LAW REVIEW 825

(May 2008)
CATEGORY: 1.18-USERRA and other laws 1.19-USERRA Enforcement

Hard Cases Make Bad Law

By CAPT Samuel F. Wright, JAGC, USN (Ret.)

***Pittman v. Department of Justice,* 486 F.3d 1276 (Fed. Cir. 2007).** Justice Oliver Wendell Holmes Jr., a Civil War veteran who is widely regarded as one of the greatest Supreme Court justices in our nation's history, once wrote, "Great cases, like hard cases, make bad law." *Northern Securities Co. v. United States,* 193 U.S. 197, 400 (1904) (Holmes, J., dissenting). *Pittman* is not a great case, but it is a hard case, and it is a good illustration of the correctness of Justice Holmes' maxim.

Sgt Gary P. Pittman, USMCR, worked for the U.S. Bureau of Prisons (part of the Department of Justice, DOJ) as a senior officer specialist with the agency's Metropolitan Detention Center (MDC) in New York City. His performance at the MDC was more than satisfactory and had warranted several performance-based awards.

The Marine Corps called Sgt Pittman to active duty in March 2003, just as the invasion of Iraq was about to begin. The Marine Corps sent Sgt Pittman to Iraq and assigned him to the Whitehorse detention facility in that war-torn nation. As a result of alleged misconduct at the Whitehorse facility, Sgt Pittman was tried by court martial for several alleged violations of the Uniform Code of Military Justice (UCMJ). On Sept. 3, 2004, the court martial found Sgt Pittman guilty of one count of dereliction of duty (Article 92 of the UCMJ, or 10 U.S.C. 892) and one count of assault (Article 128, or 10 U.S.C. 928). A two-page summary of the court martial proceedings identified the underlying conduct as the failure to safeguard the physical health, welfare, and treatment of Iraqi prisoners and the striking of unknown prisoners.

The court martial reduced Sgt Pittman in rank to private and sentenced him to perform 60 days of hard labor without confinement. The court did not award Pvt Pittman a punitive discharge, nor did the Marine Corps discharge him administratively. He left active duty in the fall of 2004, and remained in the Marine Corps Reserve. He then made a timely application for reemployment at the MDC.

As I explained in Law Review 77, and other articles, there are five conditions that an individual must meet in order to have the right to reemployment after a period of uniformed service, under the Uniformed Services Employment and Reemployment Rights Act (USERRA). The person must have left his or her civilian position of employment in order to perform voluntary or involuntary uniformed service and must have given the employer prior oral or written notice. The individual's cumulative period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment, must not have exceeded five years (all involuntary service and some voluntary service are exempted from the computation of the five-year limit, as I explained in detail in Law Review 201.) The individual must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge, and the individual must have made a timely application for reemployment with the pre-service civilian employer.

In this case, DOJ did not dispute that Pvt Pittman met the USERRA eligibility criteria as to prior notice, performance of uniformed service, the five-year limit, and having made a timely application for reemployment. The MDC warden adamantly refused to permit Pvt Pittman to return to work because of his alleged misconduct involving prisoner abuse in Iraq while on active duty.

Section 4304 of USERRA specifies the kinds of military separations that disqualify an individual from reemployment under this law: "A person's entitlement to the benefits of this chapter by reason of the service of such person in one of the uniformed services terminates upon the occurrence of any of the following events: (1) A separation of such person from such uniformed service with a dishonorable or bad conduct discharge. (2) A separation of such person from such uniformed service under other than honorable conditions, as characterized

pursuant to regulations prescribed by the secretary concerned. (3) A dismissal of such person permitted under section 1161(a) of title 10. (4) A dropping of such person from the rolls pursuant to section 1161(b) of title 10." 38 U.S.C. 4304. None of these disqualifying events occurred in Pvt Pittman's case.

