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Proposed Servicemembers Access to Justice Act

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

On Aug. 1, 2008, Sen. Robert Casey (DPa.) introduced S.3432, the proposed Service-members Access to Justice Act (SAJA), on behalf of himself, Sen. Edward Kennedy (DMass.), and Sen. Barack Obama (DIll.). If enacted, SAJA would greatly improve the Uniformed Services Employment and Reemployment Rights Act (USERRA). For more information on USERRA, visit www.roa.org/law_review, where all of ROA's past Law Review articles are available.

UNENFORCEABILITY OF AGREEMENTS TO ARBITRATE DISPUTES ARISING UNDER USERRA

In Law Reviews 149, 0619, and 0639, and the electronic attachments to Law Review 149, Colonel John S. Odom, Jr., USAFR (Ret.) and I have discussed in detail the case of *Garrett v. Circuit City Stores Inc.,* 449 F.3d 672 (5th Cir. 2006).

In *amicus curiae* (friend of the court) briefs (which you can find on the ROA website immediately following Law Review 149), ROA took the position that section 4302(b) of USERRA overrides agreements to submit future USERRA disputes to binding arbitration. The U.S. District Court for the Northern District of Texas accepted this ROA argument, but the Fifth Circuit rejected it. *Garrett* is likely to result in gutting the effective enforcement of USERRA and should be overturned either through case law development or a statutory amendment to USERRA.

The effort to overturn *Garrett* through case law development recently suffered a major setback. The U.S. Court of Appeals for the Sixth Circuit followed the Fifth Circuit *Garrett* precedent and held that section 4302(b) of USERRA does not override agreements to submit future USERRA disputes to binding arbitration. *Landis v. Pinnacle Eye Care LLC,* 2008 U.S. App. LEXIS 17055 (6th Cir. Aug. 11, 2008).

If another Court of Appeals in another part of the country reaches a result on this issue that is contrary to the result reached by the Fifth Circuit and now the Sixth Circuit, the Supreme Court likely will grant *certiorari* (discretionary review) in order to resolve the conflict among the circuits. Presently, there is no conflict among the circuits. Now that the Sixth Circuit has followed the Fifth Circuit, it seems less likely that another circuit will come to the opposite conclusion.

If we are to overturn *Garrett*, it is likely to be through a statutory amendment, not case law development. Section 3 of SAJA would add a new section 4327 to USERRA. That section would provide, "Notwithstanding any other provision of law, any clause of any agreement between an employer and an employee that requires arbitration of a dispute under this chapter shall not be enforceable." I strongly support this approach and this legislation.

WAIVER OF SOVEREIGN IMMUNITY UNDER THE 11th AMENDMENT WITH RESPECT TO USERRA ENFORCEMENT

The 11th Amendment (ratified in 1795) reads: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state or citizens or subjects of any foreign state." Although the text of this amendment bars only suits against a state by a citizen of *another* state, the Supreme Court has held that 11th Amendment immunity also bars a suit against a state by a citizen of that same state. *See Hans v. Louisiana,* 134 U.S. 1 (1890).

As originally enacted in 1994, section 4323 of USERRA permitted an individual to sue a state (as well as a political subdivision of a state or a private employer) in federal court, with private counsel or through the assistance of the Department of Labor (DOL) and the Department of Justice (DOJ). Two years later, the Supreme Court decided *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996), clarifying the 11th Amendment. After that decision, it has become clear that Congress can abrogate 11th Amendment immunity *only* when Congress is acting under constitutional authority that came after the states ratified the 11th Amendment in 1795.

For example, the states ratified the 14th Amendment in 1868. The final section of that amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." A civil rights law can constitutionally authorize a suit against a state because the states ratified the 14th Amendment 73 years after the states ratified the 11th Amendment.

