LAW REVIEW 642

Veterans' Reemployment Rights, USERRA and Time Limits

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CATEGORY: USERRA—Time Limits

In my research for a client, I came across an important case that is likely to be valuable to readers of ROA's Law Review. The case is *Wrigglesworth v. Brumbaugh,* 121 F. Supp. 2d 1126 (W.D. Mich. 2000).

Ellis Brumbaugh Jr. enlisted in the Michigan National Guard in 1968. As a civilian, he was employed as a jail guard and then deputy sheriff. He served on full-time National Guard Active Guard and Reserve (AGR) duty for more than 15 years, from March 14, 1984 until Sept. 30, 1999, when he retired from the Guard and applied for reemployment in the deputy sheriff job.

As I explained in Law Review 104, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) in 1994 as a recodification of and amendment to the Veterans' Reemployment Rights (VRR) law, which can be traced back to 1940. To have the right to reemployment under USERRA, you must meet five eligibility criteria, summarized in Law Review 77. One criterion is that your cumulative period or periods of uniformed service, relating to that particular civilian employer relationship, must not exceed five years. All involuntary service and some voluntary service are exempted from the computation of the five-year limit. See Law Review 201 for a comprehensive discussion of the five-year limit—what counts and what does not count.

Mr. Brumbaugh's situation is an example of a person who had military service, relating to the same employer relationship, both before and after Dec. 12, 1994, the effective date of USERRA. Under USERRA's transition rules, military duty performed prior to that date, relating to the same employer, will count toward USERRA's five-year limit if it counted toward the VRR law's four-year limit. Military duty performed prior to Dec. 12, 1994 does not count toward USERRA's five-year limit if it was exempt from the VRR law's four-year limit.

The VRR law made a distinction between *active duty* (which was subject to the four-year limit unless involuntary) and *active duty for training or inactive duty training,* for which there was no specific limit under the VRR law. There was a long argument about whether there was an implied limit or a "rule of reason" governing the duration of a particular active duty for training period or the cumulative amount of time that an employee could be away from work for active duty for training. The Supreme Court finally ended that argument in 1991, holding that the lack of an express limit meant that there was *no limit. See King v. St. Vincent's Hospital,* 502 U.S. 215 (1991). I discuss this issue in detail in Law Review 30.

Section 2024(f) of the VRR, formerly codified at 38 U.S.C. 2024(f), provided that duty performed by a National Guard member under certain sections of Title 32 of the United States Code, including section 502, *shall be considered active duty for training* for purposes of the VRR. Each of Mr. Brumbaugh's AGR orders cited 32 U.S.C. 502 as authority. Mr. Brumbaugh's period of National Guard AGR duty (prior to December 1994) was considered active duty for training under the VRR. Mr. Brumbaugh's five-year clock under USERRA started ticking on Dec. 12, 1994. Mr. Brumbaugh left his full-time duty and retired on Sept. 30, 1999, a few weeks before his five-year limit would have expired.

This is admittedly an anomaly—many years of full-time duty could be considered active duty for training and would not be subject to any durational limit. This anomaly only applied to National Guard members, not Reservists. Title 32 of the United States Code deals with the National Guard. Section 2024(f) of the VRR law referred to Title 32 sections, not Title 10 sections. Reservists on AGR duty do not receive orders that refer to Title 32 sections. A Reservist who performed full-time AGR duty prior to Dec. 12, 1994 was subject to the VRR's four-year limit.

Mr. Brumbaugh was entitled to reemployment under USERRA when he retired from the National Guard on Sept. 30, 1999, because he met the five eligibility criteria:
1. He gave the employer prior notice before leaving his job in March 1984.
2. He kept the employer informed about each extension of his full-time AGR duty.
3. He did not exceed the five-year limit, although he was away from work for full-time service for 15 1/2 years.
4. He was released from the period of service without receiving a punitive or other-than-honorable discharge.
5. He made a timely application for reemployment with the sheriff.

The county, as employer, initiated this legal action in the U.S. District Court for the Western District of Michigan, seeking a declaration that the county had no legal obligation to reemploy Mr. Brumbaugh. The court denied the requested relief and granted relief for Mr. Brumbaugh, based on his counterclaim against the county.

