

New case highlights military leave law



Miriam L. Rosen | Wednesday, May 24, 2017

While most employers have some general knowledge about military leave requirements, the ins and outs of those protections are less familiar than the provisions of other employment laws. A recent Sixth Circuit Court of Appeals' decision, *Savage v. Federal Express*, explores several key provisions of the Uniformed Services Employment and Reemployment Rights Act (USERRA), the federal law that protects employees who participate in military service and applies to all employers regardless of size.

USERRA Overview

USERRA establishes the rights and obligations of employees and employers with respect to military service. Some of the more well-known provisions of the law address requirements related to leave and return to work:

- USERRA requires that employers allow most employees leave time to participate in military service.
- An employer must also return employees to their pre-leave position within certain timeframes based on length of military service. Generally, an employee may not exceed a cumulative total of five years of military leave. However, one exception to that limit includes when an employee's military service is pursuant to an order to remain on active duty.

A lesser known aspect of USERRA relates to the benefits required for returning employees:

- USERRA provides that the employer place the returning service member in the position they would have

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been in had they remained continuously employed. This means, for example, that returning service members are entitled to the seniority that they would have had if they had remained continuously employed.

- USERRA also specifies that returning service members are entitled to all "rights and benefits based on seniority," meaning that they receive benefits, such as pension and vacation time, based on length of service that includes time away for military leave.

Like many other employment statutes, USERRA also prohibits an employer from discriminating or retaliating against a service member for their membership in or obligation to the military service.

How the various provisions of USERRA play out in the employment context can be seen in the *Savage* case.

The Case

Savage, an aviation mechanic for FedEx who also served in the U.S. Naval Reserve, received numerous leave from FedEx for military training and service. *Savage* participated in the FedEx Corporation Employees' Pension Plan. In mid-2012, *Savage* notified his manager and various FedEx benefits administrators about a discrepancy in his pension calculations because of his military service.

As a FedEx employee, *Savage* received a reduced rate for shipping personal, not commercial, items. To prevent abuse of the reduced rate policy, FedEx regularly investigated employee misuse of that benefit. As part of that review process, FedEx investigated the 90 times that *Savage* and/or his wife used the reduced rate shipping between May and August 2012. During the investigation, *Savage* acknowledged that he and his wife used the reduced rate to ship goods sold on eBay. As a result of that conduct, FedEx terminated *Savage* in September 2012 for violating its reduced-rate shipping policy.

The termination came 34 days after *Savage* had completed a period of military service and less than a month after he complained about how his military service affected calculation of his retirement benefits.

Savage sued FedEx in January 2014 alleging that the company discriminated against him for performing his military service and retaliated against him for complaining about the calculation of his pension benefits in violation of USERRA.

The district court dismissed the claim finding that *Savage* did not show that the military service was a substantial or motivating factor in the decision to terminate and that FedEx had a legitimate non-discriminatory reason for the termination – *Savage's* violation of the reduced-rate policy. The district court found the calculation of *Savage's* pension based on an estimate of hours he would have worked during military leave periods complied with the law.

Challenging the dismissal in an appeal to the 6th Circuit, *Savage* emphasized the "temporal proximity" between his military service, his complaint about benefits, and his termination. The court did recognize that the "33 days between *Savage's* protected activity and his suspension, and the 41 days between his activity and his termination . . . raise[d] an inference that the adverse action was motivated by *Savage's* protected activity." The court also noted that that comments by managers about leaves for training raised the inference of hostility to military service.

However, the court ultimately held that FedEx's explanation that it terminated *Savage* for violation of the reduced-rate policy established that the company had a legitimate explanation of its conduct and "would have terminated *Savage* in the absence of discrimination or retaliation." The court affirmed dismissal for

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FedEx on the discrimination and retaliation claims.

The court did, however, recognize that FedEx did not properly follow USERRA's 12-month look-back rule in calculating Savage's pension. The court concluded that "FedEx should have calculated Savage's pension benefit contributions based on an average rate of compensation (including both pay rate and hours) during the 12 months prior to each period Savage was on a military leave of absence." Thus, the court reversed the dismissal on that claim and sent the case back to the district court.

What you can learn from *Savage v. Federal Express*

The takeaways in this case are similar to many other employment cases:

- When an employee has engaged in protected activity, the timing of subsequent legitimate adverse action can become an issue. To protect itself in these situations, an employer must be able to establish that it has a legitimate non-discriminatory and non-retaliatory reason for its actions. In *Savage*, FedEx could point to its consistently applied reduced rate policy to support its employment decision.
- The ins and outs of employment statutes can be complicated, like USERRA's benefit calculation requirement. Whether it's USERRA, the FLSA or another employment law, employers should ensure that they have a thorough understanding of the requirements of those laws and should consult experienced employment counsel with any questions.



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