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Contractual Statute of Limitations Held to Apply to USERRA Case

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CATEGORY: USERRA—Enforcement

Aull v. McKeon-Grano Associates Inc., 2007 U.S. Dist. LEXIS 13008 (District of New Jersey, Feb. 26, 2007).

Tyrone G. Aull, an Army Reservist, began working for McKeon-Grano Associates Inc. as an architectural designer on April 1, 2002. He was mobilized and served on active duty from Jan. 3 to Dec. 31, 2004. He made a timely application for reemployment and returned to work May 2, 2005. The court decision does not explain the reason for the four-month delay in putting Mr. Aull back to work.

After returning to work, Mr. Aull was paid the same hourly rate he had earned before he was activated, but he was paid for only 37.5 hours per week rather than the 40 hours per week that he had been paid prior to the mobilization. He complained to his employer, asserting that his rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) had been violated. The employer fired him on Aug. 2, 2005, for "poor work performance."

Mr. Aull retained an attorney and filed suit against McKeon-Grano on June 16, 2006, more than 10 months after the company fired him. Senior District Judge Harold A. Ackerman dismissed Mr. Aull's suit, based on a six-month contractual statute of limitations.

When hired by McKeon-Grano in 2002,and again upon reemployment in 2005, Mr. Aull signed an employment agreement with the company. Paragraph 15 of the agreement provides that the employee agrees to bring any claim or action against the employer within six months after any termination of employment. In dismissing Mr. Aull's suit, Judge Ackerman held that the contractual statute of limitations was not superseded by USERRA.

Section 4302(b) of USERRA says: "This chapter supersedes any state law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit" (38 U.S.C. 4302(b)).

Mr. Aull, through his attorney, argued that section 4302(b) of USERRA overrides paragraph 15 of the employment agreement because that paragraph establishes an additional prerequisite (filing suit within just six months after termination) upon his exercise of rights conferred by

USERRA (the right to sue the employer in Federal District Court, in accordance with section 4323). In his opinion, Judge Ackerman drew a distinction between substantive rights and procedural rights, holding that section 4302(b) overrides agreements or contracts that reduce or eliminate substantive rights but not agreements or contracts that reduce or eliminate procedural rights. Judge Ackerman cited *Garrett v. Circuit City Stores, Inc.,* 449 F.3d 672, 678 (5th Cir. 2006). I have discussed that unfavorable case in detail in Law Reviews 149, 0619, and 0639, and I have called for Congress to enact a statutory amendment making it even clearer that section 4302(b) applies to procedural rights as well as substantive rights. I believe that *Aull v. McKeon-Grano Associates* makes the need for such an amendment even clearer.

In this case, as in *Garrett,* the fired employee chose to sue with private counsel rather than the Department of Labor (DOL) and the Department of Justice (DOJ). In the majority of cases, a suit is brought by DOJ after the DOL has investigated the complaint and has not obtained employer compliance. Even if the fired veteran complains to DOL the day after the discharge, it is unlikely that DOL will be able to complete its investigation and refer the matter to DOJ—and that DOJ would be able to initiate the lawsuit—within six months after the firing.