LAW REVIEW 206
Computation of Damages in USERRA Case
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Q: I was employed by the XYZ Corp. from December 1999 until December 2002, when I was called to active duty. I returned from active duty in December 2003 and immediately applied for re-employment at XYZ. The company had filled my position, and the company was very pleased with the replacement. XYZ denied my application for re-employment, stating that there was no position available for which I was qualified. Does the lack of a current vacancy mean that I am not entitled to reemployment?

A: No. "The department [Department of Veterans Affairs, the employer in the case] first argues that, in this case, Nichols' [Nichols was the returning veteran and the plaintiff] former position was 'unavailable' because it was occupied by another, and thus it was within the department's discretion to place Nichols in an equivalent position. This is incorrect. Nichols' former position is not unavailable because it still exists, even if occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. 'Employers must tailor their workforces to accommodate returning veterans' statutory rights to reemployment. Although such arrangements may produce temporary work dislocations for nonveteran employees, these hardships fall within the contemplation of the Act, which is to be construed liberally to benefit those who 'left private life to serve their country.' *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946).' *Goggin v. Lincoln St. Louis,* 702 F.2d 698, 704 (8th Cir. 1983). Although occupied by Walsh, Nichols' former position is not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him." *Nichols v. Department of Veterans Affairs,* 11 F.3d 160 (Fed. Cir. 1993).

For other cases holding that the lack of a current vacancy does not excuse the employer's failure to re-employ the returning veteran, I invite the reader's attention to *Cole v. Swint,* 961 F.2d 58 (5th Cir. 1992); *Fitz v. Board of Education of the Port Huron Area Schools,* 662 F. Supp. 10 (E.D. Mich. 1985); and *Green v. Oktibbeha County Hospital,* 526 F. Supp. 49 (N.D. Miss. 1981). There are circumstances in which the employer must lay off the replacement in order to reemploy the returning veteran. I think that your situation is such a case.

A: In 2002, before I was mobilized, I was earning $4,000 per month from XYZ, for a total of $48,000 in 2002. In 2004, after I returned from service and was denied re-employment, I diligently searched for employment for three months (January-March). I finally found a job at the JKL Corporation on April 1, 2004, and that job paid $3,000 per month, plus overtime. I stayed in that job until October 1, 2004, when I got a big promotion at JKL and started earning $6,000 per month.

After I was denied re-employment in December 2003, I complained to the National Committee for Employer Support of the Guard and Reserve (ESGR), and

an ESGR volunteer contacted the employer (XYZ) on my behalf, explaining the company's obligations under the Uniformed Services Employment and Reemployment Rights Act (USERRA), but the company's personnel director told the ESGR volunteer to "pound sand." I then complained to the Veterans' Employment and Training Service, U.S. Department of Labor (DOL-VETS), but the personnel director told DOL-VETS to "pound sand" as well. DOL-VETS forwarded the case to the Department of Justice (DOJ), and DOJ filed suit on my behalf against the employer, in the United States District Court.

As part of the discovery process in the court case, the employer demanded and obtained my 2004 tax return, which showed that I earned a total of $50,000 in that year. That includes: (a) regular salary and overtime pay at JKL, between April and December; (b) unemployment compensation that I received in the first three months of 2004; and (c) my Army Reserve drill pay, for one weekend of drills per month.

The employer's attorney has filed a motion to dismiss the case, insisting that the "no harm, no foul" rule applies because I earned more money in 2004 ($50,000) than I earned from XYZ in 2002. The company also offered me $5,000 in "full and final satisfaction" of my claim. Should I accept the offer? Is that figure satisfactory?

A: The court should deny the employer's motion to dismiss, and the settlement offer is grossly insufficient. The employer's computation of "no harm no foul" is faulty in several ways.

First, the comparison should be to what you *would have earned from XYZ in 2004* if you had not been mobilized in 2002. The comparison should not be to what you earned from XYZ in 2002. You almost certainly would have received cost-of-living pay increases from XYZ on Jan. 1, 2003, and Jan. 1, 2004, if you had not been mobilized, and you might have received other pay raises as well. If it is *reasonably certain* (not necessarily absolutely certain) that you would have received such pay raises, those increases should be factored into the computation of the XYZ pay that you lost because of the company's USERRA violation. Please see Law Reviews 120 and 169. Go to www.roa.org. Click on "Legislative Affairs" then "ROA Law Reviews."

Second, the unemployment compensation should not be included in the computation of mitigation of your back pay, because it came from a collateral source (the state). *See Niemann v. Alpine-Brook-Triangle Corp.,* 69 Labor Cases Par. 12,940 at page 24,995 (S.D.N.Y. 1972). *See also National Labor Relations Board v. Gullett Gin Co.,* 340 U.S. 361, 364-65 (1951) (Unemployment compensation should not be deducted from a back pay award under the National Labor Relations Act.)

