**4.18 USERRA – 38 U.S.C. § 4311 – USERRA**

**Discrimination – Including “Same Decision” Defense**

In this case, [name of plaintiff] makes a claim under the Uniformed Services Employment and Reemployment Rights Act, also called USERRA. USERRA prohibits an employer from discriminating against an employee in the terms and conditions of the employee’s employment because the employee [is a member of/applies to be a member of/performs service in/has performed service in/applies to perform service in/has an obligation to perform service in] a uniformed service.

[Name of plaintiff] claims that [name of defendant] discriminated against [name of plaintiff] by [discharging [him/her] from employment/denying [him/her] a promotion] because [he/she] [was a member of/applied to be a member of/performed service in/applied to perform service in/had an obligation to perform service in] a uniformed service.

[Name of defendant] denies [name of plaintiff]’s claim and asserts that [describe the defendant’s defense].

To succeed on [his/her] claim, [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Name of plaintiff] [was a member of/applied to be a member of/performed service in/applied to perform service in/had an obligation to perform service in] a uniformed service;

Second: [Name of defendant] [discharged [name of plaintiff] from employment/denied [name of plaintiff] a promotion]; and

Third: [Name of plaintiff]’s [membership/application for membership/service/application for service/obligation for service] in a uniformed service was a motivating factor that prompted [name of defendant] to take that action.

[In the verdict form that I will explain in a moment, you will be asked to answer questions about these factual issues.]

[Name of Armed Forces Branch/Army National Guard/Air National Guard] is a “uniformed service.”

If you find that [name of defendant] [discharged [name of plaintiff] from employment/denied [name of plaintiff] a promotion], you must decide whether plaintiff’s [membership/application for membership/service/application for service/obligation for service] was a motivating factor in [name of defendant]’s decision.

To prove that [name of plaintiff]’s [membership/application for membership/service/application for service/obligation for service] in a uniformed service was a “motivating factor” in [name of defendant]’s decision, [name of plaintiff] does not have to prove that [his/her] [membership/application for membership/service/application for service/obligation for service] in a uniformed service was the only reason that [name of defendant] [discharged [name of plaintiff] from employment/denied [name of plaintiff] a promotion]. It is enough if [name of plaintiff] proves that [his/her] [membership/application for membership/service/application for service/obligation for service] in a uniformed service influenced [name of defendant]’s decision. If [name of plaintiff]’s [membership/application for membership/service/application for service/obligation for service] in a uniformed service made a difference in [name of defendant]’s decision, you may find that it was a motivating factor in the decision.

[Name of defendant] claims that [name of plaintiff]’s [membership/application for membership/service/application for service/obligation for service] in a uniformed service was not a motivating factor in [his/her/its] decision and that [he/she/it] [discharged/did not promote] [name of plaintiff] for [another reason/other reasons]. An employer may not discriminate against an employee because of the employee’s [membership/application for membership/service/application for service/obligation for service] in a uniformed service. But an employer may [discharge/decline to promote] an employee for any other reason, good or bad, fair or unfair. If you believe [name of defendant]’s reason[s] for [his/her/its] decision [to discharge/not to promote] [name of plaintiff] and find that [his/her/its] decision was not motivated by [name of plaintiff]’s [membership/application for membership/service/application for service/obligation for service] in a uniformed service, you must not second guess [name of defendant]’s decision, and you must not substitute your own judgment for [name of defendant]’s judgment – even if you do not agree with it.

[**Pretext (optional, see annotations):** As I have explained, [name of plaintiff] has the burden to prove that [his/her] [membership/application for membership/service/application for service/obligation for service] was a motivating factor in [name of defendant]’s decision [to discharge/not to promote] [name of plaintiff]. I have explained to you that evidence can be direct or circumstantial. To decide whether [name of plaintiff]’s [membership/application for membership/service/application for service/obligation for service] was a motivating factor in [name of defendant]’s decision [to discharge/not to promote] [name of plaintiff], you may consider the circumstances of [name of defendant]’s decision. For example, you may consider whether you believe the reason[s] that [name of defendant] gave for the decision. If you do not believe the reason[s] that [he/she/it] gave for the decision, you may consider whether the reason[s] [was/were] so unbelievable that [it was/they were] a cover-up to hide the true discriminatory reason[s] for the decision.]

