LAW REVIEW 729

(June 2007)
CATEGORY: Miscellaneous
Kirkendall - VEOA and Equitable Tolling of Claim

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In Law Review 0726 I discussed the case *Kirkendall v. Department of the Army* (Federal Circuit Docket No.: 05-3077) as it related to the Uniformed Services Employment and Reemployment Rights Act (USERRA). The case also involved the Veterans' Employment Opportunities Act (VEOA).

In 1998, John Kirkendall, a 100 percent disabled veteran, applied for a position as a supervisory equipment specialist with the Army at Fort Bragg, N.C. In early 2000, the Army found that Mr. Kirkendall's application lacked sufficient detail on his experience and rated him ineligible for the position. Mr. Kirkendall filed several complaints contesting the Army's decision not to hire him, and on June 13, 2002, he filed appeals with the Merit Systems Protection Board (MSPB) pursuant to USERRA and the VEOA.

The administrative judge dismissed the VEOA appeal for lack of jurisdiction because the Army's decision was not founded on substance, and in the alternative said the VEOA appeal was untimely and such deadline could not be waived. Mr. Kirkendall's request for a hearing was denied.

He filed a petition for review, and the MSPB affirmed the portion of the initial decision dealing with the VEOA, but remanded the USERRA claim back to the regional office for further proceedings. The board held that Mr. Kikendall's repeated assertions that he was not selected for the position because of his status as a disabled veteran was a cognizable claim pursuant to USERRA. The case was remanded on Aug. 29, 2003, because the factual record was weak and to permit appellant to develop his claim, which may have been hindered when the administrative judge did not advise him that a claim of non-selection based on his status as a "disabled veteran" is cognizable.

On remand, the administrative judge held, without a hearing, that Mr. Kirkendall offered no proof that his veteran status was a substantial or motivating factor in his non-selection. The administration judge would not infer discrimination because Mr. Kirkendall's non-selection was based on the indefiniteness of his application, all other applicants on the certificate of eligibles were veterans, and a veteran with a 10-point preference was selected for the position. The MSPB adopted the administrative judge's remand decision when it denied the appellant's petition for review on Oct. 13, 2004.

The appellant then filed his appeal to the U.S. Court of Appeals for the Federal Circuit for review of the board's decision regarding equitable tolling of the VEOA and the denial of hearing. Equitable tolling is a principle of tort law stating that a statute of limitations shall not bar a claim in cases where the plaintiff, despite use of due diligence, could not or did not discover the injury until after the expiration of the limitations period. On June 22, 2005, the court reversed the board's decision with regard to filing periods in 5 U.S.C. §3330a that cannot be tolled and that 5 U.S.C. 7701 does not apply to USERRA.

A petition for panel rehearing and rehearing *en banc* was filed by the Department of the Army and granted on Jan. 2, 2006. In a rehearing *en banc,* all of the active judges (all those who have not taken "senior status") of the appellate court hear new oral arguments and read new briefs by the parties, then decide the case anew. The court vacated the panel's judgment and original opinion entered June 22, 2005. *En banc* review was limited to three issues: (1) Is the 15-day period for filing appeals to the MSPB set forth in 5 U.S.C. § 3330a(d)(1)(B) subject to equitable tolling? (2) Is the 60-day period for filing a claim with the Secretary of Labor set forth in 5 U.S.C. §3330a (a)(2)(A) subject to equitable tolling? (3) Are all veterans who allege a USERRA violation entitled to a hearing under 5 U.S.C. § 7701?

Here we address only the VEOA and tolling issues. There is a two-part test to determine whether equitable tolling applies to suits against the government generally and whether it applies to issues (1) and (2) above of the *en banc* hearing. First, would the doctrine of equitable tolling be available in a sufficiently analogous private suit? If not, the

query terminates here, and the doctrine is inapplicable. If so, the second query is whether Congress expressed a clear intent that equitable tolling not apply as determined by the factors in *United States v. Brockamp,* 519 U.S. 347 (1997).