If you receive, by settlement or judgment, back pay for the first three months of 2004, it is possible that the state will demand that you reimburse the state for the unemployment compensation that you received for that period of time. The state's theory

would be that, in retrospect, you were not unemployed during January–March 2004 because you later received back pay for that period of time. This is why it is important that the unemployment compensation not be included as mitigation in the back pay computation.

Third, back pay should be computed on a pay period by pay period basis. If you receive, during a particular pay period, more money from the mitigating employment than you would have received from the lawbreaking employer, but for the violation, you do not receive back pay *for that pay period.* But the excess should not be applied to earlier or later pay periods. *See Dyer v. Hinky-Dinky, Inc.,* 710 F.2d 1348 (8th Cir. 1983).

It appears that the big promotion that you received on October 1, 2004, cuts off your back pay as of that date; after that date you have been making more money from JKL than you would have received from XYZ but for the violation. But the excess should not be applied to earlier pay periods in 2004, and looking solely at your total earnings for 2004 leads to this critical computation error.

For the first three months of 2004, you did not mitigate any of your lost pay, because you had not yet found a job. Let us assume, for purposes of the computation, that your XYZ pay in early 2004 would have been $4,300 per month if you had not been mobilized in 2002. Your back pay for those months would be $12,900 ($4,300 multiplied by three). For the next six months (April–September 2004), you were receiving $3,000 per month, and you should have been receiving $4,300 per month from XYZ. The difference is $1,300 per month, or $7,800 for that six-month period. So, the back pay for the period of January–September 2004 is $20,700.

Fourth, the overtime pay that you received from JKL during the April–September time-frame should not be deducted from your back pay award, because that would amount to rewarding the lawbreaking employer for your extra effort. The comparison between your JKL pay and what your XYZ pay would have been should only be for *comparable hours*. *See Helton v. Mercury Freight Lines, Inc.,* 444 F.2d 365 (5th Cir. 1971); *McKnight v. Twin Cities Broadcasting Corp.,* 13 CCH Labor Cases Par. 64,067 (D. Minn. 1947).

Fifth, your Army Reserve drill pay should not be deducted from the back pay award. If you had remained continuously employed at XYZ, working Monday through Friday, you would have received that drill pay *in addition to* not instead of your regular XYZ salary. On the other hand, if you performed two weeks of annual training in the first nine months of 2004, that pay should probably be deducted from the back pay. The annual training pay probably would have been *instead of* rather than in addition to your XYZ pay.

Q: After I left active duty in December 2003, I had TRICARE Transitional for six months, for my husband, my young son, and myself. After June 2004, when the TRICARE Transitional coverage expired, I was concerned about being uninsured, because I did not have coverage at JKL until October 2004, when I was promoted.

Both my husband and my son have had significant health problems, so I could not afford to be uninsured.

While I was employed at XYZ, I had an excellent health insurance package, for which I paid only $100 per month. For July, August, and September 2004, I paid $1,000 per month for family health-care coverage. If I had not been unlawfully denied re-employment in December 2003, I would not have incurred this expense in July–September 2004. Is this expense reimbursable under USERRA?

A: Yes. Under Section 4317(b) of USERRA, you were entitled to immediate reinstatement of your health insurance coverage upon your prompt re-employment, after returning from service. In addition to the back pay, the employer (XYZ) is required to pay you $2,700 for the health insurance ($3,000 you paid minus $300 you would have paid if you had been back at work at XYZ during that time). USERRA specifically provides, "The court may require the employer to compensate the person for any loss of wages *or benefits* suffered by reason of such employer's failure to comply with the provisions of this chapter." 38 U.S.C. 4323(d)(1)(B)

Q: I was employed by XYZ since December 1999, and I had a pension plan at XYZ. If I had remained continuously employed, I would have reached the five-year point at XYZ, and I would have been vested in the pension plan, as of December 2004, one year after I returned from active duty. I have a pension plan at JKL, but I have started all over, as a new employee for pension purposes, as of April 2004, when I started my job at JKL. Am I entitled to compensation for this circumstance?

A: Yes. I describe USERRA's pension provisions in considerable detail in Law Reviews 4, 9, 40, 74, 75, 76, and 107. If you had never been mobilized, or if you had been properly and promptly reinstated by XYZ in December 2003, you would be much better off now as far as preparation for your retirement years. XYZ should be required to pay what is necessary to put you in the position (at least roughly) that you would now be in if you had been continuously employed. One way to measure the damage would be to obtain the cost today of an annuity or Individual Retirement Account that would at least roughly make up for what you have lost. Let us say, for purposes of discussion, that the cost would be $4,000.

