# LAW REVIEW 824

(May 2008)
CATEGORY: 1.19-USERRA Enforcement

**USERRA and Statute of Limitations—Continued**

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Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) on Oct. 13, 1994, but USERRA was not a new law in 1994. USERRA is a comprehensive rewrite of the Veterans' Reemployment Rights (VRR) law, which can be traced back to 1940. USERRA is codified in Title 38, U.S. Code, sections 4301-4334 (38 U.S.C. 4301-4334). I invite the reader's attention to Law Review 104 for a comprehensive discussion of the history of the reemployment statute.

As I explained in Law Review 0724, a statute of limitations is a rule that requires that a lawsuit be initiated within a specified time after the cause of action accrued. If the lawsuit is initiated after the statute of limitations has run out, the lawsuit will be summarily dismissed. Neither the VRR law nor USERRA has ever contained a statute of limitations.

"No State statute of limitations shall apply to any proceeding under this chapter." 38 U.S.C. 4323(i). When Congress enacted USERRA in 1994, it carried over this specific language from the VRR law, without change. Congress added this language to the VRR law in 1974 in response to some court cases that had applied state statutes of limitations to reemployment cases. As I explained in Law Review 0724, it is clear from the 1974 and 1994 legislative history that Congress intended there be no statute of limitations in reemployment cases. Unfortunately, legislative history does not trump the specific wording of a statute.

In the absence of a statute of limitations, the equitable doctrine of laches applies. If the defendant (employer) can show that the plaintiff (veteran) inexcusably delayed in asserting his or her claim, and that the employer has been prejudiced by the delay (witnesses have died, records have become unavailable, etc.), the court can dismiss the suit under the equitable doctrine of laches. This doctrine serves the same purpose as a statute of limitations, but in a much more equitable and flexible manner.

In 1990, Congress enacted a four-year "default" statute of limitations, as follows: "Except as otherwise provided by law, a civil action arising under an act of Congress enacted after the date of the enactment of this section [enacted Dec. 1, 1990] may not be commenced later than four years after the cause of action accrues." 28 U.S.C. 1658(a).

An issue has arisen as to whether this four-year statute of limitations applies to USERRA cases. In 2002, the U.S. District Court for the Eastern District of Tennessee held that this statute of limitations does not apply to USERRA cases because USERRA is not, in the court's view, a federal statute enacted after Dec. 1, 1990—Congress enacted USERRA in 1994, but it is an amendment of a law that can be traced back to 1940. *Akhdary v. City of Chattanooga,* 2002 U.S. Dist. LEXIS 268981 (E.D. Tenn. 2002.)

Two years later, the Supreme Court decided that, in determining the applicability of the four-year statute of limitations under 28 U.S.C. 2658(a), the focus should not be on the distinction between a newly enacted statute and an amendment of a statute that was enacted prior to Dec. 1, 1990. Rather, the Supreme Court held, the focus should be on whether an enactment of Congress after Dec. 1, 1990 (whether an amendment or a new statute) made possible the plaintiff's cause of action. *Jones v. R.R. Donnelly & Sons, Inc.,* 541 U.S. 369 (2004).

*Jones* is not a USERRA case, but that does not mean that the principles enunciated by the Supreme Court in that case do not apply to USERRA cases. In 2005, the U.S. District Court for the Southern District of Indiana applied Jones to a USERRA case and dismissed the case because it had been initiated more than four years after the plaintiff was fired (allegedly because of his Reserve service). *Nino v. Haynes International, Inc.,* 2005 U.S. Dist. LEXIS 43971 (S.D. Indiana 2005). I discuss Nino in Law Review 0724.

In Law Review 172 (June 2005), I discuss the case of *Duarte v. Agilent Technology, Inc.,* 366 F. Supp. 2d 1039 (D. Colorado 2005). ROA member Col George C. Aucoin Jr., USMCR, an attorney in Louisiana, represented fellow Marine Corps Reservist Steve Duarte and won a substantial judgment in a USERRA case. As a result of the good publicity he received for his handling of the *Duarte* case, Col Aucoin has been retained by Reservists in several states and has brought USERRA cases on their behalf.

Col Aucoin has brought to my attention the case that he has filed in the U.S. District Court for the Central District of California on behalf of Air Force Reservist Theodore Mac Hickman against the Los Angeles Department of Water and Power (LADWP) (Case No. CV 07-1950). Mr. Hickman was away from his LADWP job for Air Force Reserve training from May 521, 2001. During that time, the employer notified employees of an open hiring opportunity for the position of journey-level civil service electrical mechanic, a position that was superior to the position Mr. Hickman then held. The opportunity to apply for the position opened and closed while Mr. Hickman was away from work for 16 days of Air Force Reserve training. The LADWP furloughed (suspended without pay because of lack of work) Mr. Hickman in February 2003—Mr. Hickman asserts that he would not have been affected by the February 2003 layoff if he had not been denied the promotion in May 2001.

For reasons that are not clear, Mr. Hickman waited several years before retaining Col Aucoin (or some other lawyer) and filing this case; he filed suit against the LADWP on March 23, 2007. His claim for the missed promotion probably accrued in May 2001, and the four-year statute of limitations under 28 U.S.C. 2658(a) arguably expired in May 2005. As I explained in Law Review 0724, sleeping on your rights is almost always a bad idea. If Mr. Hickman had filed the suit within four years after May 2001, he would not be faced with this statute of limitations issue.

I believe that, but for the statute of limitations problem, Mr. Hickman has a strong case. I believe that the employer had a duty to notify Mr. Hickman of the promotion opportunity and to take action to ensure that Mr. Hickman not lose his opportunity to apply because of his military duty. *See Allen v. United States Postal Service,* 142 F.3d 1444 (Fed. Cir. 1998). I discuss *Allen* in some detail in Law Review 191.

The LADWP filed a motion to dismiss, based primarily on the statute of limitations issue. U.S. District Judge Margaret M. Morrow wrote an interesting 18-page unpublished decision denying the motion to dismiss but limiting the claims Mr. Hickman is permitted to make. She held that those claims Mr. Hickman could have made under the VRR law prior to 1994 are not time-barred, but those claims Mr. Hickman filed under amendments made by USERRA in 1994 are now time-barred under 28 U.S.C. 2658(a).

Let this serve as a lesson to you. If you think that you may have a cause of action under USERRA, or any law for that matter, you should consult a lawyer and (if the lawyer so advises) file suit as soon as possible. Most causes of action (other than USERRA) have statutes of limitations that are far shorter than four years. For example, under Title VII of the Civil Rights Act of 1964 (forbidding employment discrimination based on race, color, sex, religion, or national origin), the statute of limitations is just 180 days. If you sleep on your rights, you are likely to find you have no enforceable rights when you wake up.

Please note that to stop the running of the statute of limitations you need to *file suit*. Making a complaint, even a formal complaint in writing, to the National Committee for Employer Support of the Guard and Reserve (ESGR) or to the U.S. Department of Labor's Veterans' Employment and Training Service does *not* toll the statute of limitations.

On the other hand, a statute of limitations limiting when you can file a civil lawsuit or when someone else can file a civil lawsuit against you is tolled (suspended—time stops running) during the time that you are called to active duty, because the Servicemembers' Civil Relief Act (SCRA) explicitly so provides at 50 U.S.C. App. 526(a). I invite your attention to Law Review 0723.

**Update: December 2015**

As explained in Law Review 15115, the editors of the United States Code (U.S.C.) recently eliminated the "Appendix" of title 50 of the Code, and the Servicemembers Civil Relief Act (SCRA) can now be found in title 50 at sections 3901 and following.