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Seventh Supreme Court Case on Reemployment Statute *McKinney v. Missouri-Kansas-Texas Railroad Co.,* 357 U.S. 265 (1958)

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1.3.2.2—Continuous Accumulation of Seniority—Escalator Principal
10.1—Supreme Court Case on Reemployment

Henry T. McKinney was employed by the Missouri-Kansas-Texas Railroad (MKT) as a "relief clerkchief caller" until he left his position when he was inducted into the Army on Sept. 26, 1950, shortly after the outbreak of the Korean War. Mr. McKinney was separated from the Army on Sept. 25, 1952. He applied for reemployment on Oct. 1 and returned to work on Oct. 7, 1952.

Under the collective bargaining agreement (CBA) between MKT and the Brotherhood of Railway and Steamship Clerks (BRSC), employee positions were grouped into Seniority Group 1 and Seniority Group 2. Mr. McKinney's pre-service position was a Group 2 position. When Group 1 positions (the more desirable positions) became vacant, Group 2 employees were given the

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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.

opportunity to bid. MKT had the discretion to hire for Group 1 positions individuals who were not already employed by MKT, if no qualified Group 2 employees bid for the vacancy. Under the CBA, when a Group 2 employee moved up to a Group 1 position, the employee received a new Group 1 seniority date, as of the first day the employee worked in the Group 1 position.

On Sept. 8 and 10, 1952, as Mr. McKinney was nearing the end of the two-year period for which he was drafted, MKT "bulletined" two Group 1 positions and filled the positions with non-employees after no qualified Group 2 employees applied. Mr. McKinney was apparently unaware of the positions and did not have the opportunity to apply.

When Mr. McKinney returned to work on Oct. 7, 1952, he was placed in a Group 1 position, with a Group 1 seniority date of Oct. 7, 1952. Mr. McKinney contended that he should be placed in the Group 1 bill clerk position, with a seniority date of Sept. 15, 1952—the date that a non-employee began work in the position. Mr. McKinney asserted that if he had not been on active duty in early September 1952, he would have been hired for that position, and that he was therefore entitled to Sept. 15, 1952 as his Group 1 seniority date, under the reemployment statute. MKT and the BRSC rejected Mr. McKinney's request.

After Mr. McKinney was reemployed in a Group 1 position, that position was abolished, and Mr. McKinney was downgraded to a Group 2 position. Mr. McKinney filed suit, contending that he would not have been downgraded to Group 2 if he had been properly reinstated, with the correct seniority date, in Group 1. The BRSC (union) intervened in the case and argued that Mr. McKinney was required to exhaust his remedies under the CBA and the Railway Labor Act (RLA), as a condition precedent to bringing this suit in federal court. The District Court, Court of Appeals, and Supreme Court all rejected that argument.

"The Court of Appeals correctly held that petitioner was not obliged, before bringing suit in the District Court under § 9 (d) of the Act, 62 Stat. 616, as amended, 50 U. S. C. App. (Supp. V) § 459 (d), to pursue remedies possibly available under the grievance procedure set forth in the collective bargaining agreement or before the National Railroad Adjustment Board. See 48 Stat. 1189-1193, 45 U.S.C. 153. The rights petitioner asserts are rights created by federal statute even though their determination may necessarily involve interpretation of a collective bargaining agreement. Although the statute does not itself create a seniority system, but accepts that set forth in the collective bargaining agreement, it requires the application of the principles of that system in a manner that will not deprive the veteran of the benefits, in terms of restoration to position and advancement in status, for which Congress has provided. Petitioner sues not simply as an employee under a collective bargaining agreement, but as a veteran asserting special rights bestowed upon him in furtherance of a federal policy to protect those who have served in the armed forces.

