

1st Cir: Employer \$tuck with State and Fed Damages for Discriminating Against Guard Member

By Mathew B. Tully

A federal appellate court shot down a Massachusetts sprinkler company's attempt to curtail the amount of damages a service member could recover from it not only for violations to Uniformed Services Employment and Reemployment Rights Act (USERRA)

but also to a state anti-discrimination employment law. The employer, A.S.A.P. Fire and Safety, unsuccessfully argued some of these federal and state awards were duplicative.

In Fryer v. A.S.A.P. Fire and Safety, Inc.; Joseph Sheedy; Brian Cote

, the U.S. 1st

Circuit Court of Appeals in Boston affirmed a district court's ruling that awarded a National Guard member over \$738,000 in damages, interest and attorney fees against his former employer, A.S.A.P. in Tyngsboro, Mass., near Lowell. This ruling sends a clear warning to employers who discriminate against a service member because of his or her military duty by refusing to give them any wiggle room out of the steep penalties federal and state laws prescribe for such unlawful employment practices

This case involved Stephen F. Fryer, who in 2006 joined A.S.A.P. as a sprinkler service and sales representative. Fryer joined the National Guard a year later and in May 2007 was deployed to Iraq for a year. Upon Fryer's return home, A.S.A.P. refused to hire him to his pre-service position, saying that someone else had filled his position and the company suffered because of his deployment. Despite Fryer's demands for reinstatement to his pre-service position in accordance to USERRA

, the company instead offered him a job as a sprinkler helper. Despite featuring a \$3 per hour increase in pay, this position lacked the commission opportunities of his former job. Fryer reluctantly assumed this alternative position but A.S.A.P. fired him in 2008 because of excessive absenteeism – a ground even the appellate court described as “merely pretextual”.

Fryer's termination prompted his lawsuit against A.S.A.P., which he accused of violating his USERRA

rights by failing to return him to his pre-service position and discriminating against him and terminating him because of his military service. He also sought to recover sales commissions and overtime wages under the Massachusetts Wage Act and emotional distress damages under Massachusetts anti-discrimination law. The jury ruled in favor of Fryer on almost all claims, excluding those pertaining to the liability of A.S.A.P.'s owners for lost overtime. The district court doubled Fryer's USERRA

back pay award because the jury found A.S.A.P. willfully violated the federal law by not reinstating him to his pre-service position.

On appeal, A.S.A.P. argued Fryer's compensatory awards under the state's anti-discrimination law and federal liquidated damages under USERRA

represented an unlawful duplicative award. Fryer noted USERRA

does not "supersede, nullify or diminish any Federal or State law . . . that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person [by USERRA]." He added that A.S.A.P. failed to raise the preemption question during trial and therefore waived the argument. While the Supreme Court has ruled preemption defenses cannot be waived when they dictate a choice of forum that deprives the reviewing court the power to undertake review of the case, the 1st

Circuit said A.S.A.P.'s preemption bid only attempted to "dictate a change in law, not a change in forum". Thus, the company waived the argument, the 1st

court ruled.

Service members who have been discriminated against by an employer because of their military duty can recover substantial amounts in damages. They should immediately contact a military law attorney who can assert their rights under USERRA

and any other applicable federal or state laws.

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