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No Time Limit on Justice for the Returning Veteran

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On Oct. 10, 2008, President George W. Bush signed into law the Veterans' Benefits Improvement Act of 2008, Public Law 110-389, 122 Stat. 4163. This new law made several important amendments to the Uniformed Services Employment and Reemployment Rights Act (USERRA), which is codified at Title 38, United States Code, sections 4301-4335 (38 U.S.C. 4301-4335).

Section 311(f)(1) of this new law added a new section 4327 to USERRA, now 38 U.S.C. 4327. Subsection (b) of this new section provides: "If any person seeks to file a complaint or claim with the Secretary [of Labor], the Merit Systems Protection Board, or a Federal or State court under this chapter [USERRA], there shall be no limit on the period for filing the complaint or claim." 38 U.S.C. 4327(b).

It is now clear beyond any question that *no statute of limitations* (federal, state, or contractual) applies to USERRA causes of action that accrued on or after Oct. 10, 2008. The time for bringing such actions is limited only by the equitable doctrine of laches and by the practical difficulty of proving one's case when one brings the case many years after the fact. This article discusses how the new 38 U.S.C. 4327(b) applies to USERRA causes of action that accrued before Oct. 10, 2008.

In 1940, as part of the Selective Training and Service Act (STSA), Congress enacted a provision requiring civilian employers to reemploy the young men drafted under the STSA. A year later, as part of the Service Extension Act, Congress amended the reemployment provision to make it apply to voluntary enlistees as well as draftees.

The reemployment law had several different formal names, but it came to be known colloquially as the Veterans' Reemployment Rights Act (VRRA). The reemployment law was part of the draft law (although it applied to volunteers as well as draftees) until 1974, when Congress enacted the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA), which moved the reemployment law to chapter 43 of Title 38, United States Code, where it remains to this day. In 1994, Congress enacted USERRA, a long-overdue comprehensive rewrite of the VRRA.

Neither the VRRA nor USERRA has ever had a statute of limitations, but prior to 1974 there were several court decisions that applied state statutes of limitations to VRRA cases. In 1974, as part of VEVRAA, Congress amended the VRRA, adding the following language: "No state statute of limitations shall apply to any proceeding under this chapter." The 1974 legislative history makes clear that Congress believed that state statutes of limitations should never have been considered in VRRA cases, and the 1974 amendment was made to correct this judicial error. USERRA carried over this particular provision unchanged, and it is now codified in section 4323(i) of USERRA [38 U.S.C. 4323(i)].

Section 4331 of USERRA gives the secretary of labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. 38 U.S.C. 4331. The secretary has utilized that authority, and the USERRA regulations are published in Title 20, Code of Federal Regulations (CFR), Part 1002 (20 C.F.R. Part 1002).

That VRRA did not confer rulemaking authority upon the secretary of labor or anyone else, but the Department of Labor (DOL) did publish its *Veterans' Reemployment Rights Handbook* in 1957, 1970, and 1988. I served as the co-editor (along with CDR Billie Jane Spencer, JAGC, USNR) of the 1988 handbook, during the decade that I worked for DOL as an attorney. The handbook did not have the legal status of a lawfully promulgated regulation, but several

courts cited the handbook on questions of statutory interpretation and accorded it some weight. *See, e.g., Leonard v. United Air Lines Inc.,* 972 F.2d 155, 159 (7th Cir. 1992). I discuss the *Leonard* case and its implications in detail in Law Review 0857 (Nov. 2008). All previous Law Review articles are available at www.roa.org/law_review.

The 1988 *VRR Handbook* includes a new chapter (not included in the 1957 or 1970 handbook) entitled "Timeliness in Asserting Claims" (Chapter 23). That chapter includes the following three paragraphs:

A statute of limitations is a law requiring that a claim be asserted in court within a particular time, such as two years after the claim arose, or be entirely barred. The reemployment statute does not contain a statute of limitations, and it specifically bars the application of state statutes of limitations.

The equitable doctrine of laches is much more flexible. In order to successfully invoke the doctrine of laches, the employer must prove both that there has been inexcusable delay and that the employer's ability to defend the case has been prejudiced by the delay. For example, if records have been destroyed, witnesses have died, and memories have dimmed because of a delay which the veteran could have avoided, laches may bar the veteran's claim.

The prejudice to the employer must relate to his ability to defend the case, not to the amount of money he may be required to pay. No specific time period is relevant in determining whether laches applies. No reference should be made to time limits imposed by state laws or collective bargaining agreements. *VRR Handbook,* 1988 edition, page 23-1.

