

Unlawful Termination Due To Military Leave

THE EMPLOYER'S BURDEN OF PROOF

Andrea K. Johnstone, Esq. | February 8, 2007

This article originally appeared in the February 2 – 15, 2007 edition of the New Hampshire Business Review.

The United States Court of Appeals for the First Circuit recently issued a decision of importance to employers in New Hampshire, Maine, and Massachusetts. The Velazquez-Garcia v. Horizon Lines decision clarifies the employer's burden of proof when defending claims of wrongful discharge in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA).

The First Circuit's decision in Velazquez-Garcia v. Horizon Lines identifies a two-pronged burden shifting analysis to be used in USERRA wrongful termination cases. Under this two-pronged analysis, the employee need only show that his/her military service as a motivating factor in the termination decision in order to prove liability, unless the employer can prove by a preponderance of the evidence that the adverse employment action would have been taken despite the protected status.

This approach places the employer in the position of being able to avoid liability under USERRA only by showing as an affirmative defense that it would have taken the same negative action regardless of the employee's military service.

The employer was not able to satisfy this burden by merely demonstrating that it had a legitimate non-discriminatory reason for discharging the employee. In Velazquez-Garcia v. Horizon Lines, the employer defended its actions by explaining that it had terminated Velazquez-Garcia for violating the company's Code of Business Conduct. The court held that "[t]he issue under USERRA is not whether an employer is "entitled" to dismiss an employee for a particular reason, but whether it would have done so if the employee were not in the military." Under the court's reasoning, proving that there had been a violation of the employer's business code and that such a violation may be a fireable offense was not enough to satisfy the employer's burden of proof.

The employer's claim that its decision to fire the employee was not affected by the employee's military status was undermined by evidence that supervisors complained about the need to adjust shifts to accommodate the employee's military leave, joked and name called which arguably suggested discriminatory animus, the employee received no warnings or other prior discipline related to the alleged offense, and other employees with similar violations were not summarily fired.

This decision demonstrates the need for employers to proceed with caution prior to making a decision to discharge an employee protected by USERRA. The burden of demonstrating that the decision to fire would have been made regardless of military status is a significant one. How the employer will do so should be analyzed in advance of the

firing and the strength of that evidence should, whenever possible, be weighed in consultation with legal counsel.

Andrea K. Johnstone is a shareholder in Bernstein Shur's Labor and Employment Practice Group. She can be contacted at 603 623-8700 or by email at ajohnstone@bernsteinshur.com.