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Does USERRA Provide for the Recovery of Nonpecuniary and Punitive Damages? No

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

1.4—USERRA enforcement

Q: I am a Major in the Marine Corps Reserve (USMCR) and a life member of the Reserve Officers Association (ROA). I have read with great interest your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

I worked for a major defense contractor (let’s call it Daddy Warbucks International or DWI) for seven years, and I was continuously harassed by my direct supervisor and other DWI officials about my USMCR service. I contacted the Department of Defense (DOD) organization called “Employer Support of the Guard and Reserve” (ESGR), and an ESGR volunteer ombudsman visited with my supervisor and a representative of the DWI Human Relations (HR) office, but that only caused the harassment to get worse—they criticized me for “going outside the company family” with my work-related concerns.

¹ We invite the reader’s attention to www.servicemembers-lawcenter.org. You will find almost 1,400 “Law Review” 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. The Reserve Officers Association (ROA) initiated this column in 1997.

² Captain Wright is the author or co-author of more than 1,200 of the more than 1,400 “Law Review” articles available at www.servicemembers-lawcenter.org. He has been dealing with the federal reemployment statute for 33 years and has made it the focus of his legal career. He developed the interest and expertise in this law during the decade (1982-92) that he worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), he largely drafted the interagency task force work product that President George H.W. Bush presented to Congress (as his proposal) in February 1991. On October 13, 1994, President Bill Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA), Public Law 103-353. The version that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. Wright has also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), and as an attorney in private practice, at Tully Rinckey PLLC. For the last six years (June 2009 through May 2015), he was the Director of ROA’s Service Members Law Center (SMLC), as a full-time employee of ROA. In June 2015, he returned to Tully Rinckey PLLC, this time in an “of counsel” relationship. To schedule a consultation with Samuel F. Wright or another Tully Rinckey PLLC attorney concerning USERRA or other legal issues, please call Mr. Zachary Merriman of the firm’s Client Relations Department at (518) 640-3538. Please mention Captain Wright when you call.

I finally got so sick of the harassment that I started looking for another job. A year ago (October 2014) I started a new job with another company, a job that pays me a little more than what DWI had been paying me. But I put up with a lot of harassment for seven years at DWI, and I think that I should receive financial compensation for that harassment.

I visited an employment attorney in my city. After researching the issue, she told me that my case is “moot” and that there is no relief that can be obtained (financial or otherwise) because I did not actually lose any money through the harassment, since I found another job that pays just as much plus a little more. Is the attorney’s assessment correct? And what does “moot” mean?

A: Unfortunately, the attorney’s assessment is correct, under USERRA as currently written. Your situation illustrates a need for an amendment to USERRA, and we are working on that.

“Moot” means “of no practical significance, because of other things that have happened.” Let us say that there is a protracted custody dispute arising out of a contentious divorce. The case drags on so long that the daughter turns 18 and can choose on her own where to live and how much time (if any) to spend with each parent. At that point, the custody dispute is moot because the daughter has aged out of minority.

Section 4323(d) of USERRA provides for the remedies that a federal district court can award to a successful USERRA plaintiff, in a case involving a private employer, a state, or a political subdivision of a state. Here is the entire text of that subsection:

(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.³

Under section 4323(d)(1)(B), the court can order the employer to compensate the plaintiff for “any loss of wages or benefits” caused by the employer’s failure to comply with USERRA. This language clearly limits the financial recovery to *pecuniary* damages—those that can be translated directly into dollars. For example, if the employer unlawfully fires you or denies you reemployment upon your return from a period of uniformed service, the court will order the employer to pay you *back pay* for the period when you were unemployed because of the employer’s USERRA violation.⁴

There are generally three categories of money damages that can be obtained in civil cases:

- a. Pecuniary damages—compensation for a loss of salary, wages, or tangible benefits that can be directly converted to dollars.
- b. Nonpecuniary compensatory damages—compensation for a loss that cannot be directly converted to dollars but is nonetheless very real. Money damages for mental distress, humiliation, embarrassment, etc. fall into this category.
- c. Punitive damages—awarded to punish the wrongdoing defendant for violating the law intentionally or willfully.

³ 38 U.S.C. 4323(d) (emphasis supplied). Under section 4324 of USERRA, 38 U.S.C. 4324, USERRA cases against federal agencies as employers are brought in the Merit Systems Protection Board (MSPB), rather than in federal district court. The MSPB has the authority, under 38 U.S.C. 4324(c), to award similar relief against a federal agency, except that the MSPB does not have the authority to order a federal agency to pay “liquidated damages” (double damages) for violating USERRA willfully.

⁴ Please see Law Review 206 for a detailed description of the kinds of money damages that can be obtained under USERRA. Under USERRA or any other employment discrimination law, you have a *duty to mitigate damages*. That means that you must search for and if possible accept mitigating employment elsewhere. The amount that you earned from the mitigating employment or the amount that you should have earned if the court finds that you breached the duty to make reasonable efforts to mitigate your damages will be subtracted, on a pay-period-by-pay-period basis from what you would have earned from the defendant employer, but for the unlawful firing or failure to reemploy, and the court awards you a judgment for the difference. You are also entitled to prejudgment interest on the back pay award, because during the interim period you lost the opportunity to use the money and earn interest, and because during the interim inflation has degraded some of the value of the money. If losing the job meant that you lost a tangible benefit like health insurance coverage, and if you paid for the coverage out of pocket, the amount that you paid for what should have come to you for free would also be a compensable pecuniary damage.