[**Including Affirmative Defense:** If you find in [name of plaintiff]’s favor for each element that [he/she] must prove, you must decide whether [name of defendant] has shown by a preponderance of the evidence that [he/she/it] would have [discharged [name of plaintiff] from employment/denied [name of plaintiff] a promotion] even if [name of defendant] had not taken [name of plaintiff]’s [membership/application for membership/service/application for service/obligation for service] in a uniformed service into account. If you find that [name of plaintiff] [would have been dismissed/would not have been promoted] for [a] reason[s] other than [his/her] [membership/application for membership/service/application for service/obligation for service] in a uniformed service, you must make that finding in your verdict.

If you find for [name of plaintiff] and against [name of defendant] on this defense, you must consider [name of plaintiff]’s compensatory damages.]

[**Without Affirmative Defense:** If you find in [name of plaintiff]’s favor for each element that [he/she] must prove, you must decide the issue of [his/her] compensatory damages.]

When considering the issue of [name of plaintiff]’s compensatory damages, you should determine what amount, if any, has been proven by [name of plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [name of plaintiff]’s damages as a result of the [discharge/denied promotion], no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [name of defendant]. Also, compensatory damages must not be based on speculation or guesswork.

To the extent you find that [name of plaintiff] proved damages by a preponderance of the evidence, you must consider only net lost wages and benefits from the date of the [discharge/denial of promotion] to the date of your verdict.

To determine the amount of [name of plaintiff]’s net lost wages and benefits, you should consider evidence of the actual wages [he/she] lost and the monetary value of any benefits [he/she] lost.

[**Mitigation of Damages:** You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to “mitigate” those damages. For purposes of this case, the duty to mitigate damages requires [name of plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [name of defendant]. To prove that [name of plaintiff] failed to mitigate damages, [name of defendant] must prove by a preponderance of the evidence that: work comparable to the position [name of plaintiff] held with [name of defendant] was available, and [name of plaintiff] did not make reasonably diligent efforts to obtain it. If, however, [name of defendant] shows that [name of plaintiff] did not make reasonable efforts to obtain any work, then [name of defendant] does not have to prove that comparable work was available.

If you find that [name of defendant] proved by a preponderance of the evidence that [name of plaintiff] failed to mitigate damages, then you should reduce the amount of [name of plaintiff]’s damages by the amount that could have been reasonably realized if [name of plaintiff] had taken advantage of an opportunity for substantially equivalent employment.]

[**Willful Violation:** If you find in [name of plaintiff]’s favor and award [him/her] compensatory damages, you must decide whether [name of defendant] willfully violated the law. If [name of defendant] knew that [his/her/its] employment decision violated the law, or acted in reckless disregard of that fact, then [his/her/its] conduct was willful. If [name of defendant] did not know, or knew only that the law was potentially applicable and did not act in reckless disregard as to whether [his/her/its] conduct was prohibited by the law, then [name of defendant]’s conduct was not willful.]

**Special Interrogatories To The Jury**

**Do you find from a preponderance of the evidence:**

That [name of plaintiff] [was a member of/applied to be a member of/performed service in/applied to perform service in/had an obligation to perform service in] a uniformed service?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

That [name of defendant] [discharged [name of plaintiff] from employment/denied [name of plaintiff] a promotion]?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

That [name of plaintiff]’s [membership/application for membership/service/application for service/obligation for service] in a uniformed service was a motivating factor that prompted [name of defendant] to take that action?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

[ That [name of defendant] would have [discharged [name of plaintiff] from employment/denied [name of plaintiff] a promotion] even if [name of defendant] had not taken [name of plaintiff]’s [membership/application for membership/service/application for service/obligation for service] in a uniformed service into account?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer is “Yes,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “No,” go to the next question.]

That [name of plaintiff] should be awarded damages to compensate for a net loss of wages and benefits to the date of your verdict?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer is “Yes,”

in what amount? $\_\_\_\_\_\_\_\_\_\_\_\_\_

If you did not award damages in response to Question No. 5, this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If you awarded damages in response to Question No. 5, go to the next question.

That [name of defendant] willfully violated the law?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

So Say We All.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Foreperson’s Signature

Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_