LAW REVIEW 0826
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Hard Cases Make Bad Law—Part Two

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***Russell v. Equal Employment Opportunity Commission,* 107 M.S.P.R. 171 (Merit Systems Protection Board 2007).**

In Law Review 0825 I quoted the late Justice Oliver Wendell Holmes Jr. to the effect that great cases and hard cases make bad law. I was referring to the case of *Pittman v. Department of Justice,* 486 F.3d 1276 (Fed. Cir. 2007). In reviewing a court decision, and especially an appellate court decision, it is important to look beyond the question of whether the court accomplished at least "rough justice" between the parties in the case. In this instance, it did not take long for the bad effects of the bad law enunciated in *Pittman* to become manifest in *Russell.*

Legal rules established by a court decision (especially an appellate court decision) will be followed in future cases by that court and by courts and administrative tribunals that are subordinate to that court, including cases arising long after the parties to the original case are dead.

Russell v. Equal Employment Opportunity Commission is the same case that MAJ Mathew Tully, NYARNG, addressed in Law Review 0747 (September 2007). MAJ Tully was referring to an earlier published decision of the Merit Systems Protection Board (MSPB), *Russell v. Equal Employment Opportunity Commission,* 104 M.S.P.R. 14 (2006). After the Federal Circuit decided *Pittman* on May 15, 2007, the MSPB reconsidered the question of whether filing a grievance through a federal employee union, under a collective bargaining agreement (CBA) between the union and the agency, deprives the MSPB of jurisdiction to decide a USERRA claim filed by the same employee involving the same personnel action.

Ms. Ermea J. Russell was a major (since promoted to lieutenant colonel and recently to colonel) in the Army Reserve, and she worked for the U.S. Equal Employment Opportunity Commission (EEOC) at a small office in Jackson, Miss, near her home. She was called to active duty. Upon her return, the EEOC reemployed her, but at its regional office in Birmingham, Ala., rather than the small sub- regional office in Jackson.

Upon meeting the eligibility criteria for reemployment rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) as to prior notice to the civilian employer,

character and duration of the military service, and having made a timely application for reemployment, Ms. Russell was entitled to be reemployed "in the position of employment in which the person [Ms. Russell] would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, *status* and pay, the duties of which the person is qualified to perform." 38 U.S.C. 4313(a) (2)(A) (emphasis supplied). The location (commuting area) of the position was part of the status to which Ms. Russell was entitled as a returning veteran. *See Armstrong v. Cleaner Services, Inc.,* 79 LRRM 2921, 2923 (M.D. Tenn. 1972). Accordingly, I believe that reemploying her in Birmingham rather than Jackson violated USERRA, unless the EEOC can show that, based on a pre-existing transfer policy, she most likely would have been transferred from Jackson to Birmingham *even if her EEOC employment had not been interrupted by military service.*

Ms. Russell filed both a union grievance and an MSPB appeal concerning her claim that reemploying her in Birmingham rather than Jackson violated USERRA. In retrospect, we can say that filing the union grievance was a tactical error, because it gave rise to the unfortunate election-of-remedies issue on which the MSPB ultimately decided against her. Applying *Pittman,* the MSPB held, in a hotly contested 2-1 decision, that filing the union grievance deprived the MSPB of jurisdiction.

What is far worse is that the MSPB held, or at least seemed to hold, that the *mere existence* of a remedy under the CBA for a USERRA violation deprived the MSPB of jurisdiction to decide the USERRA claim, *even if Ms. Russell had not filed a grievance with the union.* "Even though *Pittman* differs from the present case because it concerned an election under section 7121(e) [5 U.S.C. 7121(e)], the decision finds that claims of USERRA violations fall within the scope of section 7121. As explained above, that statute provides that *the CBA is the exclusive procedure for resolving claims that fall within its coverage.* 5 U.S.C. 7121(a); *Russell,* 104 M.S.P.R. 14, paragraphs 8-9. Here, the CBA does not exclude from its coverage the appellant's grievance concerning her allegation that the agency violated USERRA when it assigned her to a different duty station upon her return to her attorney position after active duty with the U.S. Army. Initial Appeal File, Tab 17; Tab 21 at 4. Indeed, the appellant filed a grievance under the CBA raising this claim. … *Because we are bound by the decisions of the Federal Circuit, …we conclude here that we lack jurisdiction over the appellant's USERRA claim.* We must therefore dismiss this appeal for lack of jurisdiction." *Russell,* 107 M.S.P.R. at 175 (emphasis supplied).

In its decision, the MSPB majority cited 5 U.S.C. 7121(a)(1), which provides: "Except as provided in paragraph 2 of this subsection [pertaining to matters excluded from the collective bargaining agreement], any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e), and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage." 5 U.S.C. 7121(a) (1).

This language was enacted in 1978, 16 years before Congress enacted USERRA. The 1994 legislative history of USERRA, as set forth in Law Review 08**, clearly indicates an intent by Congress to give federal employees an enforcement mechanism through the MSPB, and not to

make USERRA enforcement subordinate to the collective bargaining agreement and the remedies it provides.

Ms. Russell has informed me that she has appealed to the Federal Circuit. We will keep readers informed of future developments in this important case. We are also contemplating asking Congress for a legislative fix.

There are 16 Supreme Court cases under the reemployment statute, from 1946 to 1991. In six of the 16 cases, the union intervened as a defendant, seeking to prevent the employer from doing what the veteran sought. The point is that the union is sometimes not the friend of the veteran. Local union officers are elected in secret ballot elections, and those officers are quite likely to give greater weight to the interests of many union members than to the needs and statutory rights of a single returning veteran. But the whole point of the reemployment statute is that the employee who laid aside his or her civilian job to serve our country, often at great risk to life and limb, should not fall behind colleagues who remained in the relative safety and comfort of home. In its first case construing the 1940 reemployment statute, the Supreme Court held, "The act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. *He was, moreover, to gain by his service to his country an advantage which the law withheld from those who stayed behind." Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284 (1946) (emphasis supplied).

UPDATE MAY 2020

Please see Law Review 20050 (May 2020) for the outcome of this case.