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DOJ Sues Penske for Violating USERRA and Reaches Favorable Settlement

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

1.3.2.9—Accommodations for disabled veterans
1.4—USERRA enforcement
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Facts

The United States Department of Justice (DOJ) sued Penske Truck Leasing Company, Inc., of Chesapeake, Virginia, in the United States District Court for the Eastern District of Virginia, on behalf of former Air Force Reservist William O. Mann. DOJ and Penske announced a settlement of the lawsuit on May 5, 2014. Under the settlement, Mr. Mann is to receive $85,000 and will not return to work at Penske. Although Mr. Mann expressed disappointment with the amount and terms of the settlement, I think that the settlement achieved most or all of what could have been accomplished if the case had gone to trial and DOJ had prevailed.

Mr. Mann left his job at Penske to go on active duty with the 512th Mortuary Affairs Squadron at Dover Air Force Base in Delaware. His active duty period was originally scheduled to last six months. While on active duty, he suffered an apparently serious wrist injury in the line of duty. His release from active duty was delayed by about two months, as he was recuperating from the injury, and when he was released from active duty he was not fully recovered.

Substantive law applicable to this case

As I explained in Law Review 1281[1] and other articles, an individual must meet five conditions to have the right to reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA):[2]

a. Must have left a civilian position of employment (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services.
b. Must have given the employer prior oral or written notice, unless prior notice was precluded by military necessity or otherwise impossible or unreasonable.
c. Cumulative period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment, must not have exceeded five years.[3]
d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.
e. After release from the period of service, must have made a timely application for reemployment.[4]

It seems clear that Mr. Mann met these five conditions. He reported back to Penske just two days after he was released from active duty on May 21, 2011. Because Mr. Mann met the conditions, Penske had a duty to reemploy him in the position of employment that he *would*

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[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 1,060 articles about 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 169 new articles in 2013.

[2] USERRA is codified in title 38, United States Code, sections 4301-4335 (38 U.S.C. 4301-4335).

[3] All involuntary service and some voluntary service are excluded from the computation of the individual's five-year limit, under 38 U.S.C. 4312(c). Please see Law Review 201 (August 2005) for a detailed discussion of the five-year limit—what counts and what does not count.

[4] After a period of service of 181 days or more, the individual has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

have attained if continuously employed[5] or another position, for which he is qualified, that is of like seniority, status, and pay.[6]

Because Mr. Mann met the USERRA eligibility conditions, and because he returned from service with a temporary or permanent disability sustained or aggravated during his period of uniformed service, Penske was required to make reasonable efforts to accommodate the disability and (if necessary) to reemploy Mr. Mann in a different position, for which he was qualified, or could become qualified with reasonable employer efforts, and that provided like seniority, status, and pay, or the closest approximation thereof consistent with Mr. Mann's circumstances.[7] Penske violated USERRA by refusing to make these required accommodations for Mr. Mann's injured wrist and by firing him.

Remedies available to Mr. Mann

Section 4323(d)(1) of USERRA sets forth the remedies that are available to the successful USERRA plaintiff in a case against a private employer or a state or local government:[8]

"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.

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[5] The position that the returning veteran would have attained if continuously employed is usually but not always the position that he or she left when called to the colors. The returning veteran may be entitled to a better position, the same position, a worse position, or no position at all, depending upon that *would have happened.* We must review what has happened to the returning veteran's colleagues at the employer (those who remained behind when the individual left) in order to determine what would have happened to the individual.

[6] 38 U.S.C. 4313(a)(2)(A).

[7] 38 U.S.C. 4313(a)(3). Please see Law Review 0854 for a detailed discussion of the employer's USERRA obligations to the returning disabled veteran.

[8] Section 4324 (38 U.S.C. 4324) provides for enforcement of USERRA against federal agencies as employers, through the Merit Systems Protection Board. Liquidated (double) damages are not available against federal agencies, for willful violations.

(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."

38 U.S.C. 4323(d)(1).

On May 13, 2014, *Delaware News Journal* published an article by William H. McMichael, titled "Deal will give Air Force Reservist lost wages." The article includes the following sentence: "Now a student at Anne Arundel Community College [Maryland] and working part-time at Wal-Mart, Mann said he was displeased with the settlement because he was forced to rely on his credit cards to get by following his Air Force duty and that this amount is not being reimbursed—and that much of the income he earned during 2010-11 is to be deducted."

As I explained in Law Review 206, under USERRA or any employment discrimination law the plaintiff has a duty to mitigate damages after he or she has been unlawfully deprived of employment or reemployment. The amount that the individual earned from the mitigating employment[9] or the amount that the individual could have earned with reasonable effort must be deducted from the back pay award. The idea is to compensate the plaintiff for the wages that he or she lost because of the violation, not to give the plaintiff a windfall.

[9] The comparison is to be made on a pay period by pay period basis, for comparable hours. If the individual works overtime in the mitigating employment but the base employment figure was for straight time, the overtime earnings should not be deducted from the back pay award.

Under USERRA and other employment discrimination laws, prejudgment interest is normally awarded on back pay awards, in order to compensate the plaintiff for the loss of the use of the money and to offset the effects of inflation. Prejudgment interest is generally computed at the federal funds rate, not the much higher rate that the individual may have paid on maxed-out and overdue credit card balances.[10] The law does not provide for Mr. Mann to be compensated for his use of credit cards to pay living expenses after he lost his job at Penske.

Summary

In his article in the *Delaware News Journal,* Mr. McMichael wrote: "Penske, a Delaware corporation, agreed to settle the case without admitting guilt. It denies that it violated the Uniformed Services Employment and Reemployment Rights Act of 1994, and the agreement 'is not an admission of liability under the statute.'"

This "we do not admit that we did anything wrong" line is standard boilerplate in these cases. Penske would not have paid out $85,000 unless it believed that it was likely that it would lose and that it would be ordered to pay out at least that much.

I congratulate DOJ for having brought this case and for having achieved a just and reasonable settlement.

[10] In the last five years, the federal funds rate has been at historically low rates, so low that prejudgment interest is hardly worth arguing about.