Q: In a deposition, the employer's attorney asked me pointed questions about my efforts to find gainful employment during the first three months of 2004. The employer is arguing that I had a "duty to mitigate damages" and that I "breached" this duty. What gives?

A: It is true that you had a duty to mitigate your damages by seeking and if possible accepting suitable alternative employment. But "failure to mitigate damages" is an affirmative defense for which the employer has the burden of proof. *See Hanna v. American Motors, Inc.,* 724 F.2d 1300, 1307 (7th Cir.), *cert. denied,* 467 U.S. 1241 (1984). To prevail on the "failure to mitigate damages" argument, XYZ will be required to prove that there were other jobs available to you with reasonable effort on your part

and that you failed to make such an effort. I do not think that the employer will be able to meet that burden of proof, because three months is not an inordinate period of time; the judge is not going to find it hard to believe that it reasonably took you three months to find another job. It would perhaps be different if you had been unemployed for three years.

I receive questions about this issue all the time. My advice to folks in this situation is that you *document your efforts* to find work. You should create a logbook in which you record every job application that you complete and every interview that you do. If you are later faced with an employer argument that "she didn't even try to find a job," you can pull out that logbook to show the efforts that you made to mitigate your damages.

Q: I will be receiving in 2005 or maybe even 2006 money that I should have received in 2004. Inflation has degraded some of the value of that money, and I lost the opportunity to invest the money and earn interest during all those intervening months. I think that economists call this the "time value of money." Am I entitled to compensation for the effects of the delay in paying me what I am owed?

A: Yes. *See Hanna,* 724 F.2d at 1310-12 (holding that the District Court's refusal to award prejudgment interest was an abuse of discretion). *See also Hembree v. Georgia Power Co.,* 637 F.2d 423, 429-30 (5th Cir. 1981).

Q: I think that my employer violated USERRA *willfully.* In December 2003, when I returned from work, the ESGR volunteer carefully explained (orally and in writing) to the company's personnel director that USERRA gave me the right to prompt re-employment despite the fact that the job that I had held had been filled. The personnel director indicated that she did not want to hear any of this and that she did not want the federal government telling her how to run the company. Does USERRA provide for *punitive damages*?

A: USERRA does not provide for punitive damages, but it does provide: "The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) [actual compensatory damages] as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful." 38 U.S.C. 4323(d)(1)(C). In other words, the damages are doubled if the court finds that the violation was willful.

USERRA's legislative history provides as follows on this point: "Section 4322(d) [later renumbered to 4323(d)] provides that the courts are empowered to require employers to comply with the provisions of this chapter, to compensate the employee for any loss of wages or benefits, and to award liquidated damages in the case of willful violations. A violation shall be considered to be willful if the employer or potential employer 'either knew or showed reckless disregard for the matter of whether its conduct was prohibited by [the provisions of this chapter].' *Hazen Paper Co. v. Biggins,* 507 U.S.

604 (1993).” House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2471.

The “liquidated damages” provision is in Section 4323, which applies to cases against states, political subdivisions states (counties, cities, school districts, etc.), and private employers. There is no similar provision in Section 4324, which applies to cases against federal executive agencies. The Merit Systems Protection Board has no authority to order a federal agency to pay liquidated damages.

Summary

You appear to have established the entitlement to $20,700 in back pay for the period between January and September 2004. You appear to have shown an entitlement to an additional $2,700 for what you had to pay for health insurance coverage, minus what you would have had to pay anyway. The total is $23,400. You are entitled to prejudgment interest, probably computed at the *federal funds rate.* (Check the business page of your local newspaper, or perhaps the *Wall Street Journal.* The rate varies, but interest rates are currently pretty low.) Let us say, for ease of computation, that adding in the prejudgment interest brings the amount of the actual damages to $26,000. Adding the present value of an annuity that would make you whole for what you have lost with respect to XYZ pension credit brings the amount of damages to $30,000.

If you prevail on the merits, and it sounds like you have a strong case, you are entitled to $30,000 in actual damages. If you also establish that the employer's violation was willful, you are entitled to an additional $30,000 in liquidated damages. The $5,000 settlement offer is grossly insufficient.

I also invite your attention to Law Review 172 (June 2005), titled “USERRA Has Teeth.” Law Review 172 is about the case of *Duarte v. Agilent Technologies, Inc.* In that case, the United States District Court for the District of Colorado ordered Agilent Technologies to pay $383,761 to Marine Corps Reserve LtCol Joseph Duarte. Most of that figure ($324,082) was for *front pay*—damages for the period *after* the court's judgment because it was apparently contemplated that he would not be returning to work for Agilent. Including front pay as well as back pay is a way to make the numbers really add up, but it does not appear that you would be entitled to front pay. You are now earning, from JKL, substantially more than you would have been earning from XYZ, for the period after Oct. 1, 2004.

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