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16th Supreme Court Case Relating to Reemployment Statute *King v. St. Vincent's Hospital,* 502 U.S. 215 (1991)

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1.0—USERRA Generally
10.1—Supreme Court Cases on Reemployment

William "Sky" King [as a footnote in the Supreme Court decision says, "How and why petitioner's nickname claimed a place in the caption of this case is a mystery of the record." *King,* 502 U.S. at 217 n. 1] spent a career as an enlisted member of the Alabama Army National Guard, rising to the rank of sergeant major (E-9). In 1987, he applied for and was selected for the position of command sergeant major of the Alabama Army National Guard. Selection for the position meant that he would be expected to perform a three-year (1987-90) full-time Active Guard and Reserve (AGR) tour. He notified his employer (St. Vincent's Hospital) that he would need to leave on or about Aug. 17, 1987 and would be away for about three years.

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[1]I invite the reader's attention to https://www.roa.org/page/LawCenter. You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

[2]BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) (Public Law 103- 353) on Oct. 13, 1994, replacing a law that can be traced back to 1940. The reemployment statute in effect before the enactment of USERRA had many formal names—it came to be known colloquially as the Veterans' Reemployment Rights (VRR) law. I invite the reader's attention to Law Review 104, for a comprehensive history of the reemployment statute.

The VRR law made confusing and cumbersome distinctions among categories of military training or service. Three different subsections of the VRR law, and three different sets of rules, applied to "active duty" depending on whether the individual had been drafted, had voluntarily enlisted in an Active Component, or had been called to active duty (voluntarily or involuntarily) from a Reserve Component. Another subsection, and another set of rules, applied to "initial active duty training." Still another subsection, with different rules, applied to "active duty for training" and "inactive duty training" (drills).

USERRA eliminated these confusing and cumbersome distinctions. Under this new law, all of those categories and still other kinds of uniformed service fall within USERRA's broad definition of "service in the uniformed services." 38 U.S.C. 4303(13). Under USERRA, the rules depend upon the *duration* of the servicemember's most recent period of service, not the category. But Congress did not enact USERRA until almost three years after the Supreme Court decided *King,* the latest Supreme Court case construing the reemployment statute.

Because of a glitch in the VRR law, National Guard AGR tours, which could last for years, were considered "active duty for training" for purposes of the VRR law. I discuss the origin and implications of that glitch in detail in Law Review 0642 (December 2006).

The VRR law imposed a strict (but with certain exceptions) four-year limit on the duration of a period or periods of active duty, relating to a specific employer relationship. If the individual employee were on active duty (in a specific period or cumulatively with that employer) for more than four years, the individual would lose the right to reemployment. Section 2024(d) of the VRR law, formerly codified at 38 U.S.C. 2024(d), applied to "active duty for training" as well as "inactive duty training." Most active duty for training periods last about two weeks, but in the 1970s the Reserve Components started asking some members to perform much longer active duty for training periods. Moreover, three-year AGR tours were considered active duty for training for purposes of the VRR law.

The lack of an express limit in section 2024(d) led to a lengthy argument about whether there was an implied limit or a "rule of reason." The Supreme Court finally ended that argument when it decided *King.*

As an example, I invite the reader's attention to *Eidukonis v. Southeastern Pennsylvania Transportation Authority,* 873 F.2d 688, 694 (3rd Cir. 1989). The U.S. Court of Appeals for the Third Circuit held that the frequent and lengthy Army Reserve active duty for training periods

performed by Kestutis Eidukonis violated a judicially created "rule of reason" and that Mr. Eidukonis did not have the right to continue in his civilian job. In *Kolkhorst v. Tilghman,* 897

F.2d 1286 (4th Cir. 1990), the U.S. Court of Appeals for the Fourth Circuit declined to adopt any such "rule of reason" limiting section 2024(d). The Supreme Court granted *certiorari* in *King* to resolve this intercircuit conflict.

