

LAW REVIEW 724
Update (October 2009)

**Congress Enacts New Legislation Precluding Statutes of Limitation
in USERRA Cases**

By CAPT Samuel F. Wright, JAGC, USN (Ret.)

CATEGORY: USERRA-Enforcement

In Law Review 0724 (May 2007) and Law Review 0824 (May 2008), I discussed in detail the issue of applying statutes of limitations to cases arising under the Uniformed Services Employment and Reemployment Rights Act (USERRA). A statute of limitations is a law that establishes a strict legal deadline for filing a complaint or lawsuit. When a statute of limitations applies and has been exceeded, the court or administrative agency will dismiss the suit or claim simply based on the expiration of the statute of limitations. The merits of the claim will not be addressed.

In October 2008, President Bush signed into law the Veterans' Benefits Improvement Act of 2008 (VBIA 2008). Section 311(f) of this new law enacts a new section of USERRA—section 4327, or 38 U.S.C. 4327. Section 4327(b) of USERRA now provides as follows: "If any person seeks to file a complaint or claim with the Secretary [of Labor], the Merit Systems Protection Board, or a Federal or State court under this chapter [USERRA] alleging a violation of this chapter, there shall be no limit on the period for filing the complaint or claim." 38 U.S.C. 4327(b) (emphasis supplied).

USERRA does not contain a statute of limitations, and it explicitly precludes the application of state statutes of limitations. "No State statute of limitations shall apply to any proceeding under this chapter." 38 U.S.C. 4323(i). In several recent cases, courts have applied the four-year "default" statute of limitations established by 28 U.S.C. 1658(a) to USERRA cases. This new statutory amendment to USERRA makes it abundantly clear that no statute of limitations applies to USERRA cases.

Of course, the venerable equitable doctrine of laches still applies. If you wait several years to assert your claim, you should expect the defendant-employer to try to invoke this affirmative defense. If the defendant can convince the court that your delay was inexcusable and that the delay has prejudiced the defendant's ability to defend against a stale claim (because witnesses have died, memories have dimmed, records have been lost, etc.), the court will dismiss your lawsuit based on laches.

I also want to emphasize that you (the USERRA plaintiff) have the burden of proof to show that you meet the eligibility criteria for reemployment. The longer you wait to bring your suit, the

more difficult it becomes to prove your case. Do not sleep on your rights. If you sleep on your rights, you may find that you have no enforceable rights when you wake up.

In Law Review 0725 (May 2007), I discussed in detail and criticized *Aull v. McKeon-Grano Associates, Inc.*, 2007 U.S. Dist. LEXIS 13008 (District of New Jersey Feb. 26, 2007). When the plaintiff (Mr. Aull) went to work for the employer (McKeon-Grano Associates), he signed a written employment agreement. One provision of that agreement provided that any lawsuit challenging any later termination of employment would have to be filed within six months after the termination of employment.

McKeon-Grano fired Mr. Aull, and Mr. Aull claimed that his firing was motivated by his service as a Soldier in the Army Reserve and that the firing violated USERRA. Mr. Aull filed suit against McKeon-Grano ten months after the firing. The defendant asked the court to dismiss the lawsuit because it was filed after the expiration of the six-month contractual statute of limitations.

Mr. Aull, through his attorney, asserted that the six-month statute of limitations in the employment agreement was superseded by section 4302(b) of USERRA, 38 U.S.C. 4302(b). That subsection provides that USERRA overrides any agreement or contract that purports to limit USERRA rights or that imposes an additional prerequisite upon the exercise of USERRA rights. The District Court rejected Mr. Aull's argument, citing *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672, 678 (5th Cir. 2006).

Colonel John S. Odom, Jr., USAFR (Ret.) and I have discussed *Garrett* in great detail in Law Reviews 149, 0619, 0639, and 0847. In that case, the United States Court of Appeals for the Fifth Circuit (which includes Texas, Louisiana, and Mississippi) held that section 4302(b) of USERRA does not supersede or override an employee-employer agreement to submit future employment disputes to binding arbitration, rather than court. Colonel Odom and I believe that *Garrett* is likely to gut the effective enforcement of USERRA. We are disappointed that VBIA 2008 does not address this critical issue. The effort to overturn *Garrett* continues. Please see Law Review 0847 (October 2008).