Section 4331 of USERRA (38 U.S.C. 4331) gives the secretary of labor the authority to promulgate regulations about the application of USERRA. The new Department of Labor USERRA regulations make clear that only these four disqualifying events can disqualify the returning veteran from the right to reemployment and that it is up to the branch of the service, and not the civilian employer, to determine the characterization of service. See 20 C.F.R. 1002.134-138.

After returning from active duty and applying for reemployment at the MDC, Pvt Pittman worked only one shift, on Oct. 25, 2004. Permitting him to work that one shift was apparently an administrative error. The MDC management charged Pvt Pittman with off-duty misconduct (the alleged prisoner abuse in Iraq) and asserted that there was a sufficient nexus between the alleged misconduct and his prison guard position that the misconduct disqualified him from returning to his job.

By letter dated Dec. 20, 2004, DOJ removed Pvt Pittman from federal employment, effective Dec. 22, 2004. The letter informed him that he could grieve the removal under the collective bargaining agreement (CBA) between his union and the employer, or he could appeal to the Merit Systems Protection Board (MSPB), but that he could elect only one such procedure.

Pvt Pittman invoked his CBA remedies by means of a Jan. 18, 2005 letter sent by the union on his behalf. On Jan. 20, 2005, Pvt Pittman appealed to the MSPB, alleging that his removal from employment was improper because it violated USERRA. DOJ moved to dismiss the MSPB action, asserting that Pvt Pittman's election to grieve the removal under the CBA precluded an appeal to the MSPB on the same matter.

Under 5 U.S.C. 7701, federal employees who have completed the initial one-year "probationary" period (as Pvt Pittman had done) have the right to appeal removals to the MSPB. Under section 4324 of USERRA (38 U.S.C. 4324), federal employees, former federal employees, and applicants for federal employment have the right to file actions in the MSPB alleging that their USERRA rights have been violated, and the MSPB has a duty to adjudicate such cases. Pvt Pittman argued that his CBA grievance deprived the MSPB of jurisdiction over a general appeal to the MSPB of a removal from federal employment, in accordance with 5 U.S.C. 7701, but it did not deprive the MSPB of its jurisdiction and duty to adjudicate his USERRA claim under 38 U.S.C. 4324.

Section 7121 of title 5 provides, "Matters covered under sections 4303 and 7512 of this title [title 5] which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both." 5 U.S.C. 7121(e)(1). Please note that section 7121(e)(1) does not mention USERRA cases brought to the MSPB under 38 U.S.C. 4324. (This is not surprising: Congress did not enact USERRA until 16 years after it enacted section 7121 as part of the Civil Service Reform Act of 1978.) I think that the text and legislative history of USERRA make it clear that section 7121's "election of remedies" rule does not apply to USERRA cases.

As with MSPB cases generally, Pvt Pittman's case was assigned to an administrative judge for purposes of a hearing and initial determination, which can then be appealed to the MSPB itself. The administrative judge accepted Pvt Pittman's proposed distinction between MSPB appeals generally and USERRA appeals specifically, and held that the MSPB had jurisdiction (despite the union grievance) to consider Pvt Pittman's claim that his USERRA rights had been violated. After a hearing, the administrative judge determined that the firing of Pvt Pittman was lawful under section 4316(c) of USERRA: "A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause—(1) within one year, if the person's period of service before the reemployment was more than 180 days; or (2) within 180 days of such reemployment, if the person's period of service before the reemployment was more than 30 days but less than 181 days." 38 U.S.C. 4316(c).

I discussed section 4316(c) in detail in Law Review 184, including a lengthy citation to the legislative history of USERRA and case law under the prior reemployment statute. The purpose of this section is to give the returning veteran a reasonable time to get back "up to speed" in the civilian job and to protect the veteran from a bad faith or *pro forma* reinstatement.

It has always been my understanding that the "cause" to fire a returning veteran during the special protection period (one year, if the period of service was more than 180 days) must pertain to misconduct *after returning to work at the civilian job,* not misconduct while on active duty. Misconduct while on active duty does not disqualify the individual from the right to reemployment unless that misconduct resulted in one of the disqualifying events set forth in section 4304. None of those disqualifying events occurred in Pvt Pittman's case.

