LAW REVIEW 0639
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Mandatory Arbitration—Continued

ROA-supported case falls short, but DOL takes up USERRA issue.

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In Law Review 0619 (The Officer, July/August 2006), I addressed the unfavorable case of Garrett v. Circuit City, 449 F.3d 672 (5th Cir. 2006), reversing Garrett v. Circuit City, 338 F. Supp. 2d 717 (N.D. Tex. 2004). ROA participated as amicus curiae (friend of the court) in both the district court, where our position prevailed, and in the court of appeals, where our position lost.

LtCol Michael Garrett, USMCR and ROA member, was employed by Circuit City from 1994 until March 2003, when he was fired. In 1995, he failed to respond to a notice sent by his employer concerning binding arbitration. His failure to respond meant that he had agreed that if he ever had a dispute with his employer about any matter, he would submit the dispute to binding arbitration rather than suing in court or complaining to a government agency. Circuit City fired LtCol Garrett just before the invasion of Iraq.

LtCol Garrett sued his former employer, asserting that the firing violated section 4311 of the Uniformed Services Employment and Reemployment Rights Act (USERRA). Circuit City responded with a motion to compel arbitration, and that is where ROA came in.

At the request of LtCol Garrett and his attorney, ROA filed a brief in the district court and a new brief in the court of appeals, citing the text and legislative history of section 4302(b) of USERRA. That subsection provides that USERRA overrides an agreement that purports to limit USERRA rights or to impose an additional prerequisite upon the exercise of those rights. Along with LtCol Garrett's attorney, we argued that section 4302(b) overrode the 1995 agreement to submit future USERRA disputes to binding arbitration. The district court agreed with this argument, but the court of appeals disagreed.

In Law Review 0619, I expressed concern that "this 5th Circuit decision, if allowed to stand, could gut the effective enforcement of USERRA." I urged action to seek Supreme Court review of this case or, failing that, a statutory amendment to make it even clearer that USERRA overrides agreements to submit future USERRA issues to binding arbitration. LtGen Dennis McCarthy, ROA's executive director, met with senior officials at the U.S. Department of Labor (DOL), to discuss ROA's concerns about this important case.

However, the U.S. Department of Justice was unwilling to support a petition by LtCol Garrett for certiorari (discretionary Supreme Court review). In the absence of U.S. government support, LtCol Garrett's attorney was unwilling to apply for certiorari, thinking that without such support the chance of the Supreme Court agreeing to hear the case was too small. Garrett v. Circuit City is now final, because the deadline for applying for certiorari has passed. This unfortunate

precedent is now binding on district courts in the Fifth Circuit (Texas, Louisiana, and Mississippi).

However, DOL did include an extended discussion of the implications of *Garrett v. Circuit City* in its most recent annual report to Congress on USERRA enforcement. (You can find the report on DOL's website, www.dol.gov.) "The Assistant Secretary for VETS [Veterans' Employment and Training Service] believes Congress should be made aware of the potential impact of the recent decision by the Fifth Circuit Court of Appeals [*Garrett v. Circuit City*] … VETS is not at this time recommending that section 4302(b) of USERRA be amended to state explicitly that USERRA precludes waiver by arbitration … VETS has, however, taken special note of this decision and its potential impact on USERRA claims. VETS, after consultation with the Solicitor of Labor and the Department of Justice Civil Rights Division, believes that the decision of the Fifth Circuit does not infringe on VETS' statutory responsibility to investigate and resolve USERRA complaints in cases where employees have entered into arbitration agreements, nor does the decision preclude the Department of Justice from providing representation to USERRA complainants in such cases. See Garrett, 449 F.3d at 681. Accordingly, VETS intends to continue to accept, investigate, and assist in the resolution of USERRA complaints in cases where there is an arbitration agreement. In such cases, VETS will work with the Solicitor of Labor and the Department of Justice to assure that USERRA rights and remedies are protected, and that our service members have access to all available means of protecting their USERRA entitlements as Congress intended."

Section 670 of the National Defense Authorization Act for Fiscal Year 2007 enacts a new section, 987, in Title 10, United States Code—a section intended to regulate abuses in the "payday loan" industry affecting members of the armed forces.

Interestingly, recognizing the danger that "payday loan" outfits could make a mockery of these new protections by including mandatory arbitration clauses in the loan agreements, Congress specifically outlawed binding arbitration in this context. "It shall be unlawful for any creditor to extend consumer credit to a covered member [of the Armed Forces] or a dependent of such member with respect to which … the creditor requires the borrower to submit to arbitration or imposes onerous legal notice provisions in case of a dispute," the new law states. Therefore, a precedent now exists in federal law for a statute overriding arbitration agreements.

ROA will continue to follow this issue closely. There may be another opportunity to seek Supreme Court review, especially if another circuit concludes, contrary to the Fifth Circuit, that section 4302(b) of USERRA overrides agreements to arbitrate.

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