LAW REVIEW 948

(Web only)
1.2—USERRA—Discrimination Prohibited
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No Time Limit on Justice for the Returning Veteran—Part 2

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***Middleton v. City of Chicago,* 578 F.3d 655, 662-65 (7th Cir. Aug. 24, 2009).**

On Oct. 10, 2008, Congress enacted the Veterans' Benefits Improvement Act of 2008 (VBIA 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 in title 38, United States Code, sections 4301-4335 (38 U.S.C. 4301-4335).

Section 311(f)(1) of VBIA 2008 added a new section 4327 to USERRA, 38 U.S.C. 4327. This new section includes: "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 clear that there is no statute of limitations with respect to USERRA claims accruing on or after Oct. 10, 2008. What is not so clear is how this new "no statute of limitations" rule applies to claims accruing before Oct. 10, 2008. In Law Review 0925 (June 2009), I expressed my opinion that this new rule applies to USERRA claims accruing before Oct. 10, 2008. I want to bring to the readers' attention that, in a very recent case, the United States Court of Appeals for the 7th Circuit has disagreed with my conclusion.

The 7th Circuit is a federal appellate court, one step above the federal district courts and one step below the United States Supreme Court. This court sits in Chicago and reviews federal district court decisions from Illinois, Indiana, and Wisconsin. Federal district courts in the 7th Circuit will follow *Middleton* as binding circuit precedent. Other district and appellate courts will certainly read and may follow this precedential decision.

Congress enacted the reemployment statute in 1940, as part of the Selective Training and Service Act, the law that led to the drafting of millions of young men (including my late father) for World War II. In 1941, as part of the Service Extension Act, Congress amended the reemployment statute to make it apply to voluntary enlistees as well as draftees. For a comprehensive history of the reemployment statute, I invite the reader's attention to Law Review 104 (Dec. 2003), titled "Everything You Always Wanted To Know About USERRA But Were Afraid To Ask." You can find all previous Law Review articles (more than 600) at www.roa.org/law_review.

The reemployment statute had many formal names, but it came to be known colloquially as the Veterans' Reemployment Rights Act (VRRA). This law was codified in title 50 Appendix of the United States Code, as part of the Selective Service Act (although the law also applied to volunteers) until 1974. The Vietnam Era Veterans Readjustment Assistance Act of 1974 (VEVRAA) moved the VRRA to title 38 (veterans' benefits).

The reemployment statute has applied to the federal government and to private employers since 1940. In 1974, as part of VEVRAA, Congress amended the law to make it apply to state and local governments as well.

A statute of limitations is a rule requiring that a suit be filed within a certain period of time after the cause of action accrues. Let us assume that I am in the crosswalk with a walk light and you negligently run into me with your automobile, causing me grievous injury. Let us assume that in the relevant state the statute of limitations for vehicular accident claims is two years, and I wait two years and one day to file suit against you. My lawsuit will be summarily dismissed as being barred by the statute of limitations.

The reemployment statute has never had a statute of limitations, but in the 1960s and 1970s there were several court decisions that applied state statutes of limitations to VRRA claims and dismissed the claims as time-barred. In 1974, as part of VEVRAA, Congress amended the VRRA to provide that, "No State statute of limitations shall apply to any proceeding under this chapter."

As I explained in Law Review 0925, the 1974 legislative history makes clear that Congress, in 1974, believed that the cases applying state statutes of limitations were incorrectly decided. The 1974 amendment was intended to *clarify* that no statute of limitations applied or had ever applied to reemployment rights cases.

In the absence of a statute of limitations, the ancient equitable doctrine of laches has always applied to reemployment cases. *Laches* is an affirmative defense for which the employer-defendant bears the burden of proof. The employer must show that the veteran has *inexcusably* delayed in asserting his or her claim and that, because of the delay, evidence that would likely benefit the employer has become unavailable. With the passage of many years, memories dim, witnesses die or otherwise become unavailable, and records are lost or destroyed.

I developed my interest and expertise in the reemployment statute during the decade that I worked for the United States Department of Labor (DOL) as an attorney. In 1986, a DOL-Department of Defense (DOD) task force was appointed to study the VRRA and to propose improvements. Together with one other DOL attorney (Susan M. Webman), I largely drafted the task force's work product. In February 1991, President George Herbert Walker Bush presented the task force's work product to Congress as his proposal. In the 102nd Congress (1991-92), bills to reform the VRRA passed both the House of Representatives and the Senate, but the differences between the two versions could not be resolved during the 102nd Congress.

Near the end of the 103rd Congress, the House-Senate differences were resolved. On Oct. 13, 1994, President William J. Clinton signed into law Public Law 103-353, called the Uniformed Services Employment and Reemployment Rights Act (USERRA). This was a long-overdue rewrite of the VRRA, which can be traced back to 1940. USERRA made some significant improvements, but the basic concepts go back to 1940. You should think of the reemployment statute as being 69 years old, not 15.

As enacted in 1994, USERRA carried over unchanged the VRRA's language (enacted in 1974) that "No State statute of limitations shall apply to any proceeding under this chapter." No mention was made of federal statutes of limitations.

On Dec. 1, 1990, in response to criticism regarding the lack of a uniform federal statute of limitations, Congress enacted 28 U.S.C. 1658(a), which provides: "Except as otherwise

provided by law, a civil action arising under an Act of Congress enacted after the date of enactment of this section may not be commenced later than four years after the cause of action accrues."