Congress enacted the VEOA to provide veterans with a method for seeking reparation from the federal government where the government's hiring decisions violated veterans' preference rights. If a veteran establishes a violation, the agency is ordered to comply with the veterans' preference statutes and award compensation for any lost wages or benefits caused by the violation (5 U.S.C. § 3330c[a]). Additionally, the Supreme Court, in *Irwin v. Department of Veterans Affairs,* 498 U.S. 89 (1990), established the presumption that equitable tolling is available in cases against the government when it is available in analogous private litigation (Id. At 95-96). There only needs to be sufficient similarity between the suits rather than exacting similarity. The *Irwin court* explained that, once the government has waived sovereign immunity to permit suits against it, applying equitable tolling to such suits in the same manner as it would be applied in private actions hardly broadens the waiver of immunity, if at all.

This Irwin presumption, however, can be rebutted if there is reason to believe Congress did not intend for the doctrine of equitable tolling to apply. One can look to the text of the relevant statue to determine whether equitable tolling is consistent with the meaning of the statute. Essentially, "absent a clear contrary intent" of Congress to limit jurisdiction created by a particular statute, the Irwin presumption will apply (see Bailey v. West, 160 F.3d 1360, 1368 [Fed. Cir. 1998][*en ban*]). Indicative factors which a court should consider include the statute's detail, its technical language, its multiple iterations of the limitations period in procedural and substantive form, its explicit inclusion of exceptions, and its underlying subject matter (see *Brockamp*).

As the test applies to *Kirkendall,* the court found that Mr. Kirkendall's VEOA claim was "sufficiently analogous to private action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq," to apply the presumption of equitable tolling. See *Irwin,* 498 U.S. at 95, holding that "the statutory time limits applicable to lawsuits against private employers under Title VII are subject to equitable tolling." Therefore, the next analysis was whether Congress expressed a clear intent to rebut the presumption of equitable tolling.

The court had two statutes to analyze in determining whether Mr. Kirkendall's VEOA was time barred, 5 U.S.C. § 3330a(a)(2)(A) and 5 U.S.C. § 3330a(d)(1). In this case, the government conceded that the first statute, 5 U.S.C. § 3330a(a)(2)(A), was subject to equitable tolling. The second statute, 5 U.S.C. § 3330a(d)(1), reads: "(d)(1) If the Secretary of Labor is unable to resolve a complaint under subsection (a) within 60 days after the date on which it is filed, the complainant may elect to appeal the alleged violation to the Merit Systems Protection Board in accordance with such procedures as the Merit Systems Protection Board shall prescribe, except that in no event may any such appeal be brought (A) before the 61st day after the date on which the complaint is filed; or (B) later than 15 days after the date on which the complainant receives written notification from the secretary under subsection (c)(2)."

The government first argued that the "in no event" language expressed Congress's clear intent to rebut the *Irwin* presumption. The court disagreed with the government's interpretation; it held instead that Congress' primary intention was for the clause to emphasize that the Secretary of Labor was to have a 60-day window within which to resolve a complaint. The clause was not a deadline for a complainant.

The court further cited several other cases and examples when it cautioned not to read too much into seemingly stringent language about timing requirements as they applied to suits against the government because equitable tolling had been held to be consistent with such stringent statutory language. Using *Brockamp* factors which should be considered in applying equitable tolling, the Court ruled that the 5 U.S.C. § 3330a language was not technical, its timing provisions not repeated, was without explicit exceptions to the filing deadlines found in other statutes which would prohibit equitable tolling, and that the 15-day filing period was extraordinarily short.

The government secondly argued that 5 U.S.C. § 3330a(d)(1) was not subject to equitable tolling because the time for review was specific in the statute. The court held the argument was without merit because many other statutes specified the time for review were found to be within the *Irwin* presumption on rebutting and also favorable to equitable tolling. In support, the court distinguished 5 U.S.C. § 3330a(d)(1) from another statute in which Congress had demonstrated intent to preclude tolling. See *Bailey v. West,* 160 F.3d 1360 (Fed. Cir. 1998)(held that 38 U.S.C. § 7266 is subject to equitable tolling).

In its summation of the doctrine of equitable tolling and its applicability to 5 U.S.C. § 3330a(d)(1), the court noted that its decision was well supported by the law, and this was not a close construction of the language of the statute. It surmised, however, that, if Congressional intent were more difficult to decipher, the provision for benefits to members of the armed services are to be construed in the beneficiaries' favor. Thus, both 5 U.S.C. § 3330a(a)(1)(A) and 5 U.S.C. § 3330a(d)(1) are subject to equitable tolling.

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