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Mandatory Arbitration Mandate: Court ruling sets back USERRA Enforcement

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In Law Review 149 and its attachments, Col John S. Odom, USAFR (Ret.), and I addressed in detail the case of Garrett v. Circuit City Stores Inc. Unfortunately, this case took a turn that is not good news for servicemembers.

LtCol Michael T. Garrett, USMCR and an ROA member, was employed by Circuit City from 1994 until 2003, when he was fired. He had difficulties with his employer related to his USMCR activities during his entire period of employment with the company. Beginning in late 2002, when it became clear that U.S. military action against Iraq might be imminent, he began to receive unjustified criticism and discipline from his Circuit City supervisors, culminating in his March 2003 firing.

LtCol Garrett retained private counsel (Robert G. Goodman, Esq., of Dallas) and sued Circuit City in the U.S. District Court for the Northern District of Texas. The employer responded with a motion to compel arbitration, and that is where I came in. As requested by Mr. Goodman and LtCol Garrett, I filed on behalf of ROA an amicus curiae brief ("friend of the court"), arguing that section 4302(b) of the Uniformed Services Employment and Reemployment Rights Act (USERRA) supersedes the agreement to submit future disputes to binding arbitration. Col Odom participated, on behalf of ROA, in the district court oral argument on the motion to compel arbitration.

In 1995, a few months after LtCol Garrett went to work for Circuit City, the employer adopted its Associate Issue Resolution Program (AIRP), a nationwide policy for resolving employee disputes through binding arbitration rather than litigation in court. The employer sent each employee (including LtCol Garrett) a letter about the AIRP, including an "opt-out" form. Each employee was given 30 days after receipt of the AIRP package to opt out of the agreement. As with many Circuit City employees, LtCol Garrett failed to respond.

Circuit City asserted that the failure to respond amounted to an agreement to submit future claims to arbitration, and that the District Court should order LtCol Garrett to submit his USERRA claim to arbitration. U.S. District Judge Barbara Lynn, however, agreed with plaintiff and declined to order binding arbitration (Garrett v. Circuit City Stores Inc., 338 F. Supp. 2d 717, N.D. Tex. 2004). I have also found two other District Court decisions holding that USERRA overrides arbitration agreements. See Breletic v. CACI Inc., 2006 U.S. Dist. Lexis 4916 (N.D. Ga. January 24, 2006) and Lopez v. Dillard's Inc., 382 F. Supp. 2d 1245 (D. Kansas 2005).

The plaintiffs in both Breletic and Lopez settled and will not result in appellate decisions; but in Garrett the employer appealed. ROA (through Col Odom) filed an amicus curiae brief urging the court of appeals to affirm the district court. Unfortunately, the court of appeals reversed the district dourt decision (Garrett v. Circuit City Stores Inc., 2006 WL 1283743, 5th Cir. May 11, 2006).

Where do we go from here? The next step is to ask the Fifth Circuit for rehearing en banc, meaning that all the active judges of the appellate court would hear new oral arguments and either affirm or reverse the decision of the three-judge panel. Then, the next step would be to ask the Supreme Court for discretionary review. This case involves important issues, and it may be that the Supreme Court would agree to hear this case. We will continue to keep you apprised of developments.

In this case, LtCol Garrett chose to retain private counsel and sue in federal court. Most USERRA cases go to the U.S. Department of Labor (DOL), which conducts an investigation and seeks voluntary employer compliance, and then refers the case to the U.S. Department of Justice (DOJ), if DOL efforts to resolve the matter are not successful. Will DOL and DOJ be willing to represent USERRA claimants in informal hearings before privately appointed arbitrators? I don't think so. This 5th Circuit decision, if allowed to stand, could gut the effective enforcement of USERRA.

You can rely on ROA to represent your interests, and the interests of Reserve Component personnel generally, in this and similar cases. We will file amicus curiae briefs, as opportunities present themselves, and we will inform Reserve Component personnel of their legal rights by means of The Officer and website. If all else fails, we are prepared to go back to Congress for a legislative fix.

The views expressed are the personal views of the author, and not necessarily the views of the Department of the Navy, the Department of Defense, the Department of Labor, or the U.S. government.