The court was apparently unaware, because no party brought this issue to its attention, that section 4323(c)(4) of USERRA [38 U.S.C. 4323(c)(4)] specifically precludes suits initiated by employers. I invite your attention to Law Review 115. It is possible that Mr. Brumbaugh's attorney was aware of section 4323(c)(4) and made a tactical decision not to invoke the protection of that section. If things are going well for you in a lawsuit, you do not ask that the suit be dismissed so that you can start over, perhaps with a different judge.

After it became clear that Mr. Brumbaugh had not exceeded the five-year limit, the county argued that Mr. Brumbaugh had waived his right to reemployment when he signed a "resignation" letter in 1989, during a meeting with the sheriff. The sheriff put the letter in front of Mr. Brumbaugh and asked him to sign it for "administrative purposes." The letter said nothing about military service or the VRR.

Under the VRR and USERRA, any waiver by a servicemember must be a clear and unambiguous intentional relinquishment of known rights. Moreover, only rights that are already in existence (as opposed to rights that may or may not arise in the future) may be waived. Mr. Brumbaugh did not have reemployment rights when he signed the resignation letter in 1989—he was still on full-time AGR duty for another 10 years after signing the letter. The court held that the resignation letter did not amount to a waiver of Mr. Brumbaugh's right to reemployment. The court's holding on this point is entirely consistent with what I wrote in Law Review 63.

The court also rejected the county's argument that Mr. Brumbaugh was required to prove discriminatory intent in order to prevail under USERRA. The court drew a distinction between cases under section 4311 of USERRA (discrimination) and cases under section 4312 (reemployment). To prevail under section 4311, you must prove that your military service was *a motivating factor* (not necessarily the sole reason) for the employer's decision to fire you, deny you a promotion, or deny you initial hiring, but section 4312 is different. If you meet the five simple eligibility criteria under section 4312, you have the right to reemployment.

The county argued that it was denying Mr. Brumbaugh reemployment based upon its collective bargaining agreement with the union representing county employees, not based on any anti-military animus. The court held that the county's reason for seeking to deny Mr. Brumbaugh reemployment is irrelevant—Mr. Brumbaugh meets the eligibility criteria, and he is entitled to reemployment. The court's holding on this point is entirely consistent with what I wrote in Law Review 61.

Moreover, the court noted that the collective bargaining agreement with the union cannot defeat Mr. Brumbaugh's statutory right to reemployment. The collective bargaining agreement can confer *greater or additional rights* upon servicemembers, but it cannot take away rights that Congress has conferred, when it enacted USERRA. I invite your attention to 38 U.S.C. 4302 and to Law Reviews 18 and 149. In its first case construing the VRR, the Supreme Court held: "No practice of employers or agreements between employers and unions can cut down the service adjustment benefits that Congress has secured the veteran under the Act." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946).

In his counterclaim against the county, Mr. Brumbaugh also asserted rights under Michigan state law—such claims were properly within the *pendent jurisdiction* of the federal district court because they were closely related to his federal claims under USERRA. The county argued that the federal court could not consider these state law claims because the state statute specified the state circuit court as the appropriate forum for such claims.

The court forcefully rejected the county's argument: "This very argument has been rejected for over 100 years by the United States Supreme Court and lower federal courts. The reason for rejecting such an argument is obvious. Were the federal courts limited in the exercise of diversity and supplemental jurisdiction by state statutes assigning a state forum, then the exercise of that jurisdiction, as contemplated by Congress and the Framers of the Constitution, could be frustrated in a manner inconsistent with the preeminence of federal law."

Wrigglesworth, 121 F. Supp. 2d at 1139.

The bottom line is that Mr. Brumbaugh was entitled to reemployment in the fall of 1999. Under the "escalator principle" enunciated by the Supreme Court in *Fishgold* and codified at 38 U.S.C. 4316(a) and 4318, Mr. Brumbaugh was also entitled to civilian seniority and pension credit for his 15 1/2 years of full-time AGR duty. Although this is only a district court case, because the county did not appeal, it is worthy of deference because the opinion is thoughtful, well written, and well researched. I write this article in order to provide those who advocate for servicemembers another arrow in the quiver.

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