

2nd Cir. Decision Marks Big Win for Reservists with Commission-Based Jobs

By Mathew B. Tully

A federal appellate court has handed a huge legal rights bonus to service members who leave commission-based jobs to actively serve in the military. The court found Wachovia Securities LLC violated an Air Force reservist's rights under the Uniformed Services Employer and Reemployment Rights Act (USERRA)

The U.S. 2nd

Circuit Court of Appeals in *Serricchio v. Wachovia Securities LLC, Prudential Securities, Inc.*

affirmed on Sept. 13 a lower court's ruling ordering the investment bank and brokerage to reinstate and pay an Air Force reservist at least \$1 million for willfully failing to promptly reemploy the financial advisor with the same seniority, status and pay. This ruling is significant because it clarifies employers' responsibilities for reemploying service members to positions for which commissions are an important part of their total compensation.

The case involved Michael Serricchio, who in 2001 worked as a financial advisor for Prudential Securities. After the Sept. 11, 2001 terrorist attacks, Serricchio was called to active duty and was honorably discharged in 2003. During that period, Prudential merged with Wachovia, which is now Wells Fargo. Upon returning home, Serricchio requested reinstatement, but Wachovia did not respond to his letter for two months. The bank did not reemploy him for four months. Subsequent to that Wachovia offered him a reemployment position that set his compensation at the commission rate he received prior to activation but without regard to the considerable book of business he had established. The district court called its reinstatement offer "financially precarious and professionally degrading."

Serricchio in 2004 filed a lawsuit in the U.S. Court of Connecticut, and in 2009 a jury found Wachovia failed to "promptly" reinstate Serricchio in a position with similar "seniority, status and pay," as required by USERRA

. Because Wachovia was found to have willfully violated the law, Serricchio's backpay award was doubled. Wachovia appealed this ruling, arguing, among other things, it did satisfy USERRA

by reemploying Serricchio to the same position with the same compensation rate. Wachovia even argued it was not properly notified of Serricchio's intent to return to work. The 2nd

Circuit disagreed.

What Service Members Need to Know

Employers who are properly notified of a service member's intent to return to work must promptly reemploy him or her.

"Promptly" means "as soon as practicable under certain circumstances," or, barring unusual circumstances, within two weeks of an employee's reinstatement application.

Service members who actively served for less than 31 days must notify their employer of their intent to return to work before the start of the first full regularly scheduled work period on the first full calendar day after their service concluded, plus eight more hours to travel home.

When that period of service exceeds 180 days, service members have up to 90 days to provide their employer with a notice to return to work.

There is no specific way service members have to inform employers of their intent to return to work, aside from having to provide "ample notice of his claim" to reemployment, the 2nd

Circuit noted. Courts are willing to overlook technical issues in reemployment applications.

Under USERRA

, employers must provide eligible service members with the seniority and other rights and benefits of seniority they would have received had they not left their civilian job for military service.

Employers are required under USERRA

to offer a qualified service member returning to a financial advisor position "the book business he would have had but for his period of service," the 2nd

Circuit said.

If the employer cannot furnish that pre-service book business, the court added, "USERRA

obligates the employer to restore the servicemember to a position of like 'pay,' which may include providing an interim salary while the servicemember rebuilds his book of business."

Service members who believe their USERRA

rights have been violated should immediately contact a military law attorney.

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