The 1994 legislative history of USERRA includes a long paragraph on the statute of limitations issue:

Section 4322(d)(7) [later renumbered 4323(i)] would reaffirm the 1974 amendment to chapter 43 [the VRRA] that no state statute of limitation shall apply to any action under this chapter. It is also intended that state statutes of limitations not be used even by analogy. *See Stevens v. Tennessee Valley Authority,* 712 F.2d 1047, 1056-57 (6th Cir. 1983). Moreover, the Committee [House Committee on Veterans' Affairs] reaffirms, as was made clear in the 1974 legislative history, "that the time spent by government agencies charged with the administration and enforcement of this Act in investigation, negotiation, and preparation for suit shall not be charged against the veteran in any consideration of a time-barred defense," i.e., laches. Senate Report No. 93-907, 93rd Cong. 2d Sess. at 111-112 (June 10, 1974). *See Lemmon v. Santa Cruz County, Cal.,* 686 F. Supp. 797, 805 (N.D. Cal. 1988). Additionally, in dealing with the prejudice element of the laches defense, it was also made clear in Senate Report No. 93-907, at 113 "that the 'bumping' of another employee does not constitute prejudice to the employer." To the same effect, the payment of back wages or lost benefits, by itself, does not constitute prejudice in the laches context. *See Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 808 (8th Cir. 1979); *Cornetta v. United States*, 851 F.2d 1372, 1380-82 (Fed. Cir. 1988). House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2472.

Most federal statutes that create civil causes of action contain statutes of limitations, limiting when a lawsuit based on such a cause of action may be filed, but some federal statutes do not include statutes of limitations, either by design or through inadvertence. In 1990, Congress enacted a four-year "default" statute of limitations: "Except as otherwise provided by law, a civil action arising under an act of Congress enacted after the date of enactment of this section [Dec. 1, 1990] may not be commenced later than four years after the cause of action accrues." 28 U.S.C. 1658(a).

Does the four-year default statute of limitations under 28 U.S.C. 1658(a) apply to USERRA cases? Congress enacted USERRA in 1994 (after Dec. 1, 1990), but USERRA is a rewrite of the VRRA, which can be traced back to 1940. In 2002, the U.S. District Court for the Eastern District of Tennessee rejected an employer's claim that section 1658(a) barred USERRA claims based on events that occurred more than four years before the plaintiff filed suit: "Section 1658 also does not apply to Akhdary's claims under the USERRA. Section 1658 applies 'only when Congress establishes a new cause of action without reference to preexisting law.' *Zubi v. ATT Corp.,* 219 F.3d 220, 225 (3d Cir. 2000); *see also Madison v. IBP Inc.,* 257 F.3d 780, 798 (8th Cir. 2001); *Campbell v. AMTRAK,* 163 F. Supp. 2d 19, 25 (D.D.C. 2001); *Coleman v. Shoney's Inc.,* 145 F. Supp. 2d 934, 935-38 (W.D. Tenn. 2001). The USERRA does not establish a new cause of action; instead, it amends the preexisting law of the VRRA. Thus, there is no statute of limitations that applies to Akhdary's claims in this case." *Akhdary v. City of Chattanooga,* 2002 U.S. Dist. LEXIS 26898, at page 5 (E.D. Tenn. May 22, 2002). Two years after *Akhdary,* the Supreme Court decided

Jones v. R.R. Donnelly & Sons Inc., 541 U.S. 369 (2004). *Jones* was not a USERRA case, but that does not mean that it can be ignored in determining the reach of 28 U.S.C. 1658(a). In a case decided the year after *Jones,* the U.S. District Court for the Southern District of Indiana criticized *Akhdary* (which was decided before *Jones*) and concluded that the four-year statute of limitations under 28 U.S.C. 1658(a) does apply to USERRA cases. *Nino v. Haynes International Inc.,* 2005 U.S. Dist. LEXIS 43971 (S.D. Ind. Aug. 19, 2005). *Accord, Wagner v. Novartis Pharmaceuticals Corp.,* 2008 U.S. Dist. LEXIS 52974 (E.D. Tenn. July 10, 2008); *Aull v. McKeon-Grano Associates Inc.,* 2007 U.S. Dist. LEXIS 13008 (D.N.J. Feb. 26, 2007).

Does new section 4327(b) apply to causes of action that accrued *before* Oct. 10, 2008? To help us understand the issue, let us take three hypothetical but realistic Reservists (Joe Smith, Mary Jones, and Bob Williams) in the same unit, all called to active duty from Sept. 2001 until Oct. 2002 and denied reemployment after they applied for reemployment in November 2002.

Smith filed suit against his former employer in December 2006, four years and a month after his cause of action accrued in November 2002 (when he was denied reemployment). The employer filed a motion to dismiss based on the four-year statute of limitations under 28 U.S.C. 1658(a), and the District Court granted the employer's motion. Smith did not appeal to the Court of Appeals, and the time limit for filing such an appeal has long since passed. The Oct. 10, 2008, enactment of 38 U.S.C. 4327(b) does *not* provide an occasion for the court to reopen this finally decided case. Reopening Smith's case is barred by the doctrine of *res judicata*—that is Latin for "the thing has been adjudicated."