The Veterans' Reemployment and Rights law and USERRA are based upon the "war powers" clauses of Article I, Section 8 of the Constitution. The Constitution predates the 11th Amendment by eight years. Thus, the U.S. Court of Appeals for the Seventh Circuit held (applying *Seminole Tribe*) that USERRA was unconstitutional insofar as it authorized an individual to sue a state in federal court. *Velasquez v. Frapwell,* 160 F.3d 389 (7th Cir. 1998).

Congress reacted to *Velasquez* by amending USERRA later in 1998. The 1998 amendment authorizes the attorney general of the United States to bring a USERRA action against a state (as employer) "*in the name of the United States as plaintiff in the action.*" 38 U.S.C. 4323(a)(1) (final sentence) (emphasis supplied). This solves the 11th Amendment problem, because the 11th Amendment precludes suits against states in federal court brought by *individuals*. The 11th Amendment does not preclude a lawsuit against a state brought by the attorney general in the name of the United States, as plaintiff. I discuss all of this in detail in Law Review 89 (May 2003).

The problem is that to get your case to the attorney general, you must go through DOL, and that can take a long time. If DOJ does not agree that your claim has merit, or if DOJ is too busy to bring the case on your behalf, you are likely to be left without a remedy.

"In the case of an action against a state (as an employer) by a person, the action may be brought in a state court of competent jurisdiction *in accordance with the laws of the state.*" 38 U.S.C. 4323(b)(2) (emphasis supplied). This means that you can bring your USERRA action in state court, in your own name, and with your own lawyer, *if your state has waived sovereign immunity to permit suits of that kind*.

As I explained in Law Review 0830 (June 2008), "the King can do no wrong" is the common law rule in Great Britain and the United States. This means that you cannot sue the sovereign (federal or state) without the sovereign's consent, and until recent decades, the sovereign largely withheld that consent. In the decades since World War II, the Congress and most (but certainly not all) state legislatures have enacted laws permitting suits against federal and state government entities for most but not all causes of action. Sovereign immunity is still a bar to suit in some states and with respect to some causes of action.

For example, in Law Review 89, I discussed *Larkins v. Department of Mental Health and Mental Retardation,* 806 So.2d 358 (Alabama Supreme Court 2001). Wallace M. Larkins, a Reservist and an employee of an Alabama state agency, was denied reemployment after he returned from military service. He sued in federal court, but his case was dismissed based on the 11th Amendment. He then sued in state court. His case was dismissed based on sovereign immunity under the Alabama Constitution. He was left without a remedy.

Section 2 of SAJA would amend section 4323 again and would authorize individuals to bring USERRA actions against states in either state or federal court. SAJA would also provide: "A state's receipt or use of federal financial assistance for any program or activity of a state shall constitute a waiver of sovereign immunity, under the 11th Amendment to the Constitution or otherwise, to a suit [under USERRA]."

This waiver of sovereign immunity would only apply to employees of the state agency or program receiving the federal assistance, or applicants for such positions, or persons seeking to return to such positions after uniformed service. Some state agencies (like the transportation department) typically receive a great deal of federal financial assistance and could not afford to turn it down in order to avoid getting sued under USERRA. Other state agencies (like the taxation department) receive little or no federal financial assistance.

CLARIFYING THE DEFINITION OF "SUCCESSOR IN INTEREST"

If you are called to the colors for many months, you may find that much has changed at your civilian job by the time you return. The company that employed you may have merged with or sold out to another company. If you worked for a government contractor, you may find that the company that employed you lost the contract to another government contractor. You may find that most of your former colleagues at the old contractor are now working for the new contractor, doing essentially the same jobs that they had been doing before you were called to the colors.

Section 4303 of USERRA (38 U.S.C. 4303) defines 16 terms used in this law, including the term "employer." USERRA's definition of "employer" includes "any successor in interest to a person, institution, organization, or other entity referred to in this subparagraph." 38 U.S.C. 4303(4)(a)(iv). If the new company or organization is the successor in interest to the company or organization that employed you before you were called to the colors, the new company has the legal obligation to reemploy you after you are released from the period of service. (This assumes, of course, that you meet the USERRA eligibility criteria as to prior notice, the cumulative five-year limit, release from the period of service under honorable conditions, and timely application for reemployment.)

