LAW REVIEW 857

(November 2008)
CATEGORY: USERRA Enforcement
USERRA Affirmative Defenses

You Cannot Waive Your Reemployment Rights Until You Return from Service

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***Leonard v. United Air Lines, Inv.,* 972 F.2d 155 (7th Cir. 1992).**

Jack Leonard started working for United Air Lines as a pilot in 1946. At his first opportunity, in 1947, he began to contribute to United's voluntary, contributory pension plan for its pilots. Mr. Leonard was a member of the Air Force Reserve, and in 1948 he was recalled to active duty for the Berlin Airlift Crisis. He remained on active duty until November 1952 and returned to work at United in January 1953.

When he left United to report to active duty in 1948, Mr. Leonard stopped participating in United's pension plan, and he withdrew the pension contributions he had made up to that point. The question of whether Mr. Leonard voluntarily or involuntarily withdrew his pension contributions was a matter of serious factual dispute. Almost four decades passed between Mr. Leonard's 1948 call to the colors and the 1987 filing of this lawsuit. The factual issue of the choices that United gave Mr. Leonard in 1948 could not be resolved and was not resolved in this litigation. In 1961, as part of a general corporate housekeeping, United threw away its files relating to Mr. Leonard's 1948 withdrawal from the pension plan. Moreover, many of the witnesses available in 1948 died before the suit was filed in 1987, and those who were still alive had dim memories.

United insisted that it gave Mr. Leonard three choices with respect to the pension plan when he left the company for military service in 1948. First, he could continue participating in the pension plan while away from work for service, and continue making contributions to the plan. Second, he could suspend making new contributions to the plan while on active duty, but leave in the fund the contributions that he had already made. Under those circumstances, he could make up the missed employee contributions after returning to work. Third, he could both suspend making new contributions and withdraw the contributions he had already made. United insisted that it informed Mr. Leonard, in 1948, that if he chose this third option he would never be permitted to make up the contributions he would miss while in service and the contributions that he withdrew upon entering service. United insisted that Mr. Leonard made a conscious choice, after having the consequences explained to him, to withdraw the pension contributions he had made in 1947 and 1948.

Mr. Leonard just as adamantly insisted that United had given him no such choices. He testified that United had insisted he must withdraw from the pension plan and take his accrued contributions with him upon leaving United to report to active duty in 1948. Upon returning to work in January 1953, Mr. Leonard immediately requested the opportunity to make up the contributions he had withdrawn from the pension plan in 1948 and the additional contributions he would have made during 194852 if he had not been on active duty at the time. A United official informed him by letter (which Mr. Leonard fortunately retained) that because he had withdrawn his pension contributions in 1948 he was required to begin anew his pension participation upon returning to work in 1953.

Mr. Leonard did begin anew his participation in the United pension plan, and he forgot about the matter until 1981, when United sent him a pre-retirement pension notification alerting him to the fact that he had 421 months of United service but only 337 months of pension plan participation. Mr. Leonard then renewed his request to pay back the pension payments he had withdrawn in 1948 and to make up the contributions he would have made in 194852 if he had not been on active duty at the time. United again denied his request, based on its assertion that he had voluntarily withdrawn his pension contributions in 1948.

Mr. Leonard exhausted his appeals within United and its pension plan committee, to no avail, and then he complained to the U.S. Department of Labor's Veterans' Employment and Training Service (DOL-VETS). In 1985,

DOL-VETS decided to help Mr. Leonard and forwarded his case to the Department of Justice (DOJ), which filed suit on his behalf against United on May 22, 1987. Mr. Leonard prevailed in the U.S. District Court for the Northern District of Illinois, and the employer appealed to the U.S. Court of Appeals for the Seventh Circuit. The Court of Appeals affirmed the District Court's judgment for Mr. Leonard.

Congress enacted the reemployment statute in 1940, as part of the Selective Training and Service Act. Congress amended the law many times, and the law came to be known as the Veterans' Reemployment Rights Act (VRRA). In 1994, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA), a rewrite of the VRRA. The VRRA, not USERRA, governed Mr. Leonard's case.

The VRRA did not contain a statute of limitations, and it expressly precluded the application of state statutes of limitations. Reemployment cases have always been governed by the equitable doctrine of laches. Under this doctrine, the defendant can get a case dismissed if it can show the court that the plaintiff inexcusably delayed in filing suit, after the cause of action accrued, and that the defendant was prejudiced in defending the suit because the long passage of time had caused relevant evidence to be unavailable (i.e., records lost or destroyed, memories have dimmed, witnesses have died, etc.). Laches is an affirmative defense. The defendant invoking this defense has the burden of proof on both inexcusable delay and prejudice.

The Court of Appeals acknowledged that United's strongest argument was that the District Court should have invoked laches and dismissed Mr. Leonard's suit, based on the 34-year delay between January 1953 (when Mr. Leonard returned to work at United after completing his active duty) and May 1987 (when this suit was filed). The court held that Mr. Leonard's suit was not barred by laches because his pension claim did not accrue until 1981, when Mr. Leonard received his first monthly pension check that was less than it should have been because he had not been credited for his 194648 United employment and his 194852 active duty. A claim cannot be time-barred before it has even accrued.

