

4 PJI 18 | USERRA - 38 USC §4311(A) - USERRA DISCRIMINATION - INCLUDING "SAME DECISION" DEFENSE

In this case, [Plaintiff] makes a claim under the Uniformed Services Employment and Reemployment Rights Act, also called USERRA. USERRA prohibits an employer from discriminating against an employee in the terms and conditions of the employee's employment because the employee [is a member of/applies to be a member of/performs service in/has performed service in/applies to perform service in/has an obligation to perform service in] a uniformed service.

[Plaintiff] claims that [Defendant] discriminated against [Plaintiff] by [discharging [him/her] from employment/denying [him/her] a promotion] because [he/she] [was a member of/applied to be a member of/performed service in/applied to perform service in/had an obligation to perform service in] a uniformed service.

[Defendant] denies [Plaintiff]'s claim and asserts that [describe the defendant's defense].

To succeed on [his/her] claim, [Plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Plaintiff] [was a member of/applied to be a member of/performed service in/applied to perform service in/had an obligation to perform service in] a uniformed service;

Second: [Defendant] [discharged [Plaintiff] from employment/denied [Plaintiff] a promotion]; and2

Third: [Plaintiff]'s [membership/application for membership/service/application for service/obligation for service] in a uniformed service was a motivating factor that prompted [Defendant] to take that action.

[In the verdict form that I will explain in a moment, you will be asked to answer questions about these factual issues.]

[Name of Armed Forces Branch/Army National Guard/Air National Guard] is a "uniformed service."

If you find that [Defendant] [discharged [Plaintiff] from employment/denied [Plaintiff] a promotion], you must decide whether plaintiff's [membership/application for membership/service/application for service/obligation for service] was a motivating factor in [Defendant]'s decision.



To prove that [Plaintiff]'s [membership/application for membership/service/application for service/obligation for service] in a uniformed service was a "motivating factor" in [Defendant]'s decision, [Plaintiff] does not have to prove that [his/her] [membership/application for membership/service/application for service/obligation for service] in a uniformed service was the only reason that [Defendant] [discharged [Plaintiff] from employment/denied [Plaintiff] a promotion]. It is enough if [Plaintiff] proves that [his/her] [membership/application for membership/service/application for service/obligation for service] in a uniformed service influenced [Defendant]'s decision. If [Plaintiff]'s [membership/application for membership/service/application for service/obligation for service] in a uniformed service made a difference in [Defendant]'s decision, you may find that it was a motivating factor in the decision.

[Defendant] claims that [Plaintiff]'s [membership/application for membership/service/application for service/obligation for service] in a uniformed service was not a motivating factor in [his/her/its] decision and that [he/she/it] [discharged/did not promote] [Plaintiff] for [another reason/other reasons]. An employer may not discriminate against an employee because of the employee's [membership/application for membership/service/application for service/obligation for service] in a uniformed service. But an employer may [discharge/decline to promote] an employee for any other reason, good or bad, fair or unfair. If you believe [Defendant]'s reason[s] for [his/her/its] decision [to discharge/not to promote] [Plaintiff] and find that [his/her/its] decision was not motivated by [Plaintiff]'s [membership/application for membership/service/application for service/obligation for service] in a uniformed service, you must not second guess [Defendant]'s decision, and you must not substitute your own judgment for [Defendant]'s judgment - even if you do not agree with it.

[Pretext (optional, see annotations): As I have explained, [Plaintiff] has the burden to prove that [his/her] [membership/application for membership/service/application for service/obligation for service] was a motivating factor in [Defendant]'s decision [to discharge/not to promote] [Plaintiff]. I have explained to you that evidence can be direct or circumstantial. To decide whether [Plaintiff]'s



[membership/application for membership/service/application for service/obligation for service] was a motivating factor in [Defendant]'s decision [to discharge/not to promote] [Plaintiff], you may consider the circumstances of [Defendant]'s decision. For example, you may consider whether you believe the reason[s] that [Defendant] gave for the decision. If you do not believe the reason[s] that [he/she/it] gave for the decision, you may consider whether the reason[s] [was/were] so unbelievable that [it was/they were] a cover-up to hide the true discriminatory reason[s] for the decision.]

[Including Affirmative Defense: If you find in [Plaintiff]'s favor for each element that [he/she] must prove, you must decide whether [Defendant] has shown by a preponderance of the evidence that [he/she/it] would have [discharged [Plaintiff] from employment/denied [Plaintiff] a promotion] even if [Defendant] had not taken [Plaintiff]'s [membership/application for membership/service/application for service/obligation for service] in a uniformed service into account. If you find that [Plaintiff] [would have been dismissed/would not have been promoted] for [a] reason[s] other than [his/her] [membership/application for membership/service/application for service/obligation for service] in a uniformed service, you must make that finding in your verdict.

If you find for [Plaintiff] and against [Defendant] on this defense, you must consider [Plaintiff]'s compensatory damages.]

[Without Affirmative Defense: If you find in [Plaintiff]'s favor for each element that [he/she] must prove, you must decide the issue of [his/her] compensatory damages.]

When considering the issue of [Plaintiff]'s compensatory damages, you should determine what amount, if any, has been proven by [Plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [Plaintiff]'s damages as a result of the [discharge/denied promotion], no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [Defendant]. Also, compensatory damages must not be based on speculation or guesswork.

