



2nd Circuit: Returning Service Members Must Be Given Reasonable Opportunity to Rebuild Commission Income

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By Kenneth J. Diamond

An employer must promptly reinstate a service member returning from active duty and provide that person a reasonable opportunity to regain the same level of commission income as was being earned prior to deployment, the 2nd U.S. Circuit Court of Appeals held.

In 2001, Michael Serricchio worked as a financial advisor for Wachovia Securities LLC. His compensation was commission based. After the Sept. 11, 2001, attacks, he was called to active duty in the Air Force Reserve. During his deployment, many of his accounts were lost or redistributed within Wachovia.

In 2003, Serricchio sought reinstatement pursuant to the Uniformed Services Employment and Reemployment Rights Act (USERRA). Because of how Wachovia handled his accounts, Serricchio expressed concern regarding his ability to resume the same position and earnings as before. About two months later, Wachovia responded by offering him a position at his previous commission structure with a small monthly draw while he rebuilt his book of business. He was also offered a limited number of small accounts and opportunities for cold calling clients. Wachovia did not offer to compensate him for his lost book of business or provide him any other assistance in rebuilding his client base. As a result, Serricchio quit and filed suit.

A jury found Wachovia violated USERRA by (1) failing to promptly reinstate Serricchio; (2) failing to reinstate him to a position of like "seniority, status, and pay" and (3) constructively discharging him by not offering him an adequate re-employment position or properly responding to the problems he voiced regarding the position. After a bench trial on damages, based on its finding Wachovia willfully violated USERRA, the court doubled the \$389,453 back pay award. In addition, the court reinstated Serricchio to a fixed salary position for three months while he regained his broker's licenses, followed by a nine-month period during which he would receive a fixed draw offset by the commissions earned during that time as he rebuilt his book of business.

The 2nd Circuit affirmed. In so doing, the court rejected Wachovia's argument that its only duty under USERRA was to offer Serricchio re-employment at the same rate of pay—(i.e., a monthly draw and potential commission earnings)—as he was receiving prior to his deployment. Rather, for the position to be of like "seniority, status, and pay" as required by USERRA, Wachovia needed to do more to help him re-create his previous level of compensation. The court upheld Serricchio's constructive discharge claim because he could not support himself and his family under the commission scheme offered and Wachovia did not take adequate steps to remedy the concerns he raised.

Serricchio v. Wachovia Sec. LLC, 2nd Cir., No. 10-1590 (Sept. 13, 2011).

Professional Pointer: This case demonstrates the types of issues that can arise under USERRA when a returning service member's compensation is largely or entirely commission based. Specifically, the service member must be re-employed in a position that provides commission earning opportunities comparable to those available prior to deployment. This means the employer may need to offer a guaranteed compensation and related assistance for a reasonable period of time while the service member seeks to rebuild his or her previously existing book of business.

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Editor's Note: This article should not be construed as legal advice.

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