

LAW REVIEW 858

(November 2008)

1.2 Discrimination Prohibited

1.4 USERRA Enforcement

1.8 USERRA and Jury Trial

Right to Jury Trial and Liquidated Damages Survives Death of the Unlawfully Fired Employee

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In Law Review 0707 (February 2007), I discussed the case of *McLaughlin v. Newark Paperboard Products*, 2006 U.S. Dist. LEXIS 62936 (W.D. Pa. Sept. 5, 2006) (*McLaughlin I*). Judge Terrence F. McVerry wrote one more informally published decision in this case, before the case settled in January 2007. The last court decision is *McLaughlin v. Newark Paperboard Products*, 2007 U.S. Dist. LEXIS 805 (W.D. Pa. Jan. 8, 2007) (*McLaughlin II*).

Michael E. McLaughlin was a lieutenant colonel in the Pennsylvania Army National Guard. In August 2001, immediately after he returned from his two weeks of annual National Guard training, Newark Paperboard Products (Newark) fired him. He complained to the U.S. Department of Labor's Veterans Employment and Training Service, (DOL-VETS), asserting that the firing was motivated by his National Guard service and that the firing violated the Uniformed Services Employment and Reemployment Rights Act (USERRA). DOL-VETS investigated his complaint and found it to have merit. After attempts at securing voluntary compliance failed, DOL-VETS referred the matter to the Department of Justice, which filed suit on LTC McLaughlin's behalf in the U.S. District Court for the Western District of Pennsylvania.

While the case was pending, the Army called LTC McLaughlin to active duty and deployed him to Iraq. He was killed in action on Jan. 5, 2006. On March 3, 2006, the court ordered the substitution of Mrs. Tamera J. McLaughlin (LTC McLaughlin's widow) as the plaintiff in the case.

Newark filed a motion for summary judgment, contending that Mrs. McLaughlin had produced no direct evidence that the August 2001 firing of LTC McLaughlin was motivated by his National Guard service. The court denied the motion, holding that the absence of direct evidence was not fatal to the plaintiff's case and that a reasonable jury could find for the plaintiff, based on inferences from facts that had been or could be established (including the proximity in time between LTC McLaughlin's National Guard training and the firing). *McLaughlin I*.

Section 4323(d)(1) of USERRA provides as follows concerning the remedies that a federal court may award to a prevailing USERRA plaintiff in a case against a private employer or a state or local government: "In any action under this section, the court may award relief as follows: A. The court may require the employer to comply with the provisions of this chapter. B. The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter. C. The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful." 38 U.S.C. 4323(d)(1).

As I explained in Law Review 104 and other articles, Congress enacted USERRA in 1994 as a comprehensive recodification of the Veterans' Reemployment Rights Act (VRRA), which can be traced back to 1940. The VRRA provided for the federal court to use its equity powers to order a losing employer to comply with the VRRA and to compensate the prevailing plaintiff for lost salary, wages, and benefits. The VRRA did not provide for extra damages or liquidated damages for willful VRRA violations.

The language of 38 U.S.C. 4323(d)(1)(C) (providing for liquidated damages for willful violations) was enacted in 1994 and was borrowed from the liquidated damages provision of the Age Discrimination in Employment Act (ADEA). Newark cited ADEA case law for the proposition that the right to liquidated damages for a willful violation of the ADEA did not survive the death of the ADEA claimant. Newark argued that because the USERRA

liquidated damages language was borrowed from the ADEA, the same result should apply under USERRA.

The court forcefully rejected this argument: “The court cannot accept defendant’s indirect and formalistic reasoning. Because the class of persons protected by USERRA are exposed to a unique risk of death in the service of the nation, a simplistic adoption of ADEA precedents regarding the survival of claims after death is hardly proper. Simply put, Congress could rationally intend to provide for the survival of remedies available to members of the armed forces under USERRA that may not be available to victims of age discrimination under the ADEA. Moreover, defendant’s methodology is incompatible with the clear mandate from Congress, the Supreme Court, and the Third Circuit that the USERRA statute should be construed broadly.... As explained above, the court concludes that Congress did not intend the right to recover liquidated damages under USERRA to cease upon a service member’s death in combat.” *McLaughlin II*, at pages 9-10.

VRRA case law held that there was no right to a jury trial in a VRRA case. Because a VRRA case involved the plaintiff’s effort to get the court to use its equity powers to order reinstatement and back pay, a VRRA case was not considered to be a “suit at common law” for purposes of the Seventh Amendment right to a jury trial. *See, e.g., Troy v. Hampton*, 756 F.2d 1000, 1003 (4th Cir. *en banc*), *cert. denied sub nom. Blackmon v. Observer Transportation Co.*, 474 U.S. 864 (1985).

The 1994 addition of the right to liquidated damages for willful USERRA violations transformed a purely equity matter into a suit at common law to which the right to a jury trial applies. *See Maher v. City of Chicago*, 2006 U.S. Dist. LEXIS 87508 (N.D. Ill. Nov. 21, 2006); *Nino v. Hayes International, Inc.*, 2005 U.S. Dist. LEXIS 43971 (S.D. Ind. Aug. 19, 2005). These cases and this issue are discussed in Law Review 0737 (July 2007). You can now add *McLaughlin II* to the list of cases holding that there is a right to a jury trial under USERRA.

Newark argued strenuously that LTC McLaughlin’s right to recover liquidated damages for a willful USERRA violation did not survive his death in order to avoid a jury trial in this case. By ruling against Newark on the liquidated damages survival issue, the court also thereby rejected Newark’s motion to strike Mrs. McLaughlin’s demand for a jury trial. Just a few days later, Newark made Mrs. McLaughlin a generous settlement offer, which she accepted, thus ending the case. The details of the settlement are cloaked in a confidentiality agreement, but suffice it to say that Mrs. McLaughlin was satisfied.

Employers who find themselves defendants in USERRA actions are justifiably afraid of juries. The American people are deeply divided about the wisdom and conduct of the Iraq War, but the American people overwhelmingly support the troops. Those people who are called to jury service are prone to express righteous indignation against employers who flout USERRA.