LAW REVIEW 730

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CATEGORY: USERRA Enforcement

Are Schedule C Employees Protected by USERRA?

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Q: I am an Army Reserve officer. I have worked for the federal government as a Schedule C employee since 2001. I was called to active duty early last year, and I served in Iraq for a year. I was released from active duty under honorable conditions, and I immediately applied for reemployment. I meet the eligibility criteria for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA), as you described in your Law Review 77. When I left, another person was brought in to fill my job, and she is still there, in that same job. My immediate supervisor and the personnel office are telling me that I will not be reemployed and that USERRA does not apply to Schedule C appointees because they "serve at the pleasure of the President." What do you think?

A: I think that you definitely have reemployment rights under USERRA and that your agency should reemploy you. A more difficult question is whether you have any legal remedy if the agency refuses to reemploy you. I will address those questions separately, but first, for the benefit of our readers outside the Washington Beltway, let me explain what a "Schedule C" employee is.

On its website, the U.S. Office of Personnel Management (OPM) states, "Schedule C positions are excepted from the competitive service because they have policy-determining responsibilities or require the incumbent to serve in a confidential relationship with a key official. Appointments to Schedule C positions require advance approval from OPM, but appointments may be made without competition. OPM does not review the qualifications of the Schedule C appointee; final authority on this matter rests with the appointing official. Employees in Schedule C positions are subject to removal at the discretion of the administration or appointing official. Agencies may separate Schedule C appointees whenever the confidential or policy-determining relationship between the incumbent and his/her superior ends. Schedule C appointees are not covered by statutory removal procedures and generally have no rights to appeal removal actions to the Merit Systems Protection Board (MSPB). This is true, regardless of veterans' preference or length of service in the position."

Schedule C employees are clearly "employees at will," but so are more than 80 percent of all employees in this country. USERRA most definitely applies to employees at will, and any law that did not apply to employees at will would be essentially worthless. I invite your attention to Law Review 0616. As I explained in Law Review 0701, anyone who meets the five eligibility criteria for reemployment is entitled to reemployment-it does not matter why the employer does not want to reemploy you, \ it does not matter that you were an employee at will, and it does not matter that the job has been filled-sometimes the employer is required to displace the replacement in order to reemploy the returning veteran. I invite your attention to Law Review 206.

A separate question, and a more difficult question, is whether there is an enforcement mechanism available to you if the agency flatly refuses to comply with USERRA. I see these questions as separate. We all have an obligation to obey the law, even when we realize that we are unlikely to be held accountable if we violate it. I address USERRA's enforcement mechanism, with respect to the federal government as the employer, in Law Reviews 12, 34, 67, 93, 108, 148, 163, 189, 197, and 0605.

I do not question the OPM statement that Schedule C employees *generally* have no remedy in the MSPB when they are dismissed from employment, for whatever reason. But USERRA was intended to give a remedy through the MSPB to many unusual federal employees who otherwise had no remedy prior to the enactment of this law. For example, I explain in detail in Law Review 163 that nonappropriated fund employees (employees of officers' clubs, military exchanges, etc.) clearly have a remedy through the MSPB when their USERRA rights are violated, although the MSPB otherwise has no jurisdiction over nonappropriated fund employees.

It should also be pointed out that in section 4325 of USERRA (38 U.S.C. 4325), Congress exempted intelligence agencies (CIA, DIA, FBI, etc.) from the USERRA enforcement mechanism, through the MSPB, but not from the substantive obligation to comply with USERRA. If Congress had intended that Schedule C employees not have a remedy through the MSPB, Congress could have and should have expressed that intention in USERRA.

This is a good case for the invocation of the legal doctrine of *expressio unius est exclusio alterius* (expression of one thing is the exclusion of another). By excluding intelligence agencies from the USERRA enforcement mechanism, Congress demonstrated that it considered the question of excluding some agencies or some kinds of federal employees from the enforcement mechanism, because of countervailing policy implications. By expressly excluding intelligence agencies from USERRA enforcement through the MSPB, Congress has precluded arguments that other kinds of agencies or employees were to be excluded.

The classic example of *expressio unius est exclusio alterius* comes in the early Supreme Court case, *Marbury v. Madison,* 5 U.S. 137 (1803). Article III, section 2, clause 2 of the Constitution establishes the *original* (as opposed to appellate) jurisdiction of the Supreme Court-cases affecting ambassadors and other public ministers and disputes between states. The statute at issue in *Marbury* expanded the original jurisdiction of the Supreme Court to include cases in which a *writ of mandamus* is sought against a federal official. The Supreme Court held that since the Constitution expressly states the classes of cases for which the Supreme Court has original jurisdiction, a federal statute that adds additional classes of cases to the original jurisdiction of the Supreme Court is unconstitutional.

The conclusion that Congress intended a broad application of MSPB jurisdiction to remedy USERRA violations in the federal government is supported by USERRA's legislative history. See House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2472. Moreover, Congress has expressly provided that even employees of the White House and the Executive Office of the President have enforceable USERRA rights. See 3 U.S.C. 416.

I recognize that the question of whether a Schedule C employee has a remedy through the MSPB for a USERRA violation is a hard case, and "hard cases make bad law." This is a hard case because there are important policy arguments to make on both sides of the question. On one side, it is important that the elected president have unfettered ability to appoint policy-making folks who support and will implement the policy platform upon which the president was elected. On the other hand, it is also most important that those who lay aside their civilian jobs to serve their country, voluntarily or involuntarily, should be able to return to those jobs upon completion of their service.