

<b>Wang v New York State Dept. of Health</b>
2013 NY Slip Op 34100(U)
November 14, 2013
Supreme Court, Albany County
Docket Number: 1901-11
Judge: Richard M. Platkin
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ORIGINAL

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

DONNA L. N. WANG,

Plaintiff,

-against-

**DECISION**  
**AND**  
**ORDER**

NEW YORK STATE DEPARTMENT OF HEALTH,

Defendant.

Albany County Clerk  
Document Number 11517971  
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Index No. 1901-11

(RJI No. 01-01-11-103840)

(Judge Richard M. Platkin, Presiding)

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Hon. Richard M. Platkin, A.J.S.C.

Defendant New York State Department of Health (“DOH”) moves in limine to exclude any and all evidence relating to plaintiff’s claim for workers’ compensation benefits. Plaintiff Donna L.N. Wang opposes defendant’s motion and cross-moves for an order determining that “emotional damages” are recoverable under Military Law § 242.

### **BACKGROUND**

This action is brought pursuant to the Uniform Services Employment and Reemployment Rights Act (“USERRA”) (38 USC § 4301, *et seq.*) and New York State Military Law § 242 (“Section 242”). In a complaint dated March 10, 2011, plaintiff alleges that her employer, DOH, discriminated against her on account of her military service. The complaint alleges 15 causes of action and seeks the following relief: (a) compensatory damages, including lost wages, lost benefits, back pay, future pay and pension credits; (b) the costs of suit, including reasonable attorney’s fees, expert witness fees, costs and other litigation expenses; (c) liquidated damages; (d) punitive damages; and (e) an injunction restraining DOH from terminating plaintiff’s employment and directing the agency to comply with USERRA.

This action has been the subject of extensive motion practice. In response to defendant’s pre-answer CPLR 3211 motion, the Court issued a Decision and Order on September 6, 2011 dismissing certain of the causes of action. Following the completion of discovery, the parties cross-moved for summary judgment. By Decision and Order dated February 19, 2013, the Court dismissed certain other causes of action. Following the dispositive motions, plaintiff is left with claims under USERRA and Section 242 based upon the following acts of discrimination: (1) an alleged hostile work environment; (2) a challenge to plaintiff’s removal from a certain on-call

list; and (3) allegations that plaintiff was given shorter deadlines to complete her work than her colleagues.

Most recently, in response to an ongoing disagreement between the parties as to whether Section 242 authorizes compensation for “emotional damages”, plaintiff sought to amend her complaint to add a cause of action for discrimination under Executive Law § 296, which is said to clearly authorize such an award. By Decision and Order dated October 30, 2013, leave to amend was denied on account of the “lateness of plaintiff’s motion, the absence of a satisfactory excuse for the delay, [and] the prejudice to defendant”.

### **DEFENDANT’S MOTION**

Prior to the commencement of this action, plaintiff filed a claim alleging that she suffered a work related injury due to defendant’s discrimination. The Workers’ Compensation Board (“WCB”) granted plaintiff’s claim and awarded her benefits, finding that she was singled out, harassed and retaliated against based upon her military service. Defendant seeks to exclude any and all evidence relating to plaintiff’s claim for workers’ compensation benefits as irrelevant and unduly prejudicial.

In opposing the motion, plaintiff argues principally that evidence concerning the workers’ compensation claim is material and relevant in at least two respects: (1) it would serve to establish and/or confirm plaintiff’s subjective belief that she was subject to discrimination; and (2) the workers’ compensation benefits she received and the resulting lien claimed by the State Insurance Fund (“SIF”) are relevant to the issues of damages and mitigation. Plaintiff further argues that any prejudice to defendant is outweighed by the probative value of the evidence.

As this Court previously held in declining to give preclusive effect to the WCB's determination, the legal standard governing the award of workers' compensation benefits differs substantially from the standard for recovery in this action:

Adjudication of a discrimination claim under USERRA requires application of "a two-pronged burden-shifting analysis" (*Mock v City of Rome*, 851 F Supp 2d 428, 432 [NDNY 2012]). Once the plaintiff meets her initial burden of demonstrating by a preponderance of the evidence that her military status was a substantial or motivating factor in the challenged employment actions, the employer may escape liability by demonstrating as an affirmative defense that it would have made the same decision without regard to such status (*id.*). The WCB did not apply this type of burden shifting analysis or accord DOH the opportunity to present the aforementioned affirmative defense. Rather, the issue before the WCB was whether Wang "suffered a work-related injury" in a "controverted claim for stress, depression and anxiety" and, if so, whether the claimed injury was "a direct consequence of a lawful personnel decision involving a disciplinary action, work evaluation, job transfer, demotion, or termination taken in good faith by the employer" (*Matter of DePaoli v Great A & P Tea Co.*, 94 NY2d 377, 380 [2000]; see Workers' Compensation Law § 2 [7]).

Given these differing legal standards, the WCB's decision to award plaintiff workers' compensation benefits has no bearing on the issues of liability that the jury will be called upon to decide.

While plaintiff argues that her WCB claim is relevant to establish her subjective belief that she was subjected to discrimination, any such relevance is substantially outweighed by the resulting prejudice to defendant. Plaintiff will have an opportunity to testify at trial regarding her belief that she has been discriminated against and the facts supporting such belief. As such, testimony and evidence that merely serves to corroborate her subjective belief is cumulative and of limited probative value. On the other hand, allowing proof of plaintiff's workers'

compensation claim, the WCB's disposition thereof and plaintiff's receipt of workers' compensation benefits would unfairly prejudice defendant and confuse the jury, particularly in light of the differing legal standards.

