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## **USERRA Has Teeth**

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All Reserve Component personnel owe a big debt of gratitude to Marine Corps Reserve Col George C. Aucoin Jr. and LtCol Joseph Steve Duarte, USMCR. Duarte sued Agilent Technologies, Inc., under the Uniformed Services Employment and Reemployment Rights Act (USERRA), and Aucoin was his attorney. (Colonel Aucoin is an ROA member.) The trial was held before the Hon. Lewis T. Babcock, chief judge of the United States District Court for the District of Colorado. Judge Babcock entered a judgment for Duarte March 31, 2005, against Agilent, in the amount of \$383,761.

That figure included \$114,500 in back pay, from November 2003 (when Agilent terminated Duarte's employment) until the trial in March 2005, plus \$324,082 in front pay (explained further below), for a total of \$438,582. Judge Babcock deducted the \$54,821 severance payment that Agilent had paid Duarte, for a net of \$383,761.

Judge Babcock awarded Duarte prejudgment interest on the back pay, as is customary in employment cases. If you receive money in March 2005 that you should have received earlier, inflation has degraded some of the value of that money, and you have lost the opportunity to invest that money, and earn interest, during the interim. Economists refer to this concept as the "time value of money." Prejudgment interest compensates for this effect. Judge Babcock also awarded Duarte attorney fees and litigation expenses, in accordance with section 4323(h)(2) of USERRA, 38 U.S.C. 4323(h)(2).

Based on expert testimony of an economist, Judge Babcock awarded front pay, explaining the computation: "The amount of front pay awarded assumes that Duarte will re-enter the work force at closer to 50 percent of his salary at Agilent at the time of his termination as set forth under Butler's [the economist's] second scenario, but that he will return to the level of income that he enjoyed at Agilent in six years." The \$324,082 is the current value of this lost future income, adjusted for the fact that Agilent will be required to pay it in advance.

Duarte started working for Hewlett-Packard (HP) in 1984. In 1999, Agilent Technologies spun off from HP and became an independent company in 2000. During his employment with Agilent, Duarte was mobilized on two occasions, from October 2001 to April 2002 and from November 2002 to July 2003. When Duarte returned from the second mobilization, Agilent did not reinstate him in the position that he had held previously, and that he almost certainly would have continued to hold if he had not been mobilized. Instead, Agilent assigned Duarte to a special project, which he completed four months later (November 2003), at which time Agilent terminated his employment.

A person returning from a period of service of more than 90 days, and meeting the USERRA eligibility criteria (which Duarte did), must be re-employed “in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform.” [38 U.S.C. 4313(a)(2)(A)] Judge Babcock held that the “special project” position in which Duarte was re-employed was not of “like status” to the position he would have attained if he had remained continuously employed.

USERRA also provides that a person returning from a period of service of more than 180 days “shall not be discharged from such employment, except for cause ... within one year after the date of such reemployment.” [38 U.S.C. 4316(c)(1)] Agilent fired Duarte just four months after he returned from his second mobilization, so Agilent violated this provision.

Section 4316(c) does not outlaw a bona fide layoff or reduction in force that would have happened anyway, even if the individual's employment had not been interrupted by military service. Agilent argued that discharging Duarte in November 2003 was not a violation because his special project had been completed and his employment at the company was surplus. The problem with this argument was that reinstating Duarte in the “special project” position, instead of the permanent position he had held, was itself a violation of USERRA. If Agilent had properly reinstated Duarte in July 2003, Duarte would not have found himself in the “surplus” situation four months later. This illustrates why the

#### **USERRA provisions need to be read together, not in isolation.**

Agilent went through hard times in the early part of this decade, reporting net losses in seven consecutive quarters. In the third quarter of FY03, Agilent lost \$1.5 billion (yes, billion with a “b”). Agilent restored itself to profitability starting in the fourth quarter of FY03 by ruthlessly cutting costs, especially for personnel. Agilent's workforce was reduced from 41,000 in FY01 to 29,000 at the end of FY03.

Judge Babcock recognized Agilent's “serious financial hardship in recent years” but held that the hardship did not excuse the company from its obligations under USERRA. He held, “I do not question Groninga's [the manager's] motives while acting under budgetary stress. But Duarte paid a steep price for his military deployment during his employment with Agilent. Specifically, he was seriously disadvantaged as a result of his military deployment and the corresponding diminished status and responsibilities assigned to him upon his return. This is the harm USERRA was enacted to prevent.”

Col George C. Aucoin Jr., USMCR, of New Orleans, represented Colonel Duarte in this most important case. Attorney Aucoin completed this trial March 9, and the next day

Colonel Aucoin was called to active duty. He was in Iraq by the time Judge Babcock handed down his decision March 31.

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