LAW REVIEW 934

(SEPTEMBER 2009)
1.1.3.7—Coverage of Examination to Determine Fitness
1.4—USERRA Enforcement

Another Good Precedent on Reemployment Rights

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Hanna v. American Motors Corp., 557 F.2d 118 (7th Cir. 1977); *Hanna v. American Motors Corp.,* 724 F.2d 1300 (7th Cir. 1984).

In his famous soliloquy contemplating suicide, Prince Hamlet ticked off the various frustrations of life, including "the law's delays." William Shakespeare, *Hamlet,* Act III, Scene I. In the intervening 400 years, that situation has only gotten worse. This case is a good illustration of the phenomenon.

Samuel C. Hanna was hired by American Motors Corp. in September 1970, and he worked on the American Motors assembly line in Kenosha, Wis. The Vietnam War was raging on, and the draft was in effect. Mr. Hanna was required to appear at the Armed Forces Induction Center in Milwaukee for a mandatory pre-induction physical examination on Sept. 17, 1970, and he unavoidably missed a day of work. He was required to report for follow-up examinations on Dec. 3, Dec. 4, and Dec. 7, and he missed work on those days as well.

As I explained in Law Review 50 (September 2002) and Law Review 0913 (April 2009), the Uniformed Services Employment and Reemployment Rights Act (USERRA) accords the right to reemployment to a person who leaves a civilian position of employment for voluntary or involuntary "service in the uniformed services" and USERRA's definition of that term includes a period of time when an individual is away from his or her civilian job for the purpose of an examination to determine fitness to perform uniformed service. You can find all prior Law Review articles at www.roa.org/law_review.

Before the 1994 enactment of USERRA, the Veterans' Reemployment Rights Act (VRRA) accorded reemployment rights to persons who left jobs for voluntary or involuntary military service. Like USERRA, the VRRA also protected those who left jobs for examinations to determine fitness for service. Thus, Mr. Hanna's absences from work on Sept. 17, Dec. 3, Dec. 4, and Dec. 7, 1970 were protected by the VRRA. Under the collective bargaining agreement between the United Automobile Workers and American Motors, Mr. Hanna (as a new employee) was required to complete a 60-day probationary period before obtaining seniority. The 60 days only included days when the new employee worked. Attainment of seniority after working 60 actual workdays was automatic and related back to the employee's hire date.

After completing his pre-induction physical on Dec. 7, 1970, Mr. Hanna reported back to work on Dec. 8. Ten days later, he was laid off due to a reduction in force (RIF) necessitated by a reduced demand for American Motors automobiles. The RIF included all Kenosha employees who had not yet completed their 60-day probationary periods. As of Dec. 18, 1970, Mr. Hanna had completed 56 days of work at the Kenosha plant. He was not given credit for the four days that he missed because of his pre-induction physical, but he should have been. If he had been properly credited for those days, as required by the VRRA, he would have had 60 workdays as of Dec. 18, and he would have escaped the RIF, at least until Feb. 28, 1971.

On March 10, 1971, Mr. Hanna reported to active duty as ordered. He did no work for American Motors between Dec. 18 and March 10. As far as American Motors was concerned, Mr. Hanna left its employment without ever completing the 60-day probationary period within the first year of employment, as required by the collective bargaining agreement. On Sept. 10, 1971, while Mr. Hanna was on active duty, American Motors sent him a letter informing him that his employment had been terminated because he failed to complete the 60-day probationary period within the first year after his hire date.

Mr. Hanna remained on active duty for almost two years, including nine months in Vietnam. The Army honorably discharged him on Feb. 22, 1973, and he returned to Kenosha and applied for reemployment at American Motors. Company officials told him that he had no reemployment rights, but he returned to work as a "new hire" on March 22, 1973.

On April 23, Mr. Hanna complained to American Motors that it was violating the VRRA in that it did not recognize his seniority date as Sept. 14, 1970, the date of his original hire. The company asserted that the VRRA did not apply because Mr. Hanna never completed 60 workdays of probation before he was inducted into military service. The very next day, Mr. Hanna left work in protest and the company fired him. Mr. Hanna complained to the U.S. Department of Labor (DOL), which was then responsible for enforcing the VRRA and is now responsible for enforcing USERRA. DOL investigated Mr. Hanna's complaint and found it to have merit. After DOL tried unsuccessfully to get American Motors to come into compliance, DOL referred the matter to the U.S. Department of Justice (DOJ), which filed suit on Mr. Hanna's behalf in January 1975 in the U.S. District Court for the Eastern District of Wisconsin.