Congress enacted USERRA almost four years after it enacted 28 U.S.C. 1658(a), but it can be argued that section 1658(a) does not apply to USERRA cases because USERRA is but a recodification of a law that can be traced back to 1940. On that basis, the United States District Court for the Eastern District of Tennessee held that the four-year "default" statute of limitations under section 1658(a) does not apply to USERRA cases. *See Akhdary v. City of Chattanooga,* 2002 U.S. Dist. LEXIS 26898 (E.D. Tenn. May 22, 2002). I discuss *Akhdary* in Law Review 0724 (May 2007). *Akhdary* has been criticized as being inconsistent with a later-decided Supreme Court case: *Jones v. R.R. Donnelly & Sons. Co.,* 541 U.S. 369 (2004).

Charles Middleton served on active duty in the Air Force from 1960 until 1989. In 1993, four years after he retired from the Air Force, he applied for two City of Chicago positions. In November 1994 (one month after President Clinton signed USERRA into law), the city notified him that he had not been chosen for one of the two positions. He never heard back about the other position.

For unexplained reasons, he waited almost 13 years before filing suit against the City of Chicago in the United States District Court for the Northern District of Illinois in July 2007. He cited USERRA in his lawsuit, but it may be that the VRRA (not USERRA) applied to his discrimination claim.

For the first 15 years after it was enacted, the VRRA only accorded the right to reemployment after *active duty.* In 1955 and 1960, Congress amended the law to expand the application to include initial active duty training, active duty for training, and inactive duty training (drills) performed by Reserve and National Guard personnel. As the right to reemployment changed from a once-in-a-lifetime event to a recurring event, some employers were tempted to rid themselves of the inconvenience and expense of accommodating recurring absences from work for National Guard or Reserve training by the simple expedient of firing the employee.

In 1968, Congress enacted what became section 2021(b)(3) of the VRRA. That section made it unlawful for an employer to deny employee retention in employment or a promotion or incident or advantage of employment because of the employee's "obligations as a member of a Reserve Component of the armed forces." Some employers then chose to avoid the inconveniences of Reserve Component training by refusing to hire Reserve Component members. Accordingly, in 1986 Congress amended section 2021(b)(3) to outlaw discrimination in initial employment as well as discrimination against those already employed.

When Congress enacted USERRA in 1994, it expanded considerably the protection against discrimination. "A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation." 38 U.S.C. 4311(a).

Mr. Middleton was not a member of a Reserve Component of the armed forces in 1993, when he applied for two City of Chicago positions. He was retired from the United States Air

Force after having served on active duty from 1960 until 1989. Section 2021(b)(3) of the VRRA did not outlaw discrimination against people like Mr. Middleton, because that section only outlawed discrimination on the basis of "obligations as a member of a Reserve Component of the armed forces." Section 4311(a) of USERRA broadens the protection to outlaw discrimination against anyone who has ever been a member of or applied to join any one of the uniformed services (Army, Navy, Marine Corps, Air Force, Coast Guard, and the commissioned corps of the Public Health Service).

Section 4311(a) is not limited to Reserve Component members, but the vast majority of successful cases involve Reserve Component members. Especially after the terrorist attacks of Sept. 11, 2001, it is often not difficult to convince a judge, jury, or the Merit Systems Protection Board that an employer unlawfully considered the military obligations of a *current* National Guard or Reserve member when making a decision about hiring, promotion, or firing. An employer may object to the burden and inconvenience often imposed on the civilian employer of a National Guard or Reserve member, who may frequently demand the right to be away from the civilian job for military training or service. Thus, the employer may be tempted to avoid or rid itself of the burden by firing the Reserve Component member or not hiring the member in the first place. For a veteran or military retiree, it is much more difficult to show a nexus between an employment decision and the claimant's military service in the past, often distant past. The military retiree or veteran will not be asking for time off from work for periodic military training. It is unlikely (but not wholly out of the realm of possibility) that the retiree or veteran will volunteer for or be called to additional military service. There may be some civilian employers who have ideological objections to military service, even service four decades ago in Vietnam. If the employer uses an individual's military service (even service decades ago) as a negative factor in making a decision about hiring, promotion, or firing, then the employer has violated section 4311(a) of USERRA.

Mr. Middleton's lawsuit was dismissed almost immediately after he filed it, based on the statute of limitations. Thus, no discovery took place, and we do not know how Mr. Middleton and his lawyer expected to prove that his 1960-89 service in the Air Force was a motivating factor in the City of Chicago's decision not to hire him for one of the two positions for which he applied in 1993.

USERRA forbids discrimination against veterans and military retirees, based on their past service in the uniformed services. But please do not waste the court's time, the employer's time, and your own time making an allegation that you cannot possibly prove. If you are not a current member of a Reserve Component of the armed forces, it is unlikely that employer animus against you was motivated by your past service.

Regardless of the statute of limitations, sleeping on your rights for 13 years is a bad idea. If you believe that your rights under USERRA or any other law have been violated, you should consult an attorney and (if the attorney so advises) file suit sooner rather than later. If you sleep on your rights, you may find that you have no enforceable rights when you wake up.

If you have questions, suggestions, or comments, please contact Captain Samuel F. Wright, JAGC, USN (Ret.) (Director of the Servicemembers' Law Center) at swright@roa.org or 800-809-9448, ext. 730.