After the administrative judge declined to grant him relief, Pvt Pittman appealed to the MSPB itself, which affirmed the administrative judge's determination, without explanation. Pvt Pittman then filed a timely appeal with the U.S. Court of Appeals for the Federal Circuit. As I explained in Law Review 189, the Federal Circuit is a specialized federal appellate court with nationwide jurisdiction over certain kinds of appeals, including appeals from MSPB decisions. As with most federal appellate cases, Pvt Pittman's appeal was assigned to a three-judge panel for decision. That panel affirmed the MSPB decision by a 2-1 vote, with a vigorous dissent.

Interestingly, DOJ chose to defend the MSPB decision on a basis other than the basis that the MSPB itself chose. DOJ could have argued that the administrative judge was correct in his interpretation of section 4316(c) and that the misconduct that can constitute "cause" that justifies firing a recently returned veteran can be misconduct *during* the period of service, even though that misconduct did not result in one of the four disqualifying events set forth in section 4304. But that is not the argument DOJ chose to make. Instead, DOJ chose to argue that Pvt Pittman's union grievance challenging his firing deprived the MSPB of jurisdiction to adjudicate Pvt Pittman's claim that the firing violated USERRA.

The Federal Circuit majority opinion accepted DOJ's jurisdictional argument: "Pittman's election to grieve his removal under the applicable collective bargaining agreement challenged that he was 'terminated without just cause for Off-Duty Misconduct and Conviction.' The collective bargaining agreement provides that adverse actions may only be taken for 'just and sufficient cause and to promote the efficiency of the service.' As Pittman's election makes clear, the underlying agency action that Pittman raised under the negotiated grievance procedure—his termination—is the same underlying agency action that is challenged in Pittman's improper removal claims under sections 4311(a) and 4316(c). That is further demonstrated by the inquiries presented by Pittman's improper removal claims, which are similar to, and overlap with, the inquiry facing the arbitrator—whether Pittman's termination was for cause. We therefore conclude that Pittman's USERRA claims for improper removal under sections 4311(a) and 4316(c) are 'similar matters which arise under other personnel systems' that he had previously elected to raise under the negotiated grievance procedure. 5 U.S.C. 7121(e). Because of that election, Pittman is precluded by 5 U.S.C. 7121(e) from bringing those claims before the Board [MSPB] under 38 U.S.C. 4324(b). Accordingly, the Board lacked jurisdiction to consider Pittman's improper removal claims, and the [administrative judge's] denial of those claims on the merits was in error. Having concluded that the Board lacked jurisdiction over Pittman's improper removal claims, we need not—and do not—address the question of whether an employee can be removed for cause under USERRA predicated on the employee's conduct during military service that results in an adjudication by a military tribunal but does not disqualify the employee from a separation under honorable conditions." *Pittman,* 486 F.3d at 1282.

The Federal Circuit majority ignored the plain language of 5 U.S.C. 7121(e)—under that plain language the "election of remedies" requirement does not apply to USERRA cases brought against federal agencies, in the MSPB, under 38 U.S.C. 4324. I strenuously disagree with the Federal Circuit's conclusion that 5 U.S.C. 7121(e) precludes a federal-sector USERRA claimant, under these circumstances, from filing both a union grievance and an MSPB USERRA action. USERRA's legislative history addresses this issue head-on: "Section 4302(b) [now 38 U.S.C. 4302(b)] would reaffirm a general preemption as to state and local laws and ordinances, as well as employer practices and agreements, which provide fewer rights or otherwise limit rights provided under this amended chapter 43 or put additional conditions on those rights. *See Peel v. Florida Department of Transportation,* 600 F.2d 1070 (5th Cir. 1979); *Cronin v. Police Department of the City of New York,* 675 F. Supp. 847 (S.D.N.Y. 1987) and *Fishgold, supra,* 328 U.S. at 285, which provide that no employer practice or agreement can reduce, limit, or eliminate any right under chapter 43. Moreover, this section would reaffirm that additional resort to mechanisms such as grievance procedures or arbitration or similar administrative appeals is not required. *See McKinney v. Missouri-Kansas-Texas Railroad Co.,* 357 U.S. 265, 270 (1958); *Beckley v. Lipe-Rollway Corp.,* 448 F. Supp. 563, 567 (N.D.N.Y. 1978). It is the Committee's intent that, *even if a person protected under the Act [USERRA] resorts to arbitration, any arbitration decision shall not be binding as a matter of law. See Kidder v. Eastern Airlines, Inc.,*

