LAW REVIEW 864

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Another New Appellate Case Shows USERRA Has Teeth

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***Petty v. Metro Government of Nashville-Davidson County,* 538 F.3d 431 (6th Cir. 2008), *cert. denied*, 129 S. Ct. 1933 (2009).**

Brian Petty was a captain in the Army Reserve and a sergeant in the police department of the Metro Government of Nashville-Davidson County (Metro). The Army called him to active duty in January 2004. He and the unit he commanded were deployed to Camp Navistar, Kuwait. He was charged with violations of the Uniform Code of Military Justice, for having manufactured, possessed, and consumed alcohol (in violation of a lawful general order applicable to military personnel in Southwest Asia) and for having provided alcohol to a female enlisted Soldier under his command.

CPT Petty appeared before a military judge for arraignment on these charges, and then he agreed to resign his commission "for the good of the service" in lieu of court martial. He received a general discharge under honorable conditions, and he was sent home, his military career over. In accordance with the standard procedure for all Soldiers leaving active duty, he received two different DD-214 forms: the private version showed the general discharge and the fact that it was awarded in lieu of trial by court martial, while the public version of the form did not show this adverse information.

After returning home to Nashville, he made a timely application for reemployment with the Metro police department. He provided the employer the public version of his DD-214. Mr. Petty met the five eligibility criteria for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA). He left his civilian job for the purpose of performing uniformed service, and he gave the employer prior oral or written notice. He did not exceed the cumulative five-year limit on the duration of the period or periods of uniformed service relating to his employer relationship with Metro. Since his service was involuntary, it did not count toward his five-year limit. He made a timely application for reemployment after the general discharge.

Section 4304 of USERRA provides as follows: "A person's entitlement to the benefits of this chapter by reason of the service of such person in one of the uniformed services terminates upon the occurrence of any of the following events: (1) A separation of such person from such uniformed service with a dishonorable or bad conduct discharge. (2) A separation of such person from such uniformed service under other than honorable conditions, as characterized pursuant to regulations prescribed by the secretary concerned [service secretary, like the secretary of the army]. (3) A dismissal of such person permitted under section 1161(a) of title 10. (4) A dropping of such person from the rolls pursuant to section 1161(b) of title 10." 38 U.S.C. 4304.

Mr. Petty's conduct during his active duty in Kuwait notwithstanding, he did not receive one of the four disqualifying items mentioned in section 4304. The legal maxim *expressio unius est exclusio alterius* clearly applies here. That maxim has been defined as follows: "Expression of one thing is the exclusion of another. … Mention of one thing implies exclusion of another. … When certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred." *Black's Law Dictionary, Revised Fourth Edition,* page 692 (internal citations omitted).

In section 4304 of USERRA, four specified events (relating to unsatisfactory performance of military service)

disqualify the individual from the right to reemployment. It is thus clear that no other events (including a general discharge after a resignation in lieu of court martial) can disqualify the individual from the right to reemployment. This case strongly supports this interpretation. *Petty,* at page 24.

When Mr. Petty applied for reemployment after his general discharge, the Metro police department leadership suspected that something untoward had happened during the time that he was away from work for military service, although they were not initially familiar with the details of what had happened in Kuwait. The department delayed reinstating Mr. Petty into the position of employment that he left and almost certainly would have continued to hold if he had not been called to the colors. The department applied its "return to work policy" to Mr. Petty and subjected him to a lengthy internal affairs investigation.

Section 4302(b) of USERRA provides: "This chapter supersedes any state law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, *including the establishment of additional prerequisites* to the exercise of such right or the receipt of any such benefit." 38 U.S.C. 4302(b) (emphasis supplied).

Mr. Petty argued (through attorney Michael J. Wall of Nashville) that Metro's return-to- work policy was an "additional prerequisite" to the right to reemployment and that section 4302(b) precluded Metro from applying that additional prerequisite to Mr. Petty. The District Court rejected that argument and granted Metro's summary judgment motion. On appeal, the Court of Appeals accepted the argument and overturned the summary judgment for the defendant Metro, and then granted summary judgment for the plaintiff, Mr. Petty.

