

LAW REVIEW 752

(October 2007)

2.0: Paid Leave

1.19: USERRA Enforcement

Habit Forming Federal Circuit reverses MSPB two more times.

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Hernandez v. Department of the Air Force, 2007 U.S. App. LEXIS 20280 (Fed. Cir. Aug. 27, 2007); *Pucilowski v. Department of Justice*, 2007 U.S. App. LEXIS 20609 (Fed. Cir. Aug. 29, 2007).

The U.S. Court of Appeals for the Federal Circuit reversed the Merit Systems Protection Board (MSPB) in cases arising under the Uniformed Services Employment and Reemployment Rights Act (USERRA), twice in three days in late August. As we explained in Law Review 189, USERRA cases involving federal agencies as employers are adjudicated by the MSPB, and its final decisions can be appealed to the Federal Circuit. The Federal Circuit has not been shy about reversing the MSPB when that quasi-judicial federal agency fails to construe USERRA liberally, as Congress intended and as the Supreme Court has commanded (examples are in Law Reviews 0722 and 0726).

Both of these new cases arose out of "Butterbaugh" claims. Federal law (5 U.S.C. 6323) gives federal employees the right to 15 days of *paid* military leave per fiscal year. Prior to 2000, federal agencies charged the employee for a day of military leave for each day the employee was on military duty—including weekends and federal holidays when the employee would not have worked at the civilian job. The Federal Circuit declared this practice unlawful in *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003). See Law Review 151.

Jose D. Hernandez, a retired civilian employee of the Department of the Air Force and also a retired Reservist, filed a "Butterbaugh" claim with the MSPB, asserting he had been improperly charged with military leave days between 1980 and 2001. Because he had been unable to obtain Defense Finance and Accounting Service records on his own, he sought to subpoena those records through the MSPB Administrative Judge (AJ) hearing his case. The AJ granted the subpoena, but only for records going back to Oct. 13, 1994.

The AJ chose that date because it is the date President Bill Clinton signed USERRA (Public Law 103-353) into law. Congress enacted USERRA in 1994, as a complete rewrite of the Veterans' Reemployment Rights (VRR) law, which can be traced back to 1940.

In *Hernandez*, the Federal Circuit held that the MSPB erred in limiting discovery to documents after the USERRA date of enactment. The court pointed out that section 4324(c)(1) of USERRA [38 U.S.C. 4324(c)(1)] provides: "The Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to subsection (a)(2)(A) or (b), without regard as to whether the complaint accrued before, on, or after October 13, 1994."

The court also forcefully rejected the Department of the Air Force's argument that other federal statutes limited the "look back" period for Mr. Hernandez's "Butterbaugh" claim. "Furthermore, the period of recovery under USERRA is governed exclusively by 38 U.S.C. 4324(c), and is not limited by the Back Pay Act, 5 U.S.C. 5596, or the Barring Act, 31 U.S.C. 3702. Those statutes contain general background provisions restricting recovery against the government for past-due pay, leave, or compensation to a six-year period. However, they are inapplicable here because 'where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority [sequence] of enactment.' *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974); *see also First Nationwide Bank v. United States*, 431 F.3d 1342, 1348 (Fed. Cir. 2005).

Because of the absence of any indication that Congress intended that something other than section 4324(c)(1) apply to claims brought under USERRA, we adhere to this rule of statutory construction. Moreover, our conclusion is consistent with, and further supported by, Congress' broad remedial intent in enacting USERRA, and the canon that veterans' benefit statutes are liberally construed in favor of the veteran. Therefore, the board [MSPB] has the

authority to order relief covering the entire period of Hernandez's alleged *Butterbaugh* violations." *Hernandez*, at page 7.

The second case involves Alexander F. Pucilowski Jr., a member of the Army National Guard who worked for the Department of Justice's Bureau of Prisons as a corrections officer and supervisor, May 1989--May 2002, when he transferred to the Transportation Security Administration as an air marshal. This is also a "Butterbaugh" case.

Mr. Pucilowski established that he had been improperly charged for his paid military leave account for 22 days between 1989 and 2001. As a result of this improper charging, Mr. Pucilowski was forced to use five days of leave without pay in 1993. The MSPB awarded him five days of back pay, as a remedy for this violation.

Mr. Pucilowski also asked the MSPB to order correction of his civilian and military leave records. The MSPB AJ denied that relief, holding that the MSPB did not have the authority to grant it. The MSPB affirmed the AJ on this point, and Mr. Pucilowski appealed to the Federal Circuit, which reversed the MSPB.

Section 4311 of USERRA (38 U.S.C. 4311) makes it unlawful for an employer (federal, state, local, or private sector) to deny an individual initial employment, retention in employment, promotion, or a *benefit of employment* because of the individual's membership in a uniformed service, application to join a uniformed service, performance of uniformed service, or application or obligation to perform future service. The Federal Circuit, in *Pucilowski*, held that the term "benefit of employment" is to be given an expansive interpretation, citing *Yates v. Merit Systems Protection Board*, 145 F.3d 1480, 1484-85 (Fed. Cir. 1998) and *Peterson v. Department of the Interior*, 71 M.S.P.R. 227, 237 (1996). Applying such an expansive interpretation, The Federal Circuit held that an entitlement to *paid* military leave under 5 U.S.C. 6323 is a "benefit of employment" for purposes of section 4311 of USERRA. In *Hernandez*, the Federal Circuit held that this paid military leave is a "benefit of employment" under USERRA and also an "incident or advantage of employment" under section 2021(b)(3) of the Veterans' Reemployment Rights law [38 U.S.C. 2021(b)(3) (1988 edition of the United States Code)].

Because charging Mr. Pucilowski's paid military leave account for days that should not have been charged violated USERRA, the MSPB should have applied USERRA remedies. The Federal Circuit held, "The board [MSPB] plainly has the authority under 38 U.S.C. 4324 to remedy denial of military leave benefits. Indeed, section 4324(c)(2) provides: 'If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter relating to the employment and reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.' Accordingly, the board erred by failing to order the Department of Justice, the Transportation Security Administration, the United States Department of Defense Finance and Accounting Service, and any other relevant agency to correct their records to reflect a proper accounting of Pucilowski's military leave." (Emphasis in the court decision)

MAJ Matthew Tully, NYARNG, represented Mr. Pucilowski and Mr. Hernandez. A member of ROA, MAJ Tully is the founding partner of Tully, Rinckey & Associates of Albany, N.Y. (www.tullylegal.com/), a law firm specializing in USERRA and related laws for federal employee claimants. MAJ Tully writes the "Ask the Lawyer" column in the *Army Times*, *Navy Times*, *Air Force Times*, and *Marine Corps Times*.