American Motors filed a motion for summary judgment, which the District Court granted. DOJ appealed on Mr. Hanna's behalf, and the U.S. Court of Appeals for the 7th Circuit reversed. "As seen, plaintiff should be viewed as having held an 'other than temporary position' as early as the layoff date of Dec. 18, 1970. Therefore, under 38 U.S.C. 2024(d) and (e), plaintiff had to be credited with the four days he missed due to the pre-induction physicals. Were plaintiff credited with the four days, he would have been deemed non-probationary and would not have been laid off until Feb. 28, 1971. It is irrelevant that the defendant may have laid him off in good faith. *Cf. O'Mara v. Petersen Sand & Gravel Co.,* 498 F.2d 896, 898 (7th Cir. 1974). But for the pre-induction physicals, plaintiff would have collected his salary until Feb. 28, 1971, and he would have been reinstated upon return from active duty with a Sept. 14, 1970, date with all attendant rights under the collective bargaining agreement. Thus under the Act plaintiff is entitled to reinstatement with a Sept. 14, 1970, seniority date and to collect lost wages from Dec. 18, 1970, until at least Feb. 28, 1971, his proper layoff date. 38 U.S.C. 2022; *United States ex rel. Adams v. General Motors Corp, supra*. Plaintiff did not waive his rights under the Act by his April 24, 1973, refusal to continue in the inferior status accorded him by the defendant." *Hanna v. American Motors Corp., 557 F.2d 118, 121-22 (7th Cir. 1977) (Hanna I.)*

In a footnote, the Court of Appeals further held: "He [Hanna] will also be entitled to recover lost wages from April 24, 1973, when he left defendant's employ, to date, unless on remand defendant can show that plaintiff abandoned his willingness to continue in its employ under the conditions mandated by the Act when he enrolled in the University of WisconsinParkside in September 1973 as a student seeking a degree. *See Taylor v. Safeway Stores, Inc.,* 524 F.2d 263, 267-268 (10th Cir. 1975)." *Hanna I,* 557 F.2d at 122 note 2.

On June 23, 1977, the Court of Appeals reversed the District Court's summary judgment for the employer and remanded the case to the District Court. This case should have been wrapped up within a few weeks thereafter. It was not, because of foot-dragging by American Motors and the District Court judge. Also, it did not help that DOJ apparently lost interest in representing Mr. Hanna.

In February 1979, the District Court dismissed Mr. Hanna's complaint for alleged want of prosecution. Mr. Hanna then retained private counsel (Robert F. Sfasciotti of Kenosha) and appealed to the 7th Circuit, which reversed in an unpublished order and remanded the case back to the District Court, solely for trial as to the amount of damages due to Mr. Hanna. The District Court awarded minimal damages, and Mr. Hanna again appealed to the 7th Circuit.

After the case went back to the 7th Circuit for the third time, the Court of Appeals reviewed the District Court's substantial reduction of Mr. Hanna's back-pay award, based on the District Court's finding that Mr. Hanna had not made a sufficiently diligent effort to mitigate his damages by seeking other employment opportunities. Although Mr. Hanna's job-hunting efforts seem minimal, and although he had enrolled as a full-time college student, the Court of Appeals found that the District Court had erred in reducing the back-pay award on this basis. *Hanna v. American Motors Corp.,* 724 F.2d 1300, 1303-08 (7th Cir. 1984) *(Hanna II).*

The District Court also refused to award pre-judgment interest to Mr. Hanna, in view of American Motors' "good faith" and "the closeness of the liability question." The Court of Appeals reversed, finding the refusal to award pre-judgment interest to be an abuse of discretion. I discuss that aspect of *Hanna II* in Law Review 0611 (April 2006). The Court of Appeals computed the pre-judgment interest at $15,347.56. Normally, an appellate court would let the

District Court make computations of this kind. "Due to the fact that this lawsuit originated in 1975 and has been before this court on three separate occasions, we have calculated the pre-judgment interest award in order to facilitate and expedite payment of the same in the district court." *Hanna II*, 724 F.2d at 1312, note 14.

The *Hanna* case certainly took a long time, but in the end justice was served, and a favorable precedent was created. That precedent benefits servicemembers who were not even born when this case was filed.