"For the effective protection of these distinctively federal rights, Congress provided in § 9 (d) n1 of the act that if any employer fails to comply with the provisions of the statute, the District Court, upon the filing of a petition by a person entitled to the benefits of the act, has jurisdiction to compel compliance and to compensate for loss of wages. The court is enjoined to

order speedy hearing in any such case and to advance it on the calendar, and the U.S. attorney must appear and act for the veteran in the prosecution of his claim if reasonably satisfied that he is entitled to the benefits of the act. Nowhere is it suggested that before a veteran can obtain the benefit of this expeditious procedure and the remedies available to him in the District Court he must exhaust other avenues of relief possibly open under a collective bargaining agreement or before a tribunal such as the National Railway Adjustment Board. On the contrary, the statutory scheme contemplates the speedy vindication of the veteran's rights by a suit brought immediately in the District Court, advanced on the calendar before other litigation, and prosecuted with the assistance of the U.S. attorney. Only thus, it evidently was thought, would adequate protection be assured the veteran, since delay in the vindication of re-employment rights might often result in hardship to the veteran and the defeat, for all practical purposes, of the rights Congress sought to give him. To insist that the veteran first exhaust other possibly lengthy and doubtful procedures on the ground that his claim is not different from any other employee grievance or claim under a collective bargaining agreement would ignore the actual character of the rights asserted and defeat the liberal procedural policy clearly manifested in the statute for the vindication of those rights." *McKinney v. Missouri-Kansas-Texas Railroad Co.,* 357 U.S. 265, 268-70 (1958).

Under the "escalator principle" first enunciated by the Supreme Court in *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275 (1946), the returning veteran is entitled to be treated, for seniority purposes, as though he or she had been continuously employed by the civilian employer during the time that the employee was away from work for service. *McKinney* is an important case for establishing the parameters of the escalator principle.

"However, section 9 (c) does not guarantee the returning serviceman a perfect reproduction of the civilian employment that might have been his if he had not been called to the colors. Much there is that might have flowed from experience, effort, or chance to which he cannot lay claim under the statute. Section 9 (c) does not assure him that the past with all its possibilities of betterment will be recalled. Its very important but limited purpose is to assure that those changes and advancements in status that would necessarily have occurred simply by virtue of continued employment will not be denied the veteran because of his absence in the military service. The statute manifests no purpose to give to the veteran a status that he could not have attained as of right, within the system of his employment, even if he had not been inducted into the armed forces but continued in his civilian employment." *McKinney,* 357 U.S. at 271-72.

As I discuss in Law Reviews 120, 169, and 0604, the escalator principle applies to "perquisites of seniority." To be a perquisite of seniority, it must be *reasonably certain* that the veteran would have attained the benefit if he or she had been continuously employed. It need not be *absolutely* certain, but it must be more than a possibility. In determining whether it is reasonably certain that the veteran would have attained the benefit if continuously employed, a court must examine the *actual practice* of the employer.

"Petitioner argues that because the complaint was summarily dismissed on motion he did not have the opportunity to prove that by custom and practice under the collective bargaining

agreement he would necessarily have been assigned to the group 1 position of bill clerk or assistant cashier had he remained continuously in respondent's employ. He states that interpretation and practice by the parties to an agreement are frequently the most reliable bases for determining rights claimed to arise under it. Accordingly, we affirm the judgment, but with leave to petitioner to amend his complaint to allege, if such be the fact, that in actual practice under the collective bargaining agreement advancement from group 2 to group 1 is automatic." *McKinney,* 357 U.S. at 273-74.

Today, unlike 1958, unions represent less than 8 percent of the private sector workforce. In the absence of a union and a CBA, seniority has little or nothing to do with the selection of employees for promotion or transfer, or even for layoff. But denying you a promotion or benefit of employment on the basis of your performance of uniformed service (even full-time active duty for many months) is a violation of section 4311 of USERRA, 38 U.S.C. 4311. If you miss the opportunity to apply for a promotion opportunity that opens and closes while you are on active duty, that opportunity may not come again.

On the other hand, while you are on active duty you should not be spending your time monitoring your civilian employer's website and applying for positions. The whole idea behind USERRA, as well as the Servicemembers' Civil Relief Act, is to put these civilian distractions out of your mind, to the maximum extent possible, so that you can devote your full attention to your military duties. I invite your attention to Law Reviews 106, 125, and 134.

If you are being called to the colors for a period of months, you should, I respectfully submit, give a *limited power of attorney* to a colleague at work. The colleague should be someone you trust, and someone who is aware of your interests and skills, and of vacancies as they occur. The colleague with the power of attorney should be someone who is *not* in the running for the same positions that would interest you. Don't create a conflict of interest if you can avoid it.

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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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