The court was somewhat troubled by the 198187 delay in filing this suit. The court found that this delay was not inexcusable for two reasons. First, Mr. Leonard should not be held accountable for the delay that was attributable to his exhaustion of remedies within United and its pension committee. Second, Mr. Leonard should not be held accountable for the delay by DOL-VETS and DOJ in investigating his claim and deciding to file suit on his behalf.

The court also noted that United could not show prejudice based on the 198187 delay in filing this suit. Most of the prejudice with respect to the availability of records can be traced to 1961, when United discarded many relevant records as part of a general corporate housecleaning. Mr. Leonard's 1981 renewal of his pension claim should have alerted United to preserve any records that were still in existence as of 1981.

The court then turned to United's longstanding (at least since 1953) argument that Mr. Leonard had waived his right to 194652 United pension credit by voluntarily withdrawing his pension contributions in 1948. It should also be noted that the court's holding on the waiver argument is linked to its holding on the laches argument. The court ultimately held that, as a matter of law, Mr. Leonard could not waive his reemployment by even a voluntary and knowing act upon leaving his job to report to active duty.

Thus, United cannot show prejudice based on the unavailability of records and witnesses. Those records and witnesses might have helped United to show that Mr. Leonard voluntarily withdrew his pension contributions in 1948, but that factual issue is irrelevant to the outcome of the case. Even if the court were to agree with United's position that Mr. Leonard voluntarily withdrew his pension contributions in 1948, Mr. Leonard still wins.

"We do not think that an employee can waive his rights under the Act [VRRA] before entering military service. See Veterans' Reemployment Rights Handbook at 22-2 ('In all but the most unusual circumstances, a veteran cannot expressly or impliedly waive his reemployment rights before or during military service.')" Leonard, 972 F.2d at 159.

I am proud to say that during my 198292 employment as a DOL attorney, I largely edited the 1988 edition of the Veterans' Reemployment Rights Handbook. I wrote the language that the Seventh Circuit quoted with approval.

"In Fishgold [Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946)], the Supreme Court considered a union's claim that giving statutory reemployment rights and seniority rights to returning veterans would violate a

preexisting collective bargaining agreement. The court held that 'no practice of employers or agreements between employers and unions can cut down the service adjustment benefits that Congress has secured the veteran under the act.' 328 U.S. at 285. That a union cannot contract away the rights of its members under the act suggests that individual members cannot waive their rights, either." Leonard, 972 F.2d at 159.

"We do not think that Congress could have intended that employees would be able to waive their rights before entering military service. The purpose of the act … is 'to minimize the disruption in individual lives resulting from the national need for military personnel.' Alabama Power v. Davis, 431 U.S. 581, 583 (1977). War is hell, and a call to arms is harrowing. Faced with this unavoidable disruption in their lives, inductees may make choices that are sensible when death looms, but cease to make sense when they discover that they have survived. The reemployment rights provided by the act are necessarily directed to the survivors, and Congress intended that they be able to return to civilian life as easily as possible. Veterans should not be burdened by the choices they make when called to arms." Leonard, 972 F.2d at 159-60.

Congress enacted USERRA two years after the Seventh Circuit decided Leonard. USERRA's legislative history mentions Leonard with approval: "The [House Committee on Veterans Affairs] wishes to stress that rights under chapter 43 [USERRA] belong to the claimant, and he or she may waive those rights, either expressly or impliedly through conduct. Because of the remedial purposes of chapter 43, any waiver must, however, be clear, convincing, specific, unequivocal, and not under duress. Moreover, only known rights which are already in existence may be waived.See Leonard v. United Air Lines, 972 F.2d 155, 159 (7th Cir. 1992). An express waiver of future statutory rights, such as one that an employer might wish to require as a condition of employment, would be contrary to the public policy embodied in the committee bill and would be void." House Rep. No. 103-65, 1994 United States Code Congressional & Administrative News 2449, 2453.

In drafting the USERRA regulations that it published in the Federal Register on Dec. 19, 2005, DOL closely followed this legislative history and the Leonard precedent. In its preamble to the USERRA regulations, DOL states: "Section 1002.88 [20 C.F.R. 1002.88] also provides that an employee cannot waive the right to reemployment by informing the employer that he or she does not intend to seek reemployment following the service. This general principle that an employee cannot waive USERRA's right to reemployment until it has matured, i.e., until the period of service is completed, is reiterated in the discussion of USERRA's 'Furlough and Leave of Absence' provisions. See section 1002.152. The department received three comments regarding section 1002.88, all of which contested the department's conclusion that a person cannot waive the right to reemployment by notifying the employer prior to or during the period of military service that he or she does not intend to seek reemployment upon completion of the service. … The department's conclusion is based on both USERRA's broad prohibition against waivers of statutory rights, and the statute's legislative history on this point." You can find this language in the 2005 edition of the Federal Register, at the end of page 75256 and the start of page 75257.

The Seventh Circuit decided Leonard 16 years ago, but this important precedent helps to protect the rights of the brave young men and women who lay aside their civilian jobs to answer their country's call.