Under section 4323(d) as currently written, only the first category of money damages can be awarded in USERRA cases.

If you were still employed by DWI, you could get the court to order the company to stop supervisors from harassing you because of your USMCR service, under section 4323(d)(1)(A). Because you no longer work for the company and do not seek to return, you cannot get injunctive relief—a court order requiring the company to stop harassing you. Such a court order would serve no useful purpose because you no longer work for the company. You cannot get a court order requiring DWI to stop harassing other DWI employees who are Reserve Component members—you do not have standing to complain about violations that do not affect you directly.

Under section 4323(d) as currently written, your claim against DWI is *moot*. You cannot get injunctive relief, and you cannot get money damages. There is no relief that the court can award you, so there is no point in filing such a suit.

Q: But my DWI supervisor and other company officials violated USERRA *willfully*. The ESGR ombudsman told them, both orally and in writing, that I had the job-protected right to be absent from my DWI job for USMCR training and service and that harassing me about my military service was unlawful, and receiving this ESGR advice only caused these folks to *increase* the harassment. Why am I not entitled to “liquidated damages” for these *willful* USERRA violations?

A: Under section 4323(d)(1)(C), “The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) [pecuniary damages] as liquidated damages, if the court determines that the employer’s failure to comply with the provisions of this chapter was willful.”⁵ Since you are not entitled to any pecuniary damages under section 4323(d)(1)(B), you are not entitled to any liquidated damages under section 4323(d)(1)(C), even if the employer did violate USERRA willfully—two times zero is zero.

Q: I contacted this particular lawyer because she represented my sister in a sexual harassment case against another large employer. My sister put up with some serious sexual harassment at work for some time and eventually quit when she found another job, with a different company, a job that paid just as much plus a little more. My sister suffered no loss of salary or benefits because she went directly from the lawbreaking employer to the new

⁵ 38 U.S.C. 4323(d)(1)(C).

employer with no period of unemployment in between. Nonetheless, my sister collected \$300,000 for nonpecuniary compensatory damages (mental distress) and punitive damages.

Why does a victim of sexual harassment at work get better relief than a victim of harassment based on service in a Reserve Component of our nation's armed forces?

A: Because these are two different statutes, written differently. In our legal system, a court does not generally get to make up the remedies that can be awarded—a court can award remedies that Congress or a state legislature has provided, by statute. In section 1981a of title 42 of the United States Code, Congress has provided for nonpecuniary compensatory damages and punitive damages for intentional employer discrimination in employment based on race, color, sex, religion, or national origin. Here is the text of that section, in its entirety:

§ 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery.

(1) Civil rights. In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5 [or 2000e-16]) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3 [or 2000e-16]), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), *in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 USCS § 2000e-5(g)], from the respondent.*

(2) Disability. In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 USCS § 2000e-5 or 2000e-16] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 505(a)(1) of the Rehabilitation Act of 1973 (29 U.S.C. 794a(a)(1)), respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) and the regulations implementing section 501 [29 USCS § 791], or who violated the requirements of section 501 of the Act [29 USCS § 791] or the regulations implementing section 501 [29 USCS § 791] concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act [42 USCS § 12112(b)(5)], against an individual, the complaining party may recover compensatory and punitive damages as

allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 USCS § 2000e-5(g)], from the respondent.

(3) Reasonable accommodation and good faith effort. In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 USCS § 12112(b)(5)] or regulations implementing section 501 of the Rehabilitation Act of 1973 [29 USCS § 791], damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) Compensatory and punitive damages.

(1) Determination of punitive damages. *A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.*

(2) Exclusions from compensatory damages. *Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 USCS § 2000e-5(g)].*

(3) Limitations. The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party--

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$ 50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$ 100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$ 200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$ 300,000.

(4) Construction. Nothing in this section shall be construed to limit the scope of, or the

relief available under, section 1977 of the Revised Statutes ([42 U.S.C. 1981](#)).

(c) Jury trial. If a complaining party seeks compensatory or punitive damages under this section--

- (1) any party may demand a trial by jury; and
- (2) the court shall not inform the jury of the limitations described in subsection (b)(3).

(d) Definitions. As used in this section:

(1) Complaining party. The term "complaining party" means--

(A) in the case of a person seeking to bring an action under subsection (a)(1), the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 ([42 U.S.C. 2000e](#) et seq.); or

(B) in the case of a person seeking to bring an action under subsection (a)(2), the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 505(a)(1) of the Rehabilitation Act of 1973 ([29 U.S.C. 794a\(a\)\(1\)](#)), or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 ([42 U.S.C. 12101](#) et seq.).

(2) Discriminatory practice. The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a).⁶

Section 1981a was added to title 42 of the United States Code by the Civil Rights Act of 1991.⁷ Title VII of the Civil Rights Act of 1964⁸ forbids discrimination in employment on the basis of race, color, sex, religion, or national origin. Between 1964 and 1991, only *pecuniary* damages could be awarded for violating Title VII. The 1991 law added important new remedies that can be awarded for intentional employer violations of Title VII. We need an amendment to USERRA, along the lines of what Congress enacted in 1991. I suggest that we use the language of section 1981a in drafting that amendment.

⁶ 42 U.S.C. 1981a (emphasis supplied).

⁷ Public Law 102-166, 105 Stat. 1072, signed into law by President George H.W. Bush on November 21, 1991.

⁸ Public Law 88-352, 78 Stat. 241, signed into law by President Lyndon Johnson on July 2, 1964.