When Mr. King informed his employer that he would be leaving in August 1987 for about three years of full-time AGR duty, the employer informed him in no uncertain terms that it considered such a lengthy military tour to be unreasonable and unprotected. The employer then took the additional step of suing Mr. King in the U.S. District Court for the Northern District of Alabama, seeking a declaratory judgment to the effect that Mr. King would not have the right to reemployment at the hospital at the end of his three-year AGR tour. Today, section 4323(f) of USERRA [38 U.S.C. 4323(f)] prevents such employer-initiated lawsuits. I invite the reader's attention to Law Review 115.

In an unreported decision, the District Court found Mr. King's request for a three-year military leave of absence to be unreasonable and granted the employer's request for a declaratory judgment that Mr. King would not have the right to reemployment at the end of his three-year military tour. With the help of the Department of Labor and the Department of Justice, Mr. King appealed to the U.S. Court of Appeals for the 11th Circuit, which affirmed the District Court's judgment. *St. Vincent's Hospital v. King,* 901 F.2d 1068 (11th Cir. 1990).

The Supreme Court granted *certiorari* (agreed to hear the case) because of the importance of the issue and the intercircuit conflict as to whether a "rule of reason" limited the servicemember's rights under section 2024(d). In a well-written, unanimous decision by Justice David Souter, the Supreme Court firmly rejected the "rule of reason" that had been adopted by several courts. Justice Souter's opinion notes that other subsections of section 2024 had explicit durational limits—under section 2024(a), active duty was limited to four years. If Congress had intended a limit to apply under section 2024(d), Congress would have written such a limit into the language of the subsection. King, 502 U.S. at 218-221.

Justice Souter's opinion also cites the very first Supreme Court reemployment case, *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285, in support of "the canon [of statutory construction] that provisions for benefit of members of the Armed Forces are to be construed in the beneficiaries' favor." *King,* 502 U.S. at 221.

Justice Souter's opinion also makes an interesting reference to the adoption and later rejection of the "rule of reason" by the Department of Labor, after criticism of that rule by Congress. "The inference that Congress intended no such limits as the hospital espouses is buttressed by a joint HouseSenate Conference Committee's disapproval of a shift in the position taken by the Department of Labor on this issue. See United States Department of Labor, Veterans' Reemployment Rights Handbook 111 (1970). After *Lee v. Pensacola,* 634 F.2d 886 (5th Cir. 1981), the department adopted the different view that section 2024(d) applied only to leaves of

90 days or less. See H.R. Rep. No. 97-782, p. 8 (1982). Subsequently, a HouseSenate Conference Committee Report announced that the House and Senate Veterans Affairs Committees 'did not believe that the 90-day limit was well-founded either as legislative interpretation or application of the pertinent case law.' 128 Cong. Rec. 25513 (1982). Coming as it did in the aftermath of Congress's decision to place AGR participants under the coverage of section 2024(d), this statement is decidedly at odds with the hospital's position, and confirms the conclusion that enactment of the AGR program was not intended to modify the ostensibly unconditional application of section 2024(d)." *King,* 502 U.S. at 222.

Section 4312(h) of USERRA, 38 U.S.C. 4312(h), explicitly adopts the *King* rule that no "rule of reason" or "balancing test" limits the USERRA rights of the servicemember. I invite the reader's attention to Law Review 30 for an extended discussion of the text, legislative history, and implications of section 4312(h).

There is no room for judicial balancing of the rights of the servicemember against the economic interests of the employer. Congress has already done the balancing, and Congress has come down clearly on the side of the servicemember. Congress recognized that the reemployment statute can be burdensome on the employer. But Congress also recognized that the burdens borne by employers are small in comparison to the far greater burdens and sacrifices (sometimes the ultimate sacrifice) borne by those who serve in our armed forces. Way back in 1940, when Congress first enacted the reemployment statute, Sen. Elbert Thomas of Utah acknowledged that the reemployment statute can be burdensome on employers, but that the burden is justified "because the lives and property of employers, as well as everyone else in this country, are protected by such [military] service."

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