

Court Expands Scope of Pennsylvania “Wrongful Discharge” Claims and Recognizes Common Law Right to Pursue Punitive Damages for Violation of Military Leave Rights

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In a decision that potentially expands the scope of wrongful discharge claims in Pennsylvania to encompass claims for “failure to hire,”¹ a military reservist who claims he was denied the right to “reclaim” his civilian job upon returning from a deployment in Pakistan has won the right to pursue punitive damages in a claim under Pennsylvania common law for wrongful discharge in violation of public policy while concurrently pursuing claims under the federal Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Pennsylvania Military Affairs Act (PMAA).

Individual Rights Under USERRA and PMAA

USERRA applies to all employers in the United States, regardless of size, with certain discrete exceptions. It guarantees reinstatement to employees who have properly advised their employer that they would be taking leave for the purpose of military service, have served under honorable conditions, and have timely returned to work and requested reemployment. Generally, there is a five-year cumulative limit on the employee’s duration of military service. Pennsylvania employers must also comply with the requirements of PMAA, which is generally more favorable to employees than is USERRA and which does not require an employee to provide notice before taking leave. If the requisite conditions have been satisfied by the employee, an employer is required to reemploy the individual upon his or her return, unless the employer can show that changed circumstances have made it impossible or unreasonable to do so. USERRA entitles successful plaintiffs to reinstatement and lost pay and benefits, while PMAA does not provide for any economic recovery.

While PMAA does not articulate any specific remedy, it favors the preservation of jobs for military reservists and condemns discrimination on the basis of military service. The PMAA’s articulation of Pennsylvania public policy was a significant factor in prompting Judge McVerry to conclude that USERRA and PMAA are complemented by the Pennsylvania tort claim of wrongful discharge/failure to hire, as this tort is predicated upon a plaintiff articulating public policy expressed in a statute such as PMAA.

¹ The court recognized that the case presented “unusual facts and circumstances.” The plaintiff had never been employed by either defendant. Instead, while he was deployed, the contractor that employed him in his civilian job was replaced by the defendants. Thus, his claim alleged that the defendants, which were alleged to be successors in interest to his employer, had failed to permit him to “reclaim” his predeployment position.

Hamovitz v. Santa Barbara Applied Research

In a case of first impression, *Hamovitz v. Santa Barbara Applied Research*, No. 2:07-cv-0454, 2010 WL 4117270 (W.D. Pa. Oct. 19, 2010) (McVerry), the U.S. District Court for the Western District of Pennsylvania held that USERRA does not provide an exclusive remedy and does not preempt Pennsylvania tort law. In so holding, the court noted that USERRA has a clause that explicitly protects a plaintiff's right to pursue additional claims under state law. Thus, the court permitted the plaintiff, a Marine veteran and member of the Air Force Reserves, to pursue concurrently claims under USERRA and a common law wrongful discharge claim allowing for punitive and other damages not provided by USERRA. The court issued its decision, which it acknowledged presented an "unquestionably close call," upon reconsideration of a prior order holding that the plaintiff was not entitled to seek punitive damages because they are not permitted under either USERRA or PMAA.

While the parties to the suit acknowledged that the Pennsylvania Supreme Court has long recognized a claim for "wrongful discharge" in violation of public policy, the defendants argued that Pennsylvania does not recognize a similar tort for "refusal to hire" in violation of public policy. In recognizing such a claim, the court relied on specific language found in PMAA, which makes it "unlawful . . . for an employer to refuse to hire or employ any individual" because of membership in the National Guard or other reserve component of the armed forces. The court also relied on a 1980 Pennsylvania Superior Court decision, *Hunter v. Port Authority of Allegheny County*, 419 A.2d 631 (Pa. Super. Ct. 1980), in which the court found that a public employer had failed to hire a woman in violation of public policy where the individual had been convicted of assault 10 years prior and had since been pardoned. The Pennsylvania Superior Court found that such a failure to hire violated the individual's right to engage in the common occupations of life, as found in the Pennsylvania Constitution. Because the employer in *Hunter* was a government entity, Judge McVerry recognized that the legal issues differed from those at issue in *Hamovitz*; nonetheless, he concluded that the logic of the *Hunter* decision, along with the specific language in PMAA, created a claim for failure to hire in violation of public policy.

Neither USERRA nor PMAA entitle the plaintiff to recover for noneconomic damages such as the emotional distress, humiliation, and embarrassment that Hamowitz claimed he suffered when the defendants failed to rehire him. In addition, neither statute permits the recovery of punitive damages. Judge McVerry held that "because USERRA does not provide any meaningful route to compensation for these types of losses, and in light of the plain language of USERRA, the court finds and rules that plaintiff's remedies under USERRA do not appear to be exclusive." Therefore, the court ordered that the plaintiff is permitted to seek additional tort damages (including compensatory damages for emotional distress, embarrassment, and humiliation, as well as punitive damages), as such damages are available under Pennsylvania common law.

What This Means for Employers

Pennsylvania employers should be aware of the *Hamovitz* decision because it has the potential to significantly increase the damages that are available to an employee who claims that his or her rights under USERRA and/or PMAA have been violated. In addition, the decision potentially expands the scope of the "wrongful discharge" tort by giving rise to claims for "failure to hire" as well as wrongful discharge.

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