LAW REVIEW[1] 0809
February 2008

second Supreme Court Case Relating to Reemployment Statute: *Trailmobile Corp. v. Whirls,* 331 U.S. 40 (1947)

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1.3.2.2—Continuous Accumulation of Seniority—Escalator Principal
1.8—USERRA—Relationship Between USERRA and Other Laws/Policies
10.1—Supreme Court Case on Reemployment

Like the first reemployment rights case to make it to the U.S. Supreme Court [*Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275 (1946)], this case illustrates that the reemployed veteran is not entitled to "super seniority" that protects him from bad things that *would have happened anyway* even if his civilian career had not been interrupted by military service.

Lawrence Whirls was employed by the Highland Body Manufacturing Corp. (Highland) from 1935 until 1942, when he entered military service. He was honorably discharged and returned to work at Highland in May 1943.

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[1]I invite the reader's attention to https://www.roa.org/page/LawCenter. You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

[2]BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

Highland was a wholly owned subsidiary of Trailmobile Corp. (Trailmobile), but both companies manufactured the same products at separate plants in Cincinnati. In 1943, a decision was made to consolidate the Highland operations into the much larger Trailmobile plant. The supplies, equipment, and personnel of Highland were transferred gradually to the Trailmobile plant, and the Highland plant ceased operations at the end of 1943. The Highland employees, including Mr. Whirls, were transferred to the payroll of Trailmobile as of Jan. 1, 1944, when the consolidation became fully effective. In the new, consolidated workforce, the former Highland employees were outnumbered by a 10-to-1 ratio by the employees who had been with Trailmobile all along.

Both the Highland employees and the Trailmobile employees were represented by the American Federation of Labor (AFL).

As often happens when employees are consolidated into a single bargaining unit, a bitter and protracted dispute arose as to the computation of seniority in the new, consolidated unit. The former Highland employees, including Mr. Whirls, argued that their Trailmobile seniority should date from their Highland hire dates. The much larger group of employees who had been with Trailmobile all along argued that the former Highland employees joined Trailmobile on Jan. 1, 1944, and that should be their seniority date. The dispute was submitted to national representatives of the AFL, and they decided in favor of the Highland group.

The Trailmobile employees were not satisfied, so they petitioned for and obtained a National Labor Relations Board decertification election. The employees voted to decertify the AFL local and to certify a Congress of Industrial Organizations (CIO—then a competing organization with the AFL) local in its place. Not surprisingly, the CIO local took the position that the seniority date for all the former Highland employees was Jan. 1, 1944. In July 1944, the CIO local signed a collective bargaining agreement (CBA) with the employer, and the CBA provided that the former Highland employees all had a Trailmobile seniority date of Jan. 1, 1944, regardless of when they were initially hired by Highland. This adversely affected the interests of all the former Highland employees, including both veterans and non-veterans.

Under the National Labor Relations Act (NLRA), in the form that was in effect at the time, the "closed shop" was lawful, and under the 1944 CBA Trailmobile was a closed shop. In a closed shop, only union members were permitted to be employed. The Taft-Hartley Act, enacted in 1947, outlawed the closed shop. After Taft-Hartley was enacted, a modified "union shop" is lawful, wherein employees can be required to join the union within 30 days after being hired, but it is unlawful for the union to demand that the employer fire an individual employee for non- membership if the individual's membership was denied or terminated for any reason other than a refusal to pay the "fair share" of the cost of the union in representing all the employees in the bargaining unit. I also invite the reader's attention to Law Review 0616, wherein I discuss the purpose and effect of state "right to work" laws.

Mr. Whirls sued both Trailmobile and the CIO local under the reemployment statute and other legal theories, contending that depriving him of his pre-1944 seniority with Highland in the new

consolidated unit was unlawful. The CIO local disciplined Mr. Whirls and expelled him from the union for bringing a legal action without the union's permission, and the CIO local then demanded that Trailmobile fire Mr. Whirls for non-membership, in that the 1944 CBA provided that only members of the union were eligible to work for Trailmobile. At the time the case went to the Supreme Court, Mr. Whirls was on a paid leave of absence from Trailmobile; the company did not want to fire him but also did not want to provoke a strike by the CIO local.

The union conduct was lawful at the time, but unlawful after Congress enacted the Taft-Hartley Act late in 1947. As I explained in Law Review 104 and other articles, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) in 1994, as a complete recodification of the 1940 reemployment statute. Under section 4311(b) of USERRA, 38 U.S.C. 4311(b), it is unlawful for an employer to discriminate against or take any adverse employment action against any person because such person has taken an action to enforce rights under USERRA. Moreover, under USERRA's definition of "employer" [38 U.S.C. 4303(3)], the union can be considered an "employer" for USERRA purposes under certain circumstances. These provisions would have been most helpful to Mr. Whirls.

The Supreme Court seemed genuinely troubled by the plight of Mr. Whirls and the other former Highland employees but considered itself powerless to redress their grievances. The majority opinion contains some interesting and useful discussion of the important legal doctrine of *res judicata* (literally, "the thing has been adjudicated") and of the limited role of the Supreme Court in reviewing decisions of federal appellate courts.

Our federal judicial system has three levels. Both civil and criminal cases are tried in the 93 U.S. District Courts— each state has at least one district, and some of the larger states have several districts. The intermediate level in our federal judicial system consists of the 11 numbered circuits, plus the District of Columbia Circuit and the Federal Circuit. (I discuss the specialized U.S. Court of Appeals for the Federal Circuit in Law Review 189.) Appeal from District Court to the Court of Appeals is more or less automatic, upon request. The Court of Appeals reviews *de novo* (as of new) the decisions of the District Court on *questions of law,* but the Court of Appeals gives great deference to the District Court's findings of *fact* and overturns them only if they are clearly erroneous or there is no evidence in the record to support them.

You must remember that an appeal is not the same thing as a new trial. The appellate court does not hear new witnesses or accept new documentary evidence. If you failed to make your case in the District Court, you don't get a new chance to make your case in the Court of Appeals. The appellate court reviews the record of the trial conducted in the trial court, so appealing on a *factual* issue is generally a waste of time, except in the most unusual circumstances. Most successful appeals relate to questions of law, not fact, because the appellate court does not give any particular deference to the trial court's determination of a question of law.

If you lose at the Court of Appeals level, your chances of further review by the Supreme Court are far more limited. You have no *right* to insist that the Supreme Court review the Court of

Appeals decision. You can ask the Supreme Court to grant a *writ of certiorari,* and it takes the affirmative vote of four of the nine Justices to grant *certiorari.* If the Supreme Court denies *certiorari,* as it does about 95 percent of the time, the decision of the Court of Appeals becomes final.

If the Supreme Court grants *certiorari,* it thereby agrees to review only specific legal holdings of the Court of Appeals—it does not review the whole case, in the way that the Court of Appeals reviews a District Court case. As the Supreme Court held in *Whirls,* "The correctness of a ruling to which no error was assigned in the petition for *certiorari* is not before the Supreme Court."

It appears that Mr. Whirls was treated unfairly, but he cannot show that he lost his seniority *because of his service in the military.* All of the former Highland employees, veterans and non-veterans alike, lost out to the much larger group of Trailmobile employees when the two units were consolidated on Jan. 1, 1944.

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This article is one of 1800-plus "Law Review" articles available at www.roa.org/page/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

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