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1.19: USERRA Enforcement

Firmer Teeth
Legislation introduced to enhance USERRA enforcement.

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On Aug. 3, 2007, Rep. Artur Davis (D-Ala.) introduced H.R. 3393, the proposed Reservist Access to Justice Act of 2007. Whoever drafted this bill might have been reading the Law Reviews; several issues highlighted in these articles are comprehensively addressed in H.R. 3393. If enacted, this bill would make major and much-needed improvements in the enforcement mechanism of the Uniformed Services Employment and Reemployment Rights Act (USERRA).

The new law would make clear that USERRA overrides agreements to submit future USERRA disputes to binding arbitration.

In Law Reviews 149, 0619, and 0639, and their attachments, Col John Odom, USAFR (Ret.), and I have addressed in detail the case of *Garrett v. Circuit City Stores, Inc.,* 338 F. Supp. 2d 717 (N.D. Tex. 2004), *reversed,* 449 F.2d 672 (5th Cir. 2006).

LtCol Michael Garrett, USMCR, was hired by Circuit City in 1994. In 1995, the company distributed to each employee a package about arbitration of any disputes that may arise between the employee and the employer. Under the system that Circuit City established, an employee's failure to respond to the package means the employee has agreed to submit to an arbitrator (rather than to sue or to complain to a government agency) any future dispute with the employer about any matter related to the employment. Like most Circuit City employees, LtCol Garrett did not respond to the package.

Throughout his employment with Circuit City, LtCol Garrett had difficulties in relation to his absences from work for training and service in the Marine Corps Reserve. Those difficulties culminated in March 2003 when the company fired him just prior to the U.S. invasion of Iraq. LtCol Garrett retained private counsel (Robert Goodman, Esq., of Dallas) and sued Circuit City in the U.S. District Court for the Northern District of Texas, contending that the firing violated section 4311 of USERRA, 38 U.S.C. 4311.

The company responded with a motion to compel arbitration, contending that LtCol Garrett is bound by his 1995 agreement-by-default and the dispute should be settled by an arbitrator, not in court. At the request of Mr. Goodman, ROA submitted an *amicus curiae* (friend of the court) brief, arguing that section 4302(b) of USERRA supersedes and overrides agreements to submit future USERRA cases to arbitration. That subsection provides that USERRA overrides agreements that purport to limit USERRA rights or that impose additional prerequisites upon the exercise of USERRA rights. USERRA gave LtCol Garrett the right to sue his employer in federal court, so USERRA overrides an agreement that takes away that right and requires that he submit his claim to arbitration.

The Circuit City arbitration system has a strict limit on the number of witnesses that an employee may present, and no procedure for compelling the testimony of company officials who resist testifying. Mr. Goodman was concerned that he might not be able to prove his case without the liberal discovery rules applicable in federal court. Another concern was that LtCol Garrett could be mobilized-and indeed he was mobilized and deployed to Eastern Africa. The Servicemembers' Civil Relief Act (SCRA) provides for mandatory continuances and default judgment protection in that situation. The SCRA applies to federal and state court proceedings and administrative hearings, but it does not apply to arbitration.

The District Court agreed with ROA's contention that USERRA superseded the agreement to arbitrate, and declined to order arbitration. The employer appealed, and, unfortunately, the 5th Circuit reversed. The appellate court drew a

distinction between *substantive* rights and *procedural* rights, holding that section 4302(b) only overrides agreements that limit substantive rights. I believe this distinction is not supported by the text or legislative history of section 4302(b). Moreover, a substantive right without an effective procedure to enforce it is of little value.

LtCol Garrett's attorney did not ask the Supreme Court for *certiorari* (discretionary review), so the Court of Appeals decision became final. The appellate decision also establishes a precedent binding on District Courts in the 5th Circuit (Texas, Louisiana, and Mississippi). In Law Review 0639, I called upon Congress for a legislative fix to this problem.

Apparently, Rep. Davis was listening. Section 3 of H.R. 3393 would amend section 4322 of USERRA by adding a new subsection g: "Chapter 1 of title 9 shall not apply to employment or reemployment rights or benefits claimed under this subchapter." Title 9 of the U.S. Code relates to arbitration-the Federal Arbitration Act. The enactment of H.R. 3393 would have the effect of overruling the 5th Circuit decision in *Garrett*.

The new law would expand the availability of liquidated and punitive damages in USERRA cases.

Other sections of H.R. 3393 would improve the USERRA enforcement mechanism in other important ways. Section 2 of the bill would strengthen the USERRA provision about liquidated damages and make the provision for such damages apply to the federal government as employer. Under current law, the provision for liquidated damages applies to state and local governments and private employers, but not the federal government.

Current law provides that the Federal District Court is to award liquidated damages, in the amount of the actual damages, and thus to double the award, if the court finds the employer's USERRA violation to have been willful. I recently heard from a deputy sheriff who was unlawfully denied reinstatement upon returning from mobilization. The violation was about as willful as you could imagine; the sheriff said he knew about the federal law but did not agree with it and would not obey it. The returning veteran immediately found another job with another sheriff in a nearby county, paying slightly more than he had been making. There was no back pay award because the veteran mitigated the lost pay by finding another job immediately. As my late father, the CPA, used to say: "Two times nothing is still nothing." H.R. 3393 would amend the liquidated damages provision to make the amount of the liquidated damages equal to *the greater of* the amount of the actual damages or $20,000. In a case like the deputy sheriff's, involving a willful employer violation with little or no economic damage to the employee, H.R. 3393 would authorize a court to award $20,000 in liquidated damages.