Jones was also denied reemployment when she applied in November 2002. She filed suit against the employer in May 2007. The employer filed a motion to dismiss, based on the four-year statute of limitations under 28 U.S.C. 1658(a), and the District Court granted the motion and dismissed her case. Jones filed a timely appeal to the Court of Appeals, and her appeal was pending on Oct. 10, 2008, when Congress enacted 38 U.S.C. 4327(b). Her case comes up for oral argument in the Court of Appeals in May 2009. I believe that the Court of Appeals should apply the new 38 U.S.C. 4327(b) and should reverse the District Court and remand Jones' case to the District Court for trial.

Williams was also denied reemployment in November 2002. He finally got around to filing suit in District Court in May 2009, seven months after Congress enacted 38 U.S.C. 4327(b). Based on this new law, Williams' case should *not* be dismissed as untimely, even though it arguably would have been untimely if filed between December 2006 and Oct. 9, 2008.

I believe that the "no statute of limitations rule" under 38 U.S.C. 4327(b) should be applied retrospectively to the Jones case (and others like it) and to the Williams case (and others like it) for two reasons. First, section 4327(b) *does not establish a new rule*. The 1974 VEVRAA legislative history and the 1994 USERRA legislative history definitively establish that it has been the intent of Congress for more than a generation that *no statute of limitations shall apply to reemployment cases*. The new provision enacted on Oct. 10, 2008, simply reiterates what the law has been all along and corrects those courts that have misapplied the law. Thus, this rule should be applied, meaning that Williams' case should not be dismissed as untimely and in the Jones case the District Court decision holding her case to be untimely should be reversed on appeal.

The second reason that a court should apply the "no statute of limitations" rule to cases that accrued prior to Oct. 10, 2008, is that the Supreme Court has held that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. School Board of the City of Richmond,* 416 U.S. 696, 711 (1974), *citing United States v. Schooner Peggy,* 1 Cranch 103 (1801).

Bradley is a most interesting case that arises out of the "massive resistance" to school desegregation mandated by the Supreme Court in *Brown v. Board of Education,* 347 U.S. 483 (1954). The school board of the City of Richmond (capital of the former Confederacy) fought school desegregation at every turn, right up to the point of being jailed for contempt of court and then backing down. After finally securing compliance with school desegregation orders, the attorneys for parents of African-American children sought a court order requiring the school board to pay attorney fees for the plaintiff parents.

The "American rule" on attorney fees is that each side is responsible for paying its own attorney, in the absence of a

statute authorizing a court to order the losing party to pay the attorney fees of the prevailing party. Although there was no statute in effect at the time that provided for shifting the attorney fee, the U.S. District Judge, in the exercise of his equity powers, ordered the Richmond school board to pay $43,355 in attorney fees for legal services rendered for the plaintiff parents between Mar. 10, 1970, and Jan. 29, 1971.

The school board appealed to the U.S. Court of Appeals for the 4th Circuit, which sits in Richmond. After the 4th Circuit oral argument, but before the 4th Circuit rendered its decision, Congress enacted the Emergency School Aid Act (ESAA), which went into effect on July 1, 1972. Section 718 of that act granted authority to federal courts to direct losing parties to pay attorney fees for prevailing parties in school desegregation cases.

The 4th Circuit reversed the award of attorney fees to the prevailing African-American parents. The appellate court noted that there was no statute in effect at the time of the District Court's order, or at the time the legal services were rendered, that authorized the District Court to order the school board to pay the plaintiffs' attorney fees, and that the new section 718 of the ESAA should not be applied retroactively to legal services rendered prior to July 1, 1972. *Bradley v. School Board of the City of Richmond,* 472 F.2d 318 (4th Cir. 1972).

The Supreme Court unanimously reversed the 4th Circuit, holding that applying a new procedural rule (authorizing the awarding of attorney fees to the prevailing side) to pending litigation was not manifestly unjust or inconsistent with the text or legislative history of the new statute. The Court also held that "even where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect." Bradley, 416 U.S. at 715. It is clear that the "no statute of limitations" rule of 38 U.S.C. 4327(b) should be applied to causes of action that accrued prior to Oct. 10, 2008, as well as causes of action that accrued after that date, but cases that were final prior to Oct. 10, 2008, are not to be reopened.

I am most pleased with the enactment of the "no statute of limitations" rule, but I also want to reiterate my advice that you avoid sleeping on your rights. In my view, section 4327(b) does not repeal or preclude the application of the equitable doctrine of laches. Moreover, the plaintiff generally has the burden of proof under USERRA. If you wait many years to file suit, you may find that it is much more difficult to prove your case. Over time, witnesses forget and eventually die, and records become unavailable. It is more likely that the failure of proof problem will affect the veteran, rather than the employer. If you believe that your USERRA rights have been violated, you should seek counsel and file suit sooner rather than later.