

4 PJI 19 | USERRA - 38 USC §4311(B) - USERRA RETALIATION

In this case, [Plaintiff] claims that [Defendant] retaliated against [Plaintiff] because [he/she] took steps to enforce [his/her] lawful rights under the Uniformed Services Employment and Reemployment Rights Act, also called USERRA.

USERRA prohibits an employer from retaliating against an employee because the employee has asserted rights or made complaints under that law. [This prohibition applies regardless of whether the employee has ever served in the uniformed services.]

Specifically, USERRA prohibits an employer from retaliating against an employee who [took action to enforce a protection afforded any person under USERRA/testified or otherwise made a statement in, or in connection with, any proceeding under USERRA/assisted, or otherwise participated in, an investigation under USERRA/exercised a right USERRA provides].

[Plaintiff] claims that [Defendant] [describe adverse employment action] because [he/she] [describe protected activity]. [Defendant] denies [Plaintiff]'s claim and asserts that [describe the Defendant's defense].

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

First: [Plaintiff] engaged, in good faith, in an activity protected by USERRA;

Second: [Defendant] took an adverse employment action against [Plaintiff];

Third: [Plaintiff]'s protected activity was a motivating factor that prompted [Defendant] to take the adverse employment action; and

Fourth: [Plaintiff] suffered damages because of the adverse employment action.

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

For the first element, [Plaintiff] must prove by a preponderance of the evidence that [he/she] engaged, in good faith, in a protected activity. If you find that [Plaintiff] made the complaint to enforce what [he/she] believed in good faith to be [his/her] lawful rights, [he/she] may not be penalized - even if the [describe protected activity] is later found to be invalid or



without merit. To establish “good faith,” it is not enough for [Plaintiff] to allege that [his/her] belief was honest and bona fide. The allegations and the record must also establish that the belief was objectively reasonable even though it might have been wrong.

For the second element, [Plaintiff] claims that [Defendant] took an adverse employment action against [him/her] when [Defendant] [describe adverse employment action]. An “adverse employment action” is any type of action that might reasonably deter [Plaintiff] or another employee from engaging in an activity protected by law. Put another way, if [Defendant]’s challenged action would make a reasonable employee less likely to exercise [his/her] rights under USERRA, that action is an adverse employment action.

For the third element, you must decide whether [his/her] protected activity was a motivating factor in [Defendant]’s decision. To prove that [Plaintiff]’s protected activity was a “motivating factor” in [Defendant]’s decision, [Plaintiff] does not have to prove that [his/her] protected activity was the only reason that [Defendant] [describe adverse employment action]. It is enough if [Plaintiff] proves that [his/her] protected activity influenced [Defendant]’s decision. If [Plaintiff]’s protected activity made a difference in [Defendant]’s decision, you may find that it was a motivating factor in the decision.

[Defendant] claims that [Plaintiff]’s protected activity was not a motivating factor behind [describe adverse employment action]. [Defendant] argues that [he/she/it] [describe adverse employment action] [Plaintiff] for [another reason/other reasons]. An employer may not take an adverse employment action against an employee because of the employee’s protected activity. But an employer may [describe adverse employment action] an employee for any other reason, good or bad, fair or unfair. If you believe [Defendant]’s reason[s] for [his/her/its] decision and find that [his/her/its] decision was not motivated by [Plaintiff]’s protected activity, 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] protected activity was a motivating factor in [Defendant]’s decision to [describe adverse employment action]. I have explained to you that evidence can be direct or circumstantial. To decide whether



[Defendant]'s decision to [describe adverse employment action] was because of [Plaintiff]'s protected activity, 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 retaliatory reasons for the decision.]

For the fourth element, if you find that [Plaintiff] engaged in protected activity and that [Defendant] took an adverse employment action against [him/her] because of that protected activity, you must decide whether [Defendant]'s acts were the proximate cause of damages that [Plaintiff] sustained. Put another way, you must decide whether these damages would have occurred if [Defendant] had not [describe adverse employment action].

If you find that [Defendant]'s acts were the proximate cause of damages [Plaintiff] sustained, you must determine the amount of damages.

[Including Affirmative Defense: If you find in [Plaintiff]'s favor for each element [he/she] must prove, you must decide whether [Defendant] has shown by a preponderance of the evidence that [he/she/it] would have taken the same action even if [Defendant] had not taken [Plaintiff]'s protected activity into account. If you find that the [Defendant] would have made the same decision for reasons other than [Plaintiff]'s protected activity, you must make that finding in your verdict.

If you find for [Plaintiff] and against [Defendant] on [his/her/its] defense, you must decide the issue of [Plaintiff]'s compensatory damages.]

[Without Affirmative Defense: If you find in [Plaintiff]'s favor for each element [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 adverse employment action, 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 adverse employment action 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 [Plaintiff] lost and the monetary value of any benefits 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: [Plaintiff] also claims that [Defendant] willfully violated the law. You will only consider this issue if you find for [Plaintiff] and award [him/her] compensatory damages.

If the employer knew that [his/her/its] [describe adverse employment action] 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], in good faith, engaged in an activity protected by USERRA?

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] took an adverse employment action against [Plaintiff]?

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 protected activity 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 taken the same action even if [Defendant] had not taken [Plaintiff]'s protected activity 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.]



5. That [Plaintiff] suffered damages because of the adverse employment action?

Answer Yes or No _____

6. That [Plaintiff] should be awarded damages to compensate for a net loss of wages and benefits from the date of [describe adverse employment action] 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. 6, 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. 6, go to the next question.]

[7. That [Defendant] willfully violated the law?

Answer Yes or No _____]



SO SAY WE ALL.

DATE: _____

Foreperson's Signature

((Rev. 03/2022) | *Judicial Council of the United States Eleventh Judicial Circuit*)

Annotations and Comments

38 U.S.C. §4311 states, in part:

(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

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

(2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, 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 person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

Under the plain language of the statute, the plaintiff does not have to establish application to serve or service in a uniformed service to be entitled to the protections of this law.

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).

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).

