LAW REVIEW 1011

An Instructive New USERRA Case from Ohio

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

***Risner v. Haines,* 2009 WL 4280734 (N.D. Ohio Nov. 24, 2009).**

1.1.1.7—USERRA Application to State and Local Governments
1.2—USERRA –Discrimination Prohibited
1.4—USERRA Enforcement
1.6—USERRA Statute of Limitations

Lessons to be learned

There are three lessons to be learned from this new case decided by the United States District Court for the Northern District of Ohio:

1. If your employer is a state government agency, you are probably better off with the Department of Labor (DOL) and the Department of Justice (DOJ), rather than private counsel.
2. If the DOL-DOJ system seems to be working for you, stick with it.
3. If you sleep on your rights, you are likely to find that you have no enforceable rights when you awake.

Facts of the case

John L. Risner (a life member of ROA) began working for the Ohio Department of Rehabilitation and Corrections (ODRC) in June 1994. In 1997, he took a military leave of absence from his ODRC position to attend Officer Candidate School and was commissioned a Second Lieutenant in the Air Force Reserve, and then he returned to his ODRC employment.

In March 1999, Mr. Risner applied for promotion to the position of Parole Services Supervisor in the Mansfield Region of the ODRC. On March 22, 1999, a three-person panel interviewed him, and the panel included Ms. Sharon Haines, Regional ODRC Administrator for the Mansfield Region. During the course of the interview, Mr. Risner brought up his military experience. In his deposition for this lawsuit, Mr. Risner claimed that Ms. Haines stated that it would be difficult to promote Mr. Risner due to the time he was away from his civilian job because of his military commitment. In her deposition, Ms. Haines denied having said any such thing.

Mr. Risner promptly made a written complaint to the Veterans' Employment and Training Service, United States Department of Labor (DOL-VETS), and that agency investigated the complaint. On Dec. 23, 1999, DOL-VETS sent a letter to Mr. Risner, advising him of the results of the investigation. The letter stated the conclusion that Mr. Risner's "military commitment was a factor in the decision not to promote him." As required by section 4322(e) of the Uniformed Services Employment and Reemployment Rights Act (USERRA), the letter also advised Mr. Risner that he could request that DOL-VETS refer the case to the United States Attorney General or that Mr. Risner could retain private counsel and proceed with a lawsuit against his employer. Mr. Risner has acknowledged that he took no action in response to this Dec. 1999 letter until Aug. 2006, when he filed this lawsuit.

Law that applies

In his complaint to DOL-VETS, and later in this lawsuit, Mr. Risner asserted that ODRC and certain ODRC officials violated section 4311(a) of USERRA when they denied him the promotion in the spring of 1999. Section 4311(a) provides as follows: "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) (emphasis supplied).

Section 4311(c) provides that the plaintiff can prevail by establishing that one of the protected activities listed in section 4311(a) was *a motivating factor* in the employer's unfavorable personnel decision (denial of promotion in this case). The plaintiff need not prove that the protected military activity constituted *the reason* for the employer's decision—it is sufficient to prove that the protected activity was *a motivating factor* in the employer's decision. If the plaintiff proves that by a preponderance of the evidence, the plaintiff prevails, unless the employer can *prove* (not just say) that it*would have* (not just could have) made the same decision in the absence of the protected activity. The DOL-VETS conclusion that Mr. Risner's military commitment was a factor in the employer's decision to deny him the promotion is not admissible in court