In Law Reviews 79, 0634, 0723, and 0738 (all available at www.roa.org/law_review), I discussed in detail the applicability of USERRA to successors in interest. There are two kinds of successorship situations. The traditional situation is where your pre-service employer, during your period of service, merged with another company or was taken over by another company. The other form of successorship, particularly common in government contracting, is where you find that your pre-service employer (while still in existence elsewhere) has lost the contract on which you worked, in support of a government agency. While you were on active duty, most or all of your co-workers with the former contractor have signed on with the new contractor and are working much as before, but for a different company.

I believe that USERRA does apply and should apply to both forms of successorship. Unfortunately, the U.S. Court of Appeals for the 11th Circuit disagrees with me. I invite the reader's attention to *Coffman v. Chugach Support Services Inc.,* 411 F.3d 1231 (11th Cir. 2005). I discuss that case in detail in Law Review 0634.

Charles Coffman, an Air Force Reservist, worked for Del-Jen Inc. (DJI), the company that had the Base Operating Support contract at Tyndall Air Force Base in Florida. Coffman was called to active duty, and he gave proper notice to his DJI supervisor. DJI hired a woman to fill Coffman's job on a temporary basis while he was on active duty. Some months later, while Coffman was still on active duty, DJI lost the contract to Chugach Support Services (CSS) at the end of the fiscal year. Of the 100 DJI employees, CSS hired 98 of them. This included the woman who was hired to fill in for Coffman on a temporary basis while he was on active duty, but it did not include Coffman.

When Coffman completed his year of active duty and applied for reemployment, the transition from DJI to CSS was complete. Coffman applied for reemployment with CSS, contending that it was the successor in interest to DJI. CSS refused to reemploy Coffman and denied that it was the successor-in-interest to DJI. Unfortunately, the District Court and the Court of Appeals agreed with the CSS position that there can be no finding of successorship unless there has been a merger or transfer of assets between the purported predecessor and the purported successor.

The 11th Circuit rejected the "functional successor" theory. The 11th Circuit held that there can be no finding of successorship unless there has been a merger or transfer of assets from the purported predecessor to the purported successor. The Sixth Circuit has accepted the functional successor theory in a similar context. *See Cobb v. Contract Transport Inc.,* 452 F.3d 543 (6th Cir. 2006). *See also Murphree v. Communications Technologies Inc.,* 2006 WL 3103208 (E.D. La. Nov. 2, 2006).

Section 6 of SAJA would add a definition of "successor in interest." That term is not defined in USERRA as currently written, but it is discussed in the law's 1994 legislative history. This new definition would make it clear that the obligation to reemploy falls upon functional successors as well as acquiring and merging successors. I strongly support this approach and this legislation.

REQUIRING EQUITABLE RELIEF WHEN APPROPRIATE

In Law Review 200 (October 2005), I discussed the case of *Bedrossian v. Northwestern Memorial Hospital*, 409 F.3d 840 (7th Cir. 2005). Dr. Carlos Bedrossian is a colonel in the Air Force Reserve Medical Corps and a Life Member of ROA. He worked for Northwestern University Medical School and the affiliated Northwestern Memorial Hospital. His employer was annoyed with him for his frequent absences from work for military duty and sought to fire him. Dr. Bedrossian sought injunctive relief to prevent the firing. The District Court declined to grant such emergency relief, and the Court of Appeals affirmed.

A two-part test generally applies to court decisions about granting emergency injunctive relief. A party seeking such relief must show both a likelihood of prevailing on the merits (when the case finally gets to trial) and *irreparable* injury if the emergency relief is not granted. It is difficult to get emergency relief to enjoin a firing. The courts consider the injury resulting from a firing to be not irreparable. The plaintiff can sue, and if he or she wins, the court will award back pay as well as order reinstatement. The argument goes that the injury is not irreparable if the plaintiff can recover back pay after prevailing.

