

LAW REVIEW 953

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Joint Employment Doctrine Under USERRA-Continued

By Captain Samuel F. Wright, JAGC, USN (Ret.)

Silva v. Department of Homeland Security, 2009 MSPB 189 (Merit Systems Protection Board Sept. 23, 2009).

Brigadier General (BG) Michael J. Silva, USAR (a life member of ROA) is the named appellant in an important new case under the Uniformed Services Employment and Reemployment Rights Act (USERRA). The facts in this article come directly from the published decision.

From June 2005 to May 2006, Mr. Silva worked for SPS Consulting LLC (SPS) on a contract with the United States Department of Homeland Security (DHS). SPS provided DHS with financial support services through two positions, one of which was titled Financial Manager (FM). SPS put Mr. Silva in the FM position, but under the contract DHS retained the right to approve or disapprove any substitutions of the person serving as FM.

In February 2006, BG Silva was selected to command the 411th Engineers and immediately prepare for mobilization and deployment to Iraq. He immediately notified SPS and DHS. Mr. Silva suggested a particular person to fill his job, and she was hired, with DHS' approval.

In May 2006, BG Silva was called to active duty and deployed to Iraq. BG Silva was released from active duty in Aug. 2007, and he made a timely application for reemployment with SPS and DHS. Although he met the eligibility criteria for reemployment under USERRA, he was not reemployed.

SPS initially told Mr. Silva that it would reemploy him in the FM position that he had left, but the company changed its position and told him that it would not reemploy him because DHS had disapproved his reemployment. The new employee apparently did a fine job during Mr. Silva's absence, and the DHS contract administrator did not want her to be displaced.

I invite the readers' attention to Law Review 0829 (June 2008), titled "USERRA Overrides the Interests of the Replacement Employee." You can find more than 600 articles at www.roa.org/law_review. You can also find a detailed Subject Index, to facilitate finding articles about very specific topics.

The lack of a current vacancy in the FM position, at the time Mr. Silva applied for reemployment, in no way excused SPS from its obligation to reemploy Mr. Silva. In some circumstances, reemploying the returning veteran necessarily means displacing another employee, and this is apparently one of those cases. If an employer could defeat the reemployment rights of the employee called to the colors simply by filling the position, USERRA would be of little value.

I can certainly sympathize with SPS' predicament. USERRA required the company to reemploy Mr. Silva, but the DHS contract administrator threatened to terminate the contract if SPS did so. But customer preference can never be a defense to a violation of USERRA or any employment law. "We must violate USERRA because our customer insists that we do so" is indefensible. I invite the readers' attention to Law Review 0629 (Apr. 2006).

As I explained in Law Review 154 (Dec. 2004), and as the Department of Labor (DOL) USERRA regulations provide at 20 C.F.R. 1002.37, it is possible for an individual employee to have two employers, in the same job, at the same time. This is called the "joint employer" situation and Mr. Silva's situation is a good example.

SPS and DHS were Mr. Silva's joint employers at the time he was called to the colors, in that each entity had control over certain aspects of his employment situation. Both SPS and DHS had responsibilities under USERRA. By standing in the way of the reemployment of the returning veteran, DHS violated USERRA, even though Mr. Silva never worked for DHS in the traditional sense—he was not a federal civilian employee.

Mr. Silva complained to DOL's Veterans' Employment and Training Service (DOL-VETS), alleging that both SPS and DHS had violated USERRA. DOL-VETS is responsible for investigating complaints that any employer has violated USERRA. *See* 38 U.S.C. 4321, 4322. The reemployment statute applies to essentially all employers in this country, including the federal government, state and local governments, and private employers, regardless of size.

DOL-VETS investigated Mr. Silva's complaint and agreed with his allegation that both SPS and DHS had violated USERRA. After unsuccessful efforts to convince both employers to come into compliance, DOL-VETS referred Mr. Silva's case against SPS to the Attorney General (AG), in accordance with 38 U.S.C. 4323(a). DOL-VETS referred Mr. Silva's complaint against DHS to the Office of Special Counsel (OSC), in accordance with 38 U.S.C. 4324(a)(1).

Under section 4323 of USERRA cases against state and local governments and private employers are to be filed in the United States District Court for any district where the private employer maintains a place of business or where the state or local government exercises its functions. *See* 38 U.S.C. 4323(c). Under section 4324 of USERRA, cases against federal executive agencies are to be filed in the Merit Systems Protection Board (MSPB), a quasi-judicial federal agency.

If the AG is reasonably satisfied that the claimant is entitled to the USERRA benefits that he or she seeks, the AG may appear and act as attorney for the claimant (after referral from DOL-VETS) in filing and prosecuting the case in the appropriate federal district court. *See* 38 U.S.C. 4323(a)(1). If OSC is reasonably satisfied that the claimant is entitled to the benefits that he or she seeks, OSC may represent the claimant in a USERRA action before the MSPB, against a federal agency. *See* 38 U.S.C. 4324(a)(2)(A).

The AG declined to represent Mr. Silva in filing suit against SPS. In accordance with standard practice in these matters, the AG has not explained and will not explain the rationale for declining representation. Mr. Silva has the right to retain private counsel and file suit against SPS, but he has not yet done so.

The AG declined to represent Mr. Silva in his claim against SPS, but OSC found his case meritorious and initiated an MSPB action against DHS. In accordance with MSPB rules, his case was presented to an Administrative Judge (AJ) of the MSPB. The AJ conducted a hearing on the merits of Mr. Silva's claim but then granted the DHS motion to dismiss based on an asserted lack of MSPB jurisdiction over cases of this nature (involving "joint employees" who are not federal employees in the traditional sense).

The OSC appealed, on behalf of Mr. Silva, to the MSPB itself. The MSPB consists of three members, each of whom is appointed by the President with Senate confirmation. (One of the positions is currently vacant.) On Sept. 23, 2009, the MSPB agreed with OSC and found that it has jurisdiction to hear Mr. Silva's case against DHS. The MSPB remanded the case to the AJ to make findings on the merits of Mr. Silva's claim. We will keep the readers advised of developments in this interesting and important case.

USERRA did not create the MSPB—it was created by the Civil Service Reform Act of 1978. The MSPB adjudicates cases involving federal agencies and federal employees under many different laws, not just USERRA. USERRA (enacted in 1994) added to the jurisdiction of the MSPB. The MSPB's jurisdiction under section 4324 of USERRA is not limited to cases involving federal employees in the traditional sense. The MSPB USERRA jurisdiction includes cases involving unsuccessful applicants for federal employment (those who allege discrimination in initial employment on the basis of military affiliation or obligation) [*See* Law Review 0904 (Jan. 2009).] and employees of federal non-appropriated fund instrumentalities. *See* Law Review 102 (Dec. 2003), Law Review 163 (Mar. 2005), and Law Review 0813 (Apr. 2008). I believe that the MSPB was correct in holding that it has jurisdiction to adjudicate Mr. Silva's claim that DHS violated USERRA..

USERRA's very first section expresses the "sense of Congress that the Federal Government should be a model

employer in carrying out the provisions of this chapter." 38 U.S.C. 4301(b). DHS (which includes the Coast Guard) is one of the beneficiaries of USERRA. One would hope that DHS would especially strive for "model employer" status. It is most unfortunate that it was necessary for OSC to bring an action against DHS because DHS stood in the way of USERRA compliance by a DHS contractor.

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.