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Does USERRA Have a Statute of Limitations?

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CATEGORY: USERRA-Enforcement

Q: What is a statute of limitations? Does the Uniformed Services Employment and Reemployment Rights Act (USERRA) have a statute of limitations?

A: The term "statute of limitations" has been defined as follows: "A statute prescribing limitations to the right of action on certain described causes of action; that is, declaring that no suit shall be maintained unless brought within a specified period after the right accrued." *Black's Law Dictionary, Revised 4th Edition,* page 1077.

Let us assume that you and I are involved in an automobile accident today, I am seriously injured, and my car is destroyed. Let us assume that the state statute of limitations for cases of this nature is two years. If I sue you two years and a day after the accident, my case will be thrown out, because I did not initiate the lawsuit within the two-year statute of limitations.

In the absence of a statute of limitations, the ancient equitable doctrine of *laches* applies. While a statute of limitations is inflexible, the doctrine of *laches* is flexible. To get a suit dismissed on the basis of *laches,* the defendant would be required to show that the plaintiff *inexcusably* delayed in bringing the suit and that the delay *prejudiced* the defendant in defending the suit. For example, the defendant could show that because of the delay, critical evidence that would benefit the defendant has been lost: memories have dimmed, potential witnesses have died, or records have been lost or destroyed.

As I explained in Law Review 104, Congress enacted USERRA in 1994 as a complete rewrite of the Veterans' Reemployment Rights (VRR) law, which can be traced back to 1940. USERRA does not have a statute of limitations, and the VRR law never had a statute of limitations.

"No state statute of limitations shall apply to any proceeding under this chapter." Title 38, U.S. Code, section 4323(i) [38 U.S.C. 4323(i)]. Congress added this language to the VRR law in 1974 and carried it over, unchanged, into USERRA. The 1974 legislative history, reiterated in USERRA's legislative history, shows the intent of Congress that there should be no statute of limitations and that the equitable doctrine of *laches* should apply, and that *laches* is an affirmative defense for which the employer-defendant bears a heavy burden of proof: "Section 4322(d)(7) [later renumbered as 4323(i)] would reaffirm the 1974 amendment to chapter 43 that no state statute of limitations shall apply to any action under this chapter. It is also intended that state statutes of limitations not be used even by analogy. See *Stevens v. Tennessee Valley Authority,* 712 F.2d 1047, 1056-57 (6th Cir. 1983). Moreover, the committee

reaffirms, as was made clear in the 1974 legislative history, that the time spent by the government agencies charged with the administration and enforcement of this Act in investigation, negotiation, and preparation for suit shall not be charged against the veteran in any consideration of a time-barred defense," i.e., *laches.* Senate Report No. 93-907, 93rd Cong., 2nd Sess. at 111-112 (June 10, 1974). See *Lemmon v. Santa Cruz County,* 686 F. Supp. 797, 805 (N.D. Cal. 1988). Additionally, in dealing with the prejudice element of the *laches* defense, it was also made clear in Senate Report No. 93-907 at 113 "that the 'bumping' of employees does not constitute prejudice to the employer." To the same effect, the payment of back wages or benefits, by itself, does not constitute prejudice in the *laches* context. See *Goodman v. McDonnell Douglas Corp.,* 606 F.2d 800, 808 (8th Cir. 1979); *Cornetta v. United States,* 851 F.2d 1372, 1380-82 (Fed. Cir. 1988)." House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2472.

As I described in Law Review 0604 and Law Review 0701, 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 Department of Labor (DOL) published the final USERRA regulations in the *Federal Register* Dec. 19, 2005, and the regulations went into effect 30 days later. The regulations are now published in the *Code of Federal Regulations* (CFR), in 20 CFR Part 1002. These regulations are now considered to be fully in effect.

The USERRA regulations address the statute of limitations question as follows: "Is there a statute of limitations under USERRA? USERRA does not have a statute of limitations, and it expressly precludes the application of any state statute of limitations. At least one court, however, has held that the four-year general federal statute of limitations, 28 U.S.C. 1658, applies to actions under USERRA. *Rogers v. City of San Antonio,* 2003 WL 1566502 (W.D. Texas), *reversed on other grounds,* 392 F.3d 758 (5th Cir. 2004). But see *Akhdary v. City of Chattanooga,' 2002 WL 32060140 (E.D. Tenn*. In addition, if an individual unreasonably delays asserting his or her rights, and that unreasonable delay causes prejudice to the employer, the courts have recognized the availability of the equitable doctrine of *laches* to bar a claim under USERRA. Accordingly, individuals asserting rights under USERRA should determine whether the issue of the applicability of the federal statute of limitations has been resolved and, in any event, act promptly to preserve their rights under USERRA." 20 CFR 1002.311.

The general federal statute of limitations can be found in 28 U.S.C. 1658(a): "Except as otherwise provided by law, a civil action arising under an act of Congress enacted after the date of enactment of this section [Dec. 1, 1990] may not be commenced later than four years after the cause of action accrues." In *Akhdary,* the U.S. District Court for the Eastern District of Tennessee held that the four-year general federal statute of limitations did not apply to USERRA cases because the underlying reemployment statute dates back to 1940, long before Dec. 1, 1990. The *Akhdary* court viewed USERRA as an *amendment* to a much older law and held, accordingly, that the four-year general federal statute of limitations did not apply.

