

LAW REVIEW 723

More on Successor in Interest

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CATEGORY: USERRA—Enforcement

Most ROA members are familiar with the Reserve Officers Training Corps (ROTC), a source for commissioning many Reserve officers over the decades. The Army, Air Force, and Navy (including Marine Corps) each operate ROTC units, but this article addresses Army ROTC specifically. Army ROTC units are operated by the Army's Cadet Command (CC), commanded by a major general and subordinate to the Army's Training and Doctrine Command.

A colonel or lieutenant colonel (depending upon the size of the university and its ROTC program) commands an Army ROTC unit and is called the professor of military science (PMS). Several junior officers, called assistant professors of military science (APMS), report to the PMS and assist him or her in operating the ROTC unit. Most APMS positions are held by Active Army officers or by Army Reserve or Army National Guard officers on Active Guard/Reserve (AGR) orders.

Because of competing demands during the Global War on Terrorism (GWOT), often too few Army and AGR officers are available to fill all APMS billets. To make up the gap, the CC has contracted with a private company (originally MPRI) to fill APMS billets at most Army ROTC units. The contractor must hire an Army Reserve or Army National Guard officer in good standing to fill these positions. These APMS wear their Army uniforms, observe military courtesies, and refer to themselves by their military ranks at work. The cadets are not supposed to be able to tell which APMS officers are Active Duty or AGR and which are employees of the contractor.

In March 2000, MPRI Inc. hired MAJ Thomas Murphree, USAR, and assigned him as an APMS at Tulane University in New Orleans. MPRI's four-year contract with CC expired in the fall of 2001. The Army opened the contract for bids, and MPRI lost out to Communications Technologies Inc. (COMTEK).

In November 2001, while MPRI still had the contract, MAJ Murphree was ordered to active duty for one year and deployed to Southwest Asia (SWA). CPT Michael Kazmierzak was hired to replace MAJ Murphree in one of two contractor APMS billets at Tulane. The other contractor APMS at Tulane was already planning to resign in May 2002. CC reduced the number of contractor APMS billets at Tulane from two to one at that time, and CPT Kazmierzak remained at Tulane as the single contractor APMS. COMTEK took over the APMS contract on April 1, 2002, and hired almost all of the individuals who had been employed by MPRI in contractor APMS billets. MAJ Murphree, then on active duty in SWA, inquired of COMTEK about his right to return to his APMS position at Tulane upon release from active duty. COMTEK denied that it

had any obligation to MAJ Murphree because he had been employed by MPRI, not COMTEK.

The Army released MAJ Murphree from active duty on Aug. 15, 2002, and he immediately applied to COMTEK for reemployment as an APMS at Tulane. When COMTEK did not reemploy him, MAJ Murphree filed a complaint with the U.S. Department of Labor's Veterans' Employment and Training Service (DOL-VETS). That agency conducted an investigation and concluded that COMTEK had violated MAJ Murphree's rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

After DOL-VETS got involved, COMTEK offered MAJ Murphree an APMS job at Jacksonville State University in Alabama, but the company did not offer to pay relocation expenses. MAJ Murphree did not take the Jacksonville State job because he regarded it as inferior to the position he had held at Tulane and because he did not want to move his family from New Orleans to Jacksonville, Ala. Unable to return to his position at Tulane, MAJ Murphree voluntarily returned to active duty and has since redeployed twice to the Middle East.

It has been held that location (commuting area) is an aspect of the "status" to which the returning veteran is entitled. See *Armstrong v. Cleaner Services Inc.*, 79 LRRM 2921 (M.D. Tenn. 1972); *Britton v. Department of Agriculture*, 23 MSPR 170 (Merit Systems Protection Board 1984). Both of those cases are cited in Law Review 8. More importantly, the cases are cited with approval in USERRA's legislative history.

MAJ Murphree has been on active duty continuously since the fall of 2002. This additional active duty, although voluntary, does not count toward his five-year limit with respect to his employer relationship with MPRI and COMTEK, because he has performed this additional active duty to mitigate the damages flowing from the USERRA violation. See Law Review 190.

DOL-VETS conducted an investigation and concluded that COMTEK was the "successor in interest" to MPRI with respect to the employment of contractor APMS personnel like MAJ Murphree and CPT Kazmierzak. DOL-VETS also concluded that MAJ Murphree was entitled to the APMS position at Tulane. Although the complement of contractor APMS billets at that ROTC unit was reduced from two to one during MAJ Murphree's 2001-02 active duty period, the person who was hired to replace MAJ Murphree when he was called to active duty (CPT Kazmierzak) was still employed at Tulane when MAJ Murphree returned. The APMS billet at Jacksonville State University was not of like status to the Tulane billet, because the Jacksonville billet was outside the New Orleans metropolitan commuting area. COMTEK violated USERRA when it refused to reemploy MAJ Murphree in New Orleans, DOL-VETS found.