469 F. Supp. 1060, 1064-65 (S.D. Fla. 1978)." House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2453 (emphasis supplied).

Circuit Judge Haldane Robert Mayer, appointed to the Federal Circuit by President Ronald Reagan in 1987, filed a vigorous and well-written dissent. It is interesting to note that Judge Haldane is a graduate of the U.S. Military Academy and served in the Army and Army Reserve in the infantry and later the Judge Advocate General's Corps. He retired as a lieutenant colonel. His Army service included combat service in Vietnam.

Judge Mayer wrote: "It is ironic that the Department of Justice blatantly distorts USERRA to support this perversion of Congress' clarion mandate, in time of war, no less. It is beyond ironic that this court lets them get away with it. I dissent." *Pittman,* 486 F.3d at 1283 (Mayer, Judge, dissenting). Judge Mayer also referred to section 4301(b) of USERRA, which expresses the "sense of Congress that the federal government should be a model employer in carrying out the provisions of this chapter." 38 U.S.C. 4301(b). Judge Mayer wrote, at page 1284, that the federal government "certainly has obliterated any pretense that it is a model employer." Judge Mayer also wrote the eloquent, pro-veteran decision in *Nichols v. Department of Veterans Affairs,* 11 F.3d 160 (Fed. Cir. 1993).

Judge Mayer went on to write, at pages 1284-85, "There is no merit to the government's contention that Pittman was not entitled to reemployment due to his conduct while on military duty. Congress addressed the relationship between a person's military conduct and USERRA rights by making those rights terminable only upon a separation from service under less than honorable conditions. 38 U.S.C. 4304. In so doing, it made the military departments the sole judges of a person's military conduct, and it is for neither the employer nor this court to reevaluate military service that has already been deemed honorable. *See id.; see also Id. Section 4311* (providing that reemployment may not be denied based on the performance of military service); 20 C.F.R. 1002.136 [Department of Labor USERRA regulations]. Congress further confirmed this by specifically providing grounds on which an employer may deny reemployment rights, none of which are based on military conduct or present here. *See Ventas, Inc. v. United States,* 381 F.3d 1156, 1161 (Fed. Cir. 2004). ('Where Congress includes certain exceptions in a statute, the maxim *expresio unius est exclusio alterius* presumes that those are the only exceptions that Congress intended.') Because Pittman was entitled to be reemployed but was not, the board should have ordered the agency to comply with USERRA, and reinstate him with payment for lost wages and benefits. 38 U.S.C. 4324(c)(2)."

I discuss the legal maxim *expresio unius est exclusio alterius* (Latin for "to express one is to exclude the others") in Law Review 0730, concerning the question of whether federal "Schedule C" employees have enforceable USERRA rights.

In Law Reviews 189, 206, 0614, 0722, 0726, 0729, and 0752, MAJ Mathew Tully, NYARNG, and I have repeatedly praised the Federal Circuit for being pro-veteran and for reversing MSPB decisions that did not construe USERRA liberally for the veteran, as Congress intended and the Supreme Court has commanded. *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946). The *Pittman* case illustrates the wisdom of a famous aphorism attributed to the late Major League Baseball icon Connie Mack: "You can't win them all."