I am familiar with *Rogers v. City of San Antonio,* and I do not believe that case can be read as a

precedent for the applicability of 28 U.S.C. 1658(a) to USERRA cases. In *Rogers,* the plaintiffs' attorney conceded (for tactical reasons) that the four-year federal statute of limitations applied. Under what is known as the "law of the case doctrine," the four-year statute of limitations applied to the *Rogers* case because the plaintiffs' counsel had conceded that this statute of limitations applied. In this context, *Rogers* should not, in my view, be read as a precedent supporting the general applicability of 28 U.S.C. 1658(a) to USERRA cases.

I am more concerned about another more recent case, *Nino v. Haynes International, Inc.,* 2005 U.S. Dist. LEXIS 43971 (S.D. Indiana Aug. 19, 2005). Plaintiff Luis J. Nino (a Marine Corps Reservist) worked for defendant Haynes International from Sept. 14, 1998, until Dec. 10, 1998, when he was fired. On April 25, 2005, almost 6 _ years after the termination, Mr. Nino filed suit against Haynes International alleging that the firing violated USERRA. The opinion of Judge John Daniel Tinder says nothing about the reason Mr. Nino waited so long to file his lawsuit. Under a statute of limitations, as opposed to *laches,* the reason for the delay is immaterial. A suit filed after the expiration of the statute of limitations will be summarily dismissed, without regard to whether there may have been an excuse for the plaintiff's delay and without the need to show that the delay prejudiced the defendant.

In his opinion, Judge Tinder cited a recent Supreme Court decision: *Jones v. R.R. Donnelly & Sons Co.,* 541 U.S. 369 (2004). "In considering the matter, the [Supreme] Court found that section 1658(a) was to have a broad reach. *Jones,* 541 U.S. at 380-81. The distinction between an amendment and a completely new statute is not dispositive. Instead, 'what matters is the substantive effect of an enactment—the creation of new *rights of action* and corresponding *liabilities—not* the format in which it appears in the [United States] Code.' *Id.* at 381 (emphasis added) [by Judge Tinder]. The court held that "a cause of action arises under an Act of Congress enacted after Dec. 1, 1990—and therefore is governed by section 1658's four-year statute of limitations—if the plaintiff's claim against the defendant was made possible by a post-1990 enactment." *Id.* at 382. Following the Supreme Court's guidance in *Jones,* the court must determine if the plaintiff's claim "was made possible by' the enactment of USERRA. Or, as *Jones* states, whether the plaintiff's claim contains 'new rights of action and corresponding liabilities.' *Id.* at 381." *Nino,* at pages 6-7.

Judge Tinder pointed out that section 4323(d)(1)(C) of USERRA [38 U.S.C. 4323(d)(1)(C)] authorizes a court to award liquidated damages in the amount of the actual damages—and thus to double the damages—for USERRA violations the court finds to have been willful; the VRR law contained no provision for additional damages for willful violations. Thus, in Judge Tinder's view, the four-year statute of limitations under 28 U.S.C. 1658(a) applies to USERRA cases. *Nino,* at page 7.

It should also be noted that in his opinion Judge Tinder cites *Akhdary* with disapproval. "Nino [the plaintiff, through his counsel] notes that the only other court to address the issue presently before this court, whether section 1658(a) applies to USERRA claims, ruled that 'there is no statute of limitations that applies' to a USERRA claim. *Akhdary v. City of Chattanooga,* No. 1:01-CV-106, 2002 U.S. Dist. LEXIS 26898, 2002 WL 32060140, at 6 (E.D. Tenn. May 22, 2002). The

Akhdary holding is less than persuasive for two reasons. First, the *Akhdary* opinion fails to provide adequate explanation or reasoning for its holding. Instead, it summarily states that 'USERRA does not establish a new cause of action; instead, it amends the pre-existing law of the VRRA. Thus, there is no statute of limitations that applies.' *Id.* Second, the *Akhdary* court did not have the guidance subsequently provided by the Supreme Court in *Jones. Akhdary* apparently relies on the amendment/new law distinction. *Jones* convincingly dismisses the importance of such distinction: 'An amendment to an existing statute is no less an "Act of Congress" than a new, stand-alone statute. What matters is the substantive effect of an enactment—the creation of new rights of action and corresponding liabilities—not the format in which it appears in the [United States] Code.' *Jones,* 541 U.S. at 381. As previously noted, the enactment of USERRA created new rights and liabilities that were not available prior to its enactment." *Nino,* at page 8.

I worked for DOL for a decade, as an attorney. Together with another DOL attorney, Susan M. Webman, I largely drafted the interagency task force work product that became USERRA when Congress enacted it, with only a few changes, in 1994. I confess that I was not aware of 28 U.S.C. 1658(a) when I did this drafting work, and I believe that Ms. Webman was also unaware of this important section. If we had been aware of this section, we would have included language in USERRA expressly precluding the application of the four-year general federal statute of limitations, but we cannot turn back the clock to correct this oversight.

I believe that *Nino* is incorrectly decided. I believe the 1974 and 1994 legislative history make clear the intent of Congress that there should be no statute of limitations on reemployment rights cases and that the equitable doctrine of *laches* should apply. I must acknowledge, however, that Judge Tinder's decision is well-written, and he makes a powerful case for the applicability of 28 U.S.C. 1658(a) to USERRA cases. Accordingly, I warn potential USERRA claimants and their counsel of this statute of limitations issue. Moreover, quite apart from a statute of limitations or *laches,* sleeping on your rights is almost always a bad idea. The longer you wait, the more difficult it becomes for you to prove your case, and the more difficult it becomes for the court to fashion an effective remedy. If you believe your USERRA rights may have been violated, you should consult an attorney and, if he or she so advises, institute legal action as soon as possible.