"The district court determined that Metro's return-to-work procedures could be applied to Petty, finding that because they are applicable to all individuals regardless of military service, these procedures did not constitute 'additional prerequisites.' In this, the district court erred. First, section 4302(b) does not limit its superseding effect only to 'additional prerequisites.' It supersedes any 'policy, plan, [or] practice' that 'reduces, limits, or eliminates in any manner any right or benefit' provided by USERRA, 'including,' but not necessarily limited to, 'the establishment of additional prerequisites.' Second, Metro's return-to-work procedures *do* constitute 'additional prerequisites' for returning veterans, because the procedures are in addition to the requirements Congress specified for the exercise of USERRA's reemployment rights. The district court apparently viewed the term 'additional prerequisites' as 'additional to the *employer's* existing prerequisites' and concluded that Metro's procedures are not discriminatory because they apply to all individuals returning to the department. But this analysis is not appropriate for a claim brought under section 4312, and the superseding effect of section 4302(b) is not so limited; Metro's return-to-work procedures are indeed superseded by USERRA's reemployment provisions." *Petty,* at pages 25-26 (emphasis in original).

I invite the reader's attention to Law Review 61 (December 2002), titled "Not Necessary to Establish Discriminatory Intent under Section 4312." One of *Petty*'s central holdings is entirely consistent with what I wrote in Law Review 61 more than six years ago.

"It is important to note that Petty was not required to make any showing of discrimination in order to sustain either of his reemployment claims. The district court incorrectly characterized part of Petty's reemployment claim—that part dealing with the position to which he was reinstated—as being part of his discrimination claims and therefore held that it required a showing of discrimination. The district court did not state its authority for this, but Metro finds support for the court's view in the following language from this Circuit's decision in *Curby v. Auchon:* 'A person seeking relief under section 4312 must also meet the discrimination requirement contained in section 4311.' 216 F.3d at 557. However, this language from *Curby* was merely dicta and is therefore not binding precedent. *See Wrigglesworth,* 121 F. Supp. 2d at 1137 (characterizing this part of *Curby* as dicta). *Jordan v. Air Prods. & Chems. Inc.,* 225 F. Supp. 2d 1206, 1208 (C.D. Cal. 2002 (same). Furthermore, subsequent to *Curby,* the Department of Labor specified that 'the employee is not required to prove that the employer discriminated against him or her because of the employee's uniformed service in order to be entitled to reemployment.' 20 C.F.R. 1002.33; *accord Francis,* 452 F.3d at 303 … Finally, the imposition of section 4311's discrimination requirement on a reemployment under section 4312 is not consistent with the plain language of sections 4312 and 4313. Section 4313 states that any 'person entitled to reemployment under section 4312'—which we have found Petty to be—'shall be promptly reemployed in a position of employment in accordance with the' order of priority set forth in section 4313(a)(2). Thus, the express terms of section 4313 make its application contingent only on the prerequisites of section 4312,

none of which include a showing of discrimination." *Petty,* at pages 26-27.

In its opinion, the court cited the Department of Labor USERRA regulation that requires that, "absent unusual circumstances, reemployment must occur within two weeks of the employee's application for reemployment." 20 C.F.R. 1002.181. "Because of its return-to-work process, Metro took three weeks to 'rehire' Petty, and even then it did not place Petty in the correct position as outlined in section 4313. Metro cannot justify these delays; neither a return-to-work process that has been superseded by statute nor any investigations resulting from that process constitute the 'unusual circumstances' that the Department of Labor has specified may justify a less timely reinstatement. 20 C.F.R. 1002.181. … In any event, the burden of proving that a returning veteran is not qualified under section 4313 falls on the employer, not the employee. *McCoy v. Olin Mathieson Chem. Corp.,* 360 F. Supp. 1336, 1339 (S.D. Ill. 1973)." *Petty,* at pages 31-32.

Petty is a great case, showing that USERRA has teeth and that it overrides employer policies governing the return to work after a leave of absence. The Metro police department may have the right to apply its policies to former employees who have resigned (for reasons unrelated to military service) and now seek to be rehired. Metro does not have the right to apply that policy to a person returning from military leave under USERRA. Under Article VI, Clause 2 of the U.S. Constitution (commonly referred to as the "Supremacy Clause"), a federal statute like USERRA overrides conflicting state and local laws and policies.

Please see Law Review 1275 for further developments in this case.