Finally, the Court is not persuaded that plaintiff's receipt of workers' compensation benefits and the resulting lien claimed by SIF are material and necessary to the issues of damages and mitigation. Plaintiff can present to the jury her claim for lost wages for the period covered by the workers' compensation award, and any issues concerning liens and/or the applicability of the collateral source rule shall be determined by the court after the trial outside the presence of the jury.

Accordingly, plaintiff is precluded from introducing testimony or evidence pertaining to her claim for workers' compensation benefits, the WCB's determination of such claim, and her receipt of workers' compensation benefits.

### **PLAINTIFF'S MOTION**

Plaintiff seeks an order confirming her entitlement to recover "emotional damages" under Military Law § 242. In support of her motion, plaintiff offers the following arguments: (1) Section 242 should be interpreted broadly as an anti-discrimination statute; (2) as Section 242 has been held to authorize a claim for hostile work environment, the remedies allowed thereunder should be co-extensive with Executive Law § 296, which also authorizes such a claim; (3) the 2003 amendments to Executive Law § 296 adding military service as a protected status evince the Legislature's intention to allow the full range of compensatory damages under Section 242; and (4) general principles of tort law provide for the recovery of emotional damages.

Military Law 242 (4) provides, in pertinent part, that no public employee “shall be subjected, directly or indirectly, to any loss or diminution of time service, increment, vacation or holiday privileges, or any other right or privilege, by reason of such absence, or be prejudiced, by reason of such absence, with reference to continuance in office or employment, reappointment to office, re-employment, reinstatement, transfer or promotion.” Nothing in the quoted statute authorizes an award of damages, much less “emotional damages”. In determining whether a remedy for “emotional damages” may be fairly implied, the Court therefore must consider whether the availability of such damages is consistent with the legislative scheme and would promote the purposes of the statute.

The plain language of Section 242 (4) evinces an intention to protect public employees from the “loss or diminution” of certain “rights and privileges” of employment. Thus, the statute explicitly protects a service member’s wages, time in service and leave time, as well as the right to continued employment, re-employment, transfers and promotions. The legislative objective of protecting these rights and privileges of employment can be accomplished through equitable remedies that restore any pay, service credits, leave time or employment status lost or diminished as a result of unlawful discrimination. The same equitable remedies would serve to vindicate the right of a public employee to work in an environment free of severe or pervasive discriminatory intimidation, ridicule, and insult on account of military service. Given the text of Section 242, its limited breadth and the absence of any explicit authorization for an award of compensatory damages, the “emotional damages” sought by plaintiff are inconsistent with the statutory scheme.

In reaching this conclusion, the Court rejects plaintiff's attempt to analogize Section 242 to the Human Rights Law and to draw upon the expansive remedies available thereunder. In holding that a claim of a hostile work environment is actionable under Section 242, the Court reasoned that "Section 242 is substantively and textually similar to USERRA and is intended to serve the same remedial objective". The same reasoning, the absence of any authorization for "emotional damages" under USERRA, and the general policy of construing state law consistent with its federal counterparts whenever reasonably practicable compel the conclusion that the relief available under Section 242 is limited to equitable remedies that redress any loss or diminution of employment rights or privileges.

Moreover, there is no need to analogize Section 242 to the Human Rights Law in a strained attempt to imply a remedy for emotional damages. As plaintiff recognizes, the Legislature amended the Human Rights Law in 2003 to include military service as a protected classification. In so doing, employers who engage in discrimination on account of military service are subject to the full range of compensatory remedies available under the Human Rights Law, including damages for emotional distress (see Executive Law § 297 [4] [c] [iii]).

Finally, insofar as Military Law § 242 (4) could be held to implicitly create a private right of action that allows for an award of "emotional damages", which are legal rather than equitable in nature, it is doubtful that this Court would have subject matter jurisdiction over such a claim. In general, suits for monetary damages against the State must be heard in the Court of Claims, and there is nothing in Section 242 – a statute that does not even authorize an award of damages – that manifests the State's consent to waive the exclusivity of the Court of Claims and be sued for non-incidental monetary damages in Supreme Court.

Accordingly, plaintiff may not pursue a claim for "emotional damages" under Military Law § 242.

**CONCLUSION**

Accordingly,<sup>1</sup> it is


**ORDERED** that defendant's motion is granted; and it is further

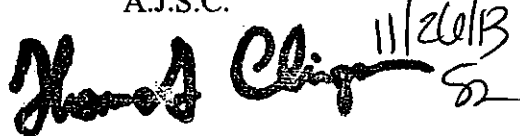
**ORDERED** that plaintiff is precluded from introducing testimony or evidence at trial pertaining to her claim for workers' compensation benefits, the WCB's determination of such claim, and her receipt of workers' compensation benefits; and it is further

**ORDERED** that plaintiff's motion is denied in accordance with the foregoing.

This constitutes the Decision and Order of the Court. The original Decision and Order is being transmitted to counsel for defendant for filing and service. All other papers are being transmitted to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

Dated: Albany, New York  
November 14, 2013

  
RICHARD M. PLATKIN  
A.J.S.C.

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<sup>1</sup> The Court has examined the parties' remaining arguments and contentions and finds them to be either without merit or unnecessary to the Court's determination of these motions.