Although DOL-VETS conducted an investigation, this case was not referred to the Department of Justice for consideration of representing MAJ Murphree in filing and pursuing a USERRA lawsuit against his employer.

MAJ Murphree sued COMTEK in the U.S. District Court for the Eastern District of Louisiana, contending that the company violated USERRA when it refused to reemploy him at Tulane. MAJ

Murphree also alleged that COMTEK inflicted emotional distress upon him when it communicated to him, in combat in SWA, that it was unwilling to reemploy him upon his return (see also Law Review 134.) Infliction of emotional distress is a common law tort under the law of Louisiana (and just about every other state). In this lawsuit, William M. Blackston (a major in the Army Reserve Judge Advocate General's Corps and a member of ROA) is representing MAJ Murphree. USERRA gives the federal district court jurisdiction to adjudicate MAJ Murphree's USERRA claims, and the federal court is permitted to adjudicate the state law claims under the doctrine of pendent jurisdiction. Because both the federal and state claims arise out of the same set of transactions and occurrences, it promotes judicial economy to resolve all these claims in a single judicial proceeding. I discuss the doctrine of pendent jurisdiction in Law Review 0642.

After discovery in the case had been largely completed, COMTEK filed a motion for summary judgment, contending that there was no remaining material issue of fact and that the court should rule in favor of the defendant employer without a trial. On Nov. 2, 2006, Judge Sarah S. Vance declined to grant the defendant's summary judgment motion. Judge Vance wrote a nine-page decision explaining her reasoning. *Murphree v. Communications Technologies Inc.*, Civil Action No. 05-111, 2006 WL 3103208 (E.D. La. Nov. 2, 2006).

COMTEK asserted that it is not the successor in interest to MPRI because there had been no merger or transfer of assets between MPRI and COMTEK, citing *Coffman v. Chugach Support Services Inc.*, 411 F.3d 1231 (11th Cir. 2005). I discuss *Coffman* in detail, and critically, in Law Review 0634. In *Coffman*, the 11th Circuit held that a merger or transfer of assets is a necessary precondition to the finding of liability as a successor in interest. Judge Vance ruled that the 5th Circuit would not follow the 11th Circuit in this holding, citing *Rojas v. TK Communications Inc.*, 87 F.3d 745, 750 (5th Cir. 1996). *Rojas* is not a USERRA case, but the successor in interest issue arises frequently in employment cases generally, not just USERRA cases.

As I explained in Law Review 0604, section 4331 of USERRA (38 U.S.C. 4331) gives the secretary of labor the authority to promulgate regulations about the application of this law to state and local governments and private employers. The secretary promulgated such regulations, and DOL published them in the *Federal Register* on Dec. 19, 2005. The regulations are now published in Title 20 of the Code of Federal Regulations, at Part 1002. In reaching her conclusion that COMTEK had inherited the USERRA obligations of MPRI, as the successor in interest to that company, Judge Vance cited with approval and relied upon sections 1002.35 and 1002.36 of the USERRA regulations. If COMTEK appeals, and if the 5th Circuit rules in the way that Judge Vance has predicted, then there will be a direct "conflict among the circuits" between the 5th Circuit and the 11th Circuit on a legal question under USERRA. The existence of such a conflict would make it much more likely that the Supreme Court would grant *certiorari* (discretionary review).

Judge Vance also declined COMTEK's summary judgment motion on its contention that the "changed circumstances" made it "impossible or unreasonable" for COMTEK to reemploy MAJ Murphree at Tulane. Judge Vance noted that "if mere replacement [of the returning veteran by

another employee—in this case, CPT Kazmierzak] would exempt an employer from the Act [USERRA], its protections would be meaningless.” In this respect, Judge Vance cited *Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992). I invite the reader’s attention to my Law Review 206, wherein I cite *Cole* and many other cases for the proposition that the reemployment statute sometimes requires the employer to displace the replacement in order to reemploy the veteran.

Judge Vance also forcefully rejected COMTEK’s argument that MAJ Murphree was required to prove that his military status was a motivating factor in COMTEK’s decision not to reemploy him, citing *Wrigglesworth v. Brumbaugh*, 121 F. Supp. 2d 1126, 1135 (W.D. Mich. 2000). I discuss *Wrigglesworth* in detail in Law Review 0642. What Judge Vance wrote in this case is entirely consistent with what I wrote in that article, as well as Law Reviews 61 and 0701.

COMTEK also asserted that MAJ Murphree’s state tort law claims were barred by Louisiana’s one-year statute of limitations for claims of this nature. Judge Vance pointed out that the Servicemembers’ Civil Relief Act (SCRA) provides that “the period of a servicemember’s military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court … by the servicemember…” 50 U.S.C. App. 526(a). MAJ Murphree was on active duty for almost the entire time between the spring of 2002, when the complained of acts and omissions occurred, and the fall of 2004, when this lawsuit was filed. The one-year statute of limitations had not expired because the running of the statute of limitations was tolled for most of that time.

We will keep the readers informed of further developments in this interesting and important case.