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DOJ Sues NC to Enforce USERRA Regarding a Magistrate Who Is a Reservist

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On Nov. 14, 2008, the U.S. Department of Justice (DOJ) announced it had filed a lawsuit on behalf of Army Reservist James Myles, under the Uniformed Services Employment and Reemployment Rights Act (USERRA). The defendants are the North Carolina Administrative Office of Courts and North Carolina Superior Court Judge Jerry Braswell, in his official capacity.

Judge Braswell appointed James Myles a magistrate, sort of an assistant judge. When Mr. Myles' initial term expired, Judge Braswell declined to appoint him for a second term. Mr. Myles complained to the Veterans' Employment & Training Service, U.S. Department of Labor (DOL-VETS), alleging that Judge Braswell considered Mr. Myles' Army Reserve obligations when deciding not to reappoint Mr. Myles to a second term.

Section 4311(a) of USERRA [38 U.S.C. 4311(a)] makes it unlawful for an employer to deny an individual initial employment, retention in employment, promotion, or a benefit of employment because of the individual's membership in a uniformed service, application to join a uniformed service, performance of uniformed service, or application or obligation to perform service.

Section 4311(c) of USERRA provides that if the plaintiff establishes that one of these protected factors was *a motivating factor* (not necessarily the sole reason) for the unfavorable personnel action, the *burden of proof* (not just the burden of going forward with the evidence) shifts to the employer, to *prove* (not just say) that the employer would have made the same personnel decision in the absence of the protected factor, for lawful reasons unrelated to the plaintiff's military service or obligation.

As applied to this case, that means that DOJ only needs to prove that Judge Braswell *considered* Mr. Myles' military service, and the absences from work that his service necessitated, in deciding not to reappoint him to a second term. If Judge Braswell considered Mr. Myles' service as a negative factor in the reappointment decision, then Judge Braswell violated USERRA, even if he had other legitimate reasons for denying Mr. Myles reappointment. In that situation, Judge Braswell can avoid liability only by proving that he *would* have (not just could have) denied the reappointment for the lawful reasons, even if Mr. Myles had not been a Reservist.

DOL-VETS investigated Mr. Myles' complaint and found it to have merit. After efforts to resolve the matter through negotiation failed, DOL-VETS referred the case to DOJ, which also agreed that the case had merit. DOJ then filed suit in the name of the United States, as plaintiff in the action, in accordance with section 4323(a)(1) of USERRA, 38 U.S.C. 4323(a)(1). I invite the reader's attention to Law Review 89 (September 2003) and Law Review 0848 (October 2008), with respect to the problems involved in enforcing USERRA against state government entities, as employers. All previous Law Review articles are available at www.roa.org/law_review.

Section 4314(c) of USERRA [38 U.S.C. 4314(c)] exempts the legislative and judicial branches of the federal government from USERRA enforcement through the Merit Systems Protection Board. (The enforcement mechanism provided by the Congressional Accountability Act of 1995 is available for legislative branch employees.) I discuss this matter in detail in Law Review 34 (November 2001).

Congress chose to exempt the legislative and judicial branches of the federal government from USERRA enforcement because of "separation of powers" concerns under the U.S. Constitution. Those concerns do not apply with respect to USERRA enforcement against state judicial and legislative employers. The judicial branch of the

North Carolina government is in no way exempt from USERRA enforcement.

Section 4331 of USERRA (38 U.S.C. 4331) gives the Secretary of Labor the authority to promulgate regulations about the applicability of USERRA to state and local governments and private employers. In accordance with the Administrative Procedures Act, DOL-VETS published proposed USERRA regulations in September 2004 and accepted comments during a 60-day comment period. DOL-VETS considered the comments and then published the final regulations in the *Federal Register* on Dec. 19, 2005. The final regulations are now published in title 20, Code of Federal Regulations, part 1002.

When DOL-VETS published the USERRA regulations on Dec. 19, 2005, it also published a lengthy and scholarly preamble, explaining the purpose and effect of the regulations and responding to the comments that DOL-VETS received. One paragraph of that preamble specifically addresses the issue of enforcing USERRA against state judicial branch employers:

"Proposed section 1002.39 covers states and other political subdivisions of the United States as employers, and the Department received one comment regarding this provision. The commenter noted USERRA's specific treatment for reemployment of employees of the federal legislative and judicial branches and, seeing no similar provision for employees of state legislative and judicial branches, asked whether USERRA's protections applied to the latter group. In response, the Department again notes USERRA's broad applicability to all employers, explicitly including the states, 38 U.S.C. 4303(4), without regard to whether the state employer is in the state's judicial or legislative branch." You can find this paragraph on page 75253 of the 2005 *Federal Register,* in the left-hand column.

It also appears that Judge Braswell may need a remedial course in the U.S. Constitution, especially Article VI, Clause 2: "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, *and the judges in every state shall be bound thereby,* any thing in the constitution or laws of any state to the contrary notwithstanding." (Emphasis supplied.)

This provision is known as the Supremacy Clause. Early in our nation's history, the Supreme Court decided that the Supremacy Clause means what it says and struck down a New York statute that violated a federal statute. *Gibbons v. Ogden,* 22 U.S. 1 (1824). Four decades later, a great war was fought about the supremacy of federal law over state law. North Carolina's team lost.