Section 2 of H.R. 3393 would also provide for the imposition of *punitive* damages, over and above the liquidated damages, upon state and local governments and private employers with more than 15 employees, if the court finds that the USERRA violation "was done with malice or reckless indifference to the federally protected rights of the person." The final subsection of section 2 would permit USERRA plaintiffs to sue state and local government officials individually and, if they prevail, to collect the costs authorized by 42 U.S.C. 1988 (an important civil rights law).

The new law would expand availability of injunctive relief in USERRA cases.

Section 4323(e) of USERRA currently provides as follows: "The court *may* use its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter." 38 U.S.C. 4323(e) (emphasis supplied). Section 2 of H.R. 3393 would change "may" to "shall"-and thus make the use of equity powers *mandatory* if a violation or the likelihood of an imminent violation is found.
In Law Review 200, I discussed the case of *Bedrossian v. Northwestern Memorial Hospital,* 409 F.3d 840 (7th Cir. 2005). Dr. Carlos Bedrossian, a physician and colonel in the Air Force Reserve (and ROA member), was a professor at Northwestern University's medical school and a staff physician at the Northwestern Memorial Hospital. The employer sought to fire Dr. Bedrossian because of the inconvenience caused by his Air Force Reserve service.

Dr. Bedrossian sued and sought an injunction, preventing the university from firing him. The U.S. District Court for the Northern District of Illinois denied the injunction, holding that regardless of the strength of Dr. Bedrossian's case an injunction against a firing was not an available remedy. The U.S. Court of Appeals for the 7th Circuit affirmed, relying on the Supreme Court case of *Sampson v. Murray,* 415 U.S. 61 (1974) (not a reemployment rights case).

Under the generally applicable rules, a plaintiff seeking preliminary injunctive relief must show two elements: likelihood of success on the merits (when the case eventually goes to trial) and *irreparable* injury to the plaintiff, if injunctive relief is not granted. Under the rule established by the Supreme Court in *Sampson,* a court will not ordinarily enjoin a firing. The idea is that the injury caused by a firing is not *irreparable*. If the plaintiff-employee eventually prevails on the merits and establishes that the firing was illegal, the court can award back pay and interest, so the injury can be repaired later.

I believe that USERRA cases are fundamentally different from other employment discrimination cases (like cases under the Age Discrimination in Employment Act or Title VII of the Civil Rights Act of 1964), in an important way. In a USERRA case, there is an additional "800 pound gorilla" in the courtroom. In addition to the interests of the employee (plaintiff) and the employer (defendant), there is also the national defense interest of the United States of America.

Congress enacted the reemployment statute in 1940, and substantially updated and improved it in 1994 (USERRA) because Congress realized that the national defense interest of the United States requires that those who serve in our nation's Armed Forces (including but not limited to the Reserve Components) must be supported by the society as a whole, and especially by civilian employers. In 1973, Congress abolished the draft. For more than a generation, we have been relying upon the "all-volunteer military." For the first time in our nation's history, we are fighting a major war without conscription. Last year, the House of Representatives held a roll-call vote on a bill that would reinstate the draft; the bill got all of two votes.

Congress strongly supports the all-volunteer military, but Congress also recognizes that the reliance on volunteers means that we must include substantial incentives for young men and women to join and remain in our nation's uniformed services. We also must mitigate the disincentives to service, including the realistic fear that "if I sign up, I will lose my civilian job." USERRA is one of many important laws Congress has enacted to help the services recruit the quality and quantity of persons they need.

The enactment of H.R. 3393 would effectively overrule the 7th Circuit decision in *Bedrossian* and would make the use of the court's equity powers mandatory, not discretionary. This is exactly what I had in mind when I called for a legislative fix in Law Review 200.

Under the proposed legislation, if a state accepts federal funding, the state thereby waives its 11th Amendment immunity.

In Law Review 89, I discussed the implications of *Larkins v. Department of Mental Health and Mental Retardation,* 806 So. 2d 358 (Alabama Supreme Court 2001). Because of the 11th Amendment to the U.S. Constitution, Mr. Larkins had no remedy in federal court. Because of the "sovereign immunity" provision of the Alabama Constitution, Mr. Larkins had no remedy in state court. A substantive right without an effective means to enforce that right is of little value.

Section 2 of H.R. 3393 would enact a new subsection (j) in 38 U.S.C. 4323, as follows: "A state's receipt or use of federal financial assistance for any program or activity of a state shall constitute a waiver of sovereign immunity, under the 11th amendment to the Constitution or otherwise, to a suit brought by an employee of that program or activity under this chapter for the rights or benefits authorized the employee by this chapter."

Call to Action

Contact your U.S. representative and your U.S. senators in support of H.R. 3393. Ask your representative to join Rep. Davis as a co-sponsor of this much-needed bill. Ask your senators to introduce a companion bill in the Senate. *The job you save may be your own.*