup>4</sup> Under 28 U.S.C. 1658(a) (supplemental jurisdiction), a party can bring in federal court state law claims that are closely related to federal law claims that are properly in federal court.

<sup>5</sup> Bursese claimed that he had reported to PayPal officials his observation that some of his PayPal colleagues had unlawfully utilized software belonging to other companies in their PayPal work. Judge Whyte granted summary judgment for PayPal on these counts, because Bursese did not claim that he had reported his observations about illegal activity to government authorities. Reporting these observations to the employer is not sufficient, Judge Whyte held.

38 U.S.C. 4316(c) (emphasis supplied).

Bursese was constructively discharged about four months after he returned from his period of military service—it was well within the 180-day special protection period. The discharge was unlawful unless it was *for cause*. PayPal argued that section 4316(c) did not apply because the severance payment which PayPal promised to Bursese (as consideration for the release) carried Bursese past the 180-day period. Judge Whyte forcefully rejected this argument, as follows:

“This section, according to PayPal, only affords an employee like Bursese, who served between 30 and 180 days, six months' job protection after their return. Bursese's employment terminated on January 30, 2004 according to the separation agreement. This date was four months after Bursese's return from military service and PayPal paid him an amount sufficient to compensate for an additional two months, as well as extended his benefits to include that two month period as part of the separation package. Thus, PayPal argues that even if plaintiff's separation from PayPal could be considered constructive termination, the fact that PayPal covered plaintiff's salary and benefits for over two months following plaintiff's return establishes that it was in compliance with section 4316(c)(2). PayPal cites no authority for the argument that severance compensation somehow constitutes employment for purposes of section 4316(c). The court rejects this argument and denies defendant's summary judgment motion as to plaintiff's wrongful discharge claim to the extent it relies on section 4316(c).”

There are other interesting aspects of Judge Whyte's decision, and it is certainly worth reading. But the important aspect of this case is Judge Whyte's liberal reading of section 4316(c).

There is no reported subsequent history of this case. It is clear that the parties settled their differences and dismissed the case.