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First Circuit Adopts Employee-Friendly Standard of Proof for Military Discrimination Claims under USERRA

Overview

In a case of first impression, the United States First Circuit Court of Appeals held that in cases brought under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301 *et seq.*, the burden is on the employer to show that the adverse employment action would have been taken regardless of the employee's military service. The court applied a two-pronged burden-shifting analysis, in which:

- the employee must only make an initial showing that military service was at least a motivating or substantial factor in the employer action; and
- the employer then must prove, by a preponderance of the evidence, *that the action would have been taken in the absence of the employee's military service*.

Importantly, this imposition of the burden of proof on the employer is markedly different from that of the three-pronged burden-shifting analysis in Title VII actions, in which the burden of proof is always on the employee. [See *Velázquez-Garcia v. Horizon Lines of Puerto Rico, Inc.*, No. 06-1082, 2007 WL 1614 (1st Cir. Jan. 4, 2007).]

Velázquez-Garcia's Employment with Horizon Lines of Puerto Rico, Inc.

Carlos Velázquez-Garcia began work for CSX Lines (later renamed Horizon Lines of Puerto Rico) ("Horizon"), an ocean shipping and transportation business, in 1999. In December 2002 Velázquez-Garcia enlisted as a reservist in the United States Marine Corp. After six months of basic training, Velázquez-Garcia returned to work, but continued to report to the Marines for monthly weekend training

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sessions and an annual two-week training session. Since his job supervising stevedores required him to work many weekends, Horizon had to adjust Velázquez-Garcia's work schedule to accommodate his training. Velázquez-Garcia claimed that this arrangement spurred trouble and complaints from his superiors at Horizon, who called him names like "G.I. Joe," "little lead soldier" and "Girl Scout."

In September 2004, one of Velázquez-Garcia's supervisors saw him cashing checks for Horizon employees (a service that Velázquez-Garcia had been providing for approximately seven months beforehand). The supervisor reported this activity to Horizon management, and Horizon terminated Velázquez-Garcia's employment two days later for violating its "Code of Business Conduct." Velázquez-Garcia objected to his termination, alleging that he was never warned to stop cashing checks for employees, never had received a copy of the code, and was treated more harshly than other employees who had similar code violations.

The First Circuit's Decision

Velázquez-Garcia filed suit against Horizon under USERRA, alleging that his firing constituted illegal discrimination due to his military service. The First Circuit, finding that the District Court had applied the wrong burden-shifting standard, held that Velázquez-Garcia could sue Horizon for military discrimination without showing that the employer's stated reason for firing him was a pretext for bias.

The court based its holding on a review of USERRA's legislative history and intent. The court observed that the statute and its history "make clear that the employee need only show that military service was '*a* motivating factor' in order to prove liability, unless 'the employer can prove that the [adverse employment] action *would* have been taken' regardless of the employee's military service." Thus, the court held, the burden is on the employer to demonstrate that the employee's military service was wholly unrelated to the decision to dismiss the employee. The court contrasted this two-pronged analytical framework to the three-pronged analysis for Title VII actions, in which the employer only has the burden of coming forward with some legitimate, nondiscriminatory reason for the employee's termination, leaving the employee with the ultimate burden of proving that the termination was discriminatory.

In further support of its decision, the court also noted that circuit courts that have addressed this burden-shifting issue under USERRA unanimously have adopted the "substantial or motivating factor" test, and placement of the burden on the employer to show lack of pretext. The First Circuit went on to find that:

- Velázquez-Garcia had produced sufficient evidence that his military service was at least a motivating factor in Horizon's decision to fire him; and
- Horizon had failed to show that no reasonable jury could find that Velázquez-Garcia's side check-cashing business was a mere pretext for discrimination.

Action Items for Employers

It is critical for employers to understand the *Velázquez-Garcia* decision, as adverse treatment of employees who serve in the military can trigger a military discrimination claim. More specifically, employers should be aware that the onus will be on them to prove that the employee's military service was *not* a motivating factor for the decision. At a minimum, an employer should immediately do the following:

1. Confirm that you have a formal military leave policy that is included in the employee handbook (and draft a policy if you don't already have one). The policy should state that for military leaves, the company complies with all applicable state and/or federal laws, including the Uniformed Services Employment and Reemployment Rights Act (USERRA). The policy should outline the process for requesting military leaves of absence. Consider having counsel review your policy.
2. Train supervisors and payroll administrators on the rights of employees covered by USERRA.
3. As always, be prepared to substantiate any termination decision. Document all performance reviews, discipline policy infractions and verbal warnings to the employee.

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If you have any questions about the topics covered in this Advisory, please do not hesitate to contact:

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