To the extent you find that [Plaintiff] proved damages by a preponderance of the evidence, you must consider only net lost wages and benefits from the date of the [discharge/denial of promotion] to the date of your verdict.



To determine the amount of [Plaintiff]'s net lost wages and benefits, you should consider evidence of the actual wages [he/she] lost and the monetary value of any benefits [he/she] lost.

[Mitigation of Damages: You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages. For purposes of this case, the duty to mitigate damages requires [Plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [Defendant]. To prove that [Plaintiff] failed to mitigate damages, [Defendant] must prove by a preponderance of the evidence that: (1) work comparable to the position [Plaintiff] held with [Defendant] was available, and (2) [Plaintiff] did not make reasonably diligent efforts to obtain it. If, however, [Defendant] shows that [Plaintiff] did not make reasonable efforts to obtain any work, then [Defendant] does not have to prove that comparable work was available.

If you find that [Defendant] proved by a preponderance of the evidence that [Plaintiff] failed to mitigate damages, then you should reduce the amount of [Plaintiff]'s damages by the amount that could have been reasonably realized if [Plaintiff] had taken advantage of an opportunity for substantially equivalent employment.]

[Willful Violation: If you find in [Plaintiff]'s favor and award [him/her] compensatory damages, you must decide whether [Defendant] willfully violated the law. If [Defendant] knew that [his/her/its] employment decision violated the law, or acted in reckless disregard of that fact, then [his/her/its] conduct was willful. If [Defendant] did not know, or knew only that the law was potentially applicable and did not act in reckless disregard as to whether [his/her/its] conduct was prohibited by the law, then [Defendant]'s conduct was not willful.]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [Plaintiff] [was a member of/applied to be a member of/performed service in/applied to perform service in/had an obligation to perform service in] a uniformed service?



Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

2. That [Defendant] [discharged [Plaintiff] from employment/denied [Plaintiff] a promotion]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

3. That [Plaintiff]'s [membership/application for membership/service/application for service/obligation for service] in a uniformed service was a motivating factor that prompted [Defendant] to take that action?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

[4. That [Defendant] would have [discharged [Plaintiff] from employment/denied [Plaintiff] a promotion] even if [Defendant] had not taken [Plaintiff]'s [membership/application for membership/service/application for service/obligation for service] in a uniformed service into account?

Answer Yes or No _____

If your answer is "Yes," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "No," go to the next question.]⁹

5. That [Plaintiff] should be awarded damages to compensate for a net loss of wages and benefits to the date of your verdict?



Answer Yes or No _____

If your answer is "Yes," in what amount?
\$ _____

If you did not award damages in response to Question No. 5, this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If you awarded damages in response to Question No. 5, go to the next question.

6. That [Defendant] willfully violated the law?

Answer Yes or No _____

SO SAY WE ALL.

DATE: _____

Foreperson's Signature

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Annotations and Comments

38 U.S.C. §4311 states:

(a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation...

(c) An employer shall be considered to have engaged in actions prohibited –

(1) under subsection (a), if the person’s membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer’s action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service...

38 U.S.C. §4311.

The term “uniformed services” means the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency.

38 U.S.C. 4303(16).

The term “benefit of employment” is defined as “any advantage, profit, privilege, gain, status, [or] account... that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes... vacations, and the opportunity to select work hours or location of employment.” 38 U.S.C. §4303(2).

The term “service in the uniformed services” means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by [10 U.S.C. §12503 or 32 U.S.C. §115].

38 U.S.C. §4303(13).

The Eleventh Circuit has stated that §4311 clearly mandates proof of discriminatory motive. A motivating factor does not mean that it had to be the sole cause of the employment action. Instead, “it is one of the factors that a truthful employer would list if asked for the reasons for its decision.” Coffman v. Chugach Support Servs., Inc., 411 F.3d



1231, 1238 (11th Cir. 2005) (internal quotation marks omitted). “Indeed, [m]ilitary status is a motivating factor if the defendant relied on, took into account, considered, or conditioned its decision on that consideration.” *Id.* (alteration in original) (internal quotation marks omitted).

USERRA provides that a court may award three kinds of relief: (1) an injunction requiring an employer to comply with USERRA’s provisions; (2) compensation for lost wages or benefits suffered by reason of the employer’s failure to comply with USERRA, and (3) liquidated damages in an amount equal to lost wages or benefits if the employer’s failure to comply with USERRA was willful. 38 U.S.C. §4323(d)(1)(A)-(C).

USERRA does not allow damages for mental anguish or emotional distress, nor does it allow recovery of punitive damages. *Dees v. Hyundai Motor Mfg. Ala., LLC* 605 F. Supp. 2d 1220, 1229 (M.D. Ala. 2009), *aff’d* 368 F. App’x 49 (11th Cir. 2010) (per curiam).

Section 4324 of USERRA applies where the employer is a “Federal executive agency.” Section 4324 does not authorize a private USERRA action against the Federal Government, as an employer, in federal district court; rather, it confers jurisdiction upon the Merit Systems Protection Board (“MSPB”). See 38 U.S.C. §4324(b). For the definition of “Federal executive agency,” see 38 U.S.C. §4303(5).

Where relevant, apply the Cat’s Paw instruction for employment cases. See Pattern Instruction 4.5, *supra*.