In cases arising under USERRA, more so even than with regard to other workplace discrimination laws, the *public interest* must be considered, as well as the interests of the plaintiff and defendant, or employee and employer. If men and women cannot be assured of protection from workplace discrimination based on their affiliation in the National Guard or Reserve, they will not join or will not remain in these Reserve Components. In the Global War on Terrorism, our nation is more dependent than ever on the National Guard and Reserve. More than 1.2 million members have been involuntarily mobilized since the terrorist attacks of Sept. 11, 2001.

Section 9 of SAJA would effectively overrule *Bedrossian* and would make it easier to obtain injunctive relief to stop firings and to require employers to reemploy returning veterans *promptly*. I strongly support this approach and this legislation.

ENHANCED USERRA REMEDIES AND ENFORCEMENT

SAJA has several other excellent provisions to improve USERRA and its enforcement mechanism. Section 4 of this bill would provide enhanced remedies for USERRA violations. This would include the availability of non-economic as well as economic damages and improved provisions for liquidated and punitive damages.

Section 4323(d)(1)(C) of USERRA [38 U.S.C. 4323(d)(1)(C)] provides for liquidated damages in the amount of the actual damages (thus doubling the damages) in cases of willful employer violations. In some instances, the employer has willfully violated the law but the actual damages are small, because the servicemember almost immediately found another job paying the same or more. SAJA would amend this provision to provide for liquidated damages equal to the actual damages or $10,000, whichever is greater. This would ensure that there would be a meaningful incentive for employers to comply. Section 4 of SAJA would also provide for *punitive* damages, over and above the liquidated damages, for truly egregious violations involving state and local governments and private employers with 25 or more employees.

Under USERRA as currently written, liquidated damages can be awarded against state and local governments and private employers, but not against federal agencies as employers. Section 4 would provide authority for the Merit Systems Protection Board to require a federal agency to pay liquidated damages for a willful violation of USERRA.

Section 5 of SAJA would make the award of attorney fees to a prevailing USERRA plaintiff *mandatory* rather than discretionary. This provision would make it easier for USERRA claimants to find competent counsel to represent them in these cases.

Section 7 would clarify that no state or federal statute of limitations would apply to USERRA cases. The reemployment statute has never had a statute of limitations, and since 1974 it has specifically precluded the application of state statutes of limitations. In the absence of a statute of limitations, the equitable doctrine of laches has applied to reemployment cases. Under that doctrine, a defendant who can show that the plaintiff has inexcusably delayed in bringing the suit, and that the defendant has suffered prejudice in the inability to establish a defense, can get the court to dismiss the plaintiff's action. If the plaintiff has waited many years to file the lawsuit, the defendant may have been prejudiced in that evidence and testimony has become unavailable during the interim. As you can imagine, over a period of many years memories dim and potential witnesses become unavailable by death or otherwise, and records may be lost or destroyed. USERRA specifically precludes the application of state statutes of

limitations, but it does not mention federal statutes of limitations. In recent years, several courts have held that the four-year default statute of limitations under 28 U.S.C. 1658(a) applies to USERRA cases. Section 7 of SAJA would make it clear that no statute of limitations applies to USERRA cases. Finally, section 8 of SAJA would strengthen the USERRA provision for compensating National Guard and Reserve personnel for wage discrimination motivated by their service.

EFFECTIVE DATE OF SAJA

Under SAJA as presently written, each of these amendments would apply to USERRA violations that occur *before,* on, or after the date that the president signs this bill into law (we earnestly hope). Thus, these changes would apply to lawsuits not yet filed, as of the date of enactment, as well as suits that have been filed but have not been finally resolved. The enactment of SAJA would not authorize the reopening of cases that have become final by settlement, by exhaustion of appeals, or by expiration of the permissible time to appeal.

CALL TO ACTION

Contact your senators and representatives in support of S.3432, the proposed Servicemembers Access to Justice Act