

LAW REVIEW¹ 22033

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Computing Damages in a USERRA Case

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1.2—USERRA forbids discrimination

1.4—USERRA enforcement

Sedric Ward v. Shelby County, Tennessee, Case No. 2:20-cv-02407-JPM-cgc. United States District Court for Western District of Tennessee, Western Division. Unanimous jury verdict dated 4/14/2022

Attorneys Robert Mitchell, Thomas Jarrard,³ and SaraEllen Hutchinson

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouses' Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

² BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 46 years, I have collaborated with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 38 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at <mailto:swright@roa.org>.

³ Thomas Jarrard is a recently retired Marine Corps Reserve officer and a life member of the Reserve Organization of America (ROA) and the author or co-author of several of our "Law Review" articles. Robert Mitchell served on active duty in the Marine Corps and is also a member of ROA.

recently won a great but preliminary victory, on behalf of Army Reserve soldier Sedric Ward, in an important case arising under the Uniformed Services Employment and Reemployment Rights Act (USERRA). On 4/14/2022, the jury unanimously ruled in favor of the plaintiff, Sedric Ward.

Regarding cases against State and local governments and private employers,⁴ USERRA provides as follows concerning the remedies that can be awarded to the successful plaintiff:

(d) Remedies.

(1) In any action under this section, the court may award relief as follows:

(A) The court may require the employer to comply with the provisions of this chapter.

(B) 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.

(C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.

(2)

(A) Any compensation awarded under subparagraph (B) or (C) of paragraph (1) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter.

(B) In the case of an action commenced in the name of the United States for which the relief includes compensation awarded under subparagraph (B) or (C) of paragraph (1), such compensation shall be held in a special deposit account and shall be paid, on order of the Attorney General, directly to the person. If the compensation is not paid to the person because of inability to do so within a period of 3 years, the compensation shall be covered into the Treasury of the United States as miscellaneous receipts.

(3) A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section.

(e) Equity powers. The court shall use, in any case in which the court determines it is appropriate, its full equity powers, including temporary or permanent injunctions,

⁴ A separate section of USERRA, section 4324 (38 U.S.C. § 4324) provides for enforcement of USERRA against Federal executive agencies as employers, and the damages that can be awarded against a Federal executive agency are less generous than the damages that can be awarded against a State or local government or private employer.

temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter.⁵

After a lengthy and contentious discovery process, the *Ward v. Shelby County* case proceeded to a jury trial⁶ and the jury returned a unanimous verdict for the plaintiff, Sedric Ward. The jury answered six questions, as follows:

1. Did the plaintiff suffer an adverse employment action? **Yes**
2. Was the plaintiff's military service a motivating factor in any adverse employment action? **Yes**
3. Did the defendant prove that it would have taken the same action anyway, without regard to the plaintiff's military service? **No**
4. Did the defendant's actions toward the plaintiff rise to the level of a willful USERRA violation as that term is defined in the [jury] instructions? **Yes**
5. Decide the total amount of damages: **Lost wages and benefits totaling \$567,183 minus \$6,183 in mitigation, for a net award of \$561,000.**
6. Compute future damages after 6/15/2021: **\$50,000 per year for three years, or \$150,000.**

Q: How are damages computed in a USERRA case?

A: Damages for lost pay and benefits are computed on a *pay period by pay period basis*.⁷ For each pay period, the jury or judge must determine how much the plaintiff *would have received* but for the USERRA violation, and from that figure the jury or judge must deduct the amount that the plaintiff earned from other mitigating employment. The computation should only include earnings for comparable hours. For example, if the plaintiff would have earned \$3,000 for two 40-hour weeks from the defendant but earned \$4,500 from the mitigating employment for two 60-hour weeks, including \$2,000 in overtime pay, the plaintiff should receive \$500 in back pay for that pay period (comparing earnings for straight-time work only).

If the plaintiff received more money from the mitigating employment for a specific pay period, the plaintiff receives no back pay for that pay period, but excess pay is not applied to earlier or later pay periods, in determining the back pay award.

⁵ 38 U.S.C. § 4323(d) and (e).

⁶ Under USERRA, unlike the predecessor reemployment statute, the person who claims that a State or local government or private employer has violated USERRA is entitled to a jury trial. See Law Review 07037 (July 2007).

⁷ See *Dyer v. Hinky-Dinky, Inc.*, 710 F.2d 1348 (8th Cir. 1983). See generally Law Review 206 (December 2005) for a detailed discussion of the computation of damages in a USERRA case.

Q: What is the effect of the jury's determination that the defendant violated USERRA willfully?

A: Under section 4323(d)(1)(C) of USERRA,⁸ the finding of willfulness means that the court will award double damages to the plaintiff—in this case \$1,122,000 instead of \$561,000.⁹

Q: What is front pay?

A: Under section 4323(d)(1)(A),¹⁰ “The court may require the employer to comply with the provisions of this chapter.” That means that the judge can order the employer (Shelby County) to reinstate Ward into the position that he would have attained but for the USERRA violation, and in that case, there would be no need for front pay. In some cases, however, the parties agree or the judge determines that ordering reinstatement is not appropriate because the “bad blood” between the parties will make a harmonious return to work impossible. This is apparently such a case. In lieu of a reinstatement order, the plaintiff (Ward) will be awarded front pay of \$150,000 (\$50,000 per year for three years).¹¹

Q: Is this case over?

A: No. Section 4323(h)(2) of USERRA provides:

In any action or proceeding to enforce a provision of this chapter by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court may award such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses.¹²

In the next step of this case, the plaintiff, Sedric Ward, through his attorneys (Mitchell, Jarrard, and Hutchinson) will seek to have the judge award substantial attorney fees.¹³

After proceedings in the United States District Court for the Western District of Tennessee are completed, the defendant (Shelby County) may appeal to the United States Court of Appeals for

⁸ 38 U.S.C. § 4323(d)(1)(C).

⁹ See *Law Review* 07013 (March 2007) for a discussion of the awarding of liquidated (double) damages under USERRA.

¹⁰ 38 U.S.C. § 4323(d)(1)(A).

¹¹ See *generally* *Law Review* 172 (June 2005) for a detailed discussion of front pay in USERRA cases.

¹² 38 U.S.C. § 4323(h)(2).

¹³ See *generally* *Law Review* 15099 (November 2015) for a detailed discussion of the USERRA provision providing for the award of attorney fees to successful USERRA plaintiffs.

the 6th Circuit.¹⁴ We will keep the readers informed of developments in this interesting and important case.

Evaluation

I commend attorneys Robert Mitchell, Thomas Jarrard, and SaraEllen Hutchinson for their imaginative, diligent, and successful (so far at least) representation of Army Reserve member Sedric Ward. The effective enforcement of USERRA is essential if our nation's armed forces are to be able to recruit and retain a sufficient quantity and quality of military personnel to defend our nation.

Q: Where can I, as an attorney, find sample verdict forms, motions, complaints, discovery, voir dire questions, and post-trial motions for USERRA cases?

A: The definitive attorney reference on USERRA is *The USERRA Manual* by Kathryn Piscitelli and Edward Still. Appendices I through P of the *Manual* contain all the sample materials you mentioned.

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Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members, through their

¹⁴ The 6th Circuit is the Federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee.

dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

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¹⁵ Congress recently established the United States Space Force as the 8th uniformed service.

¹⁶ You can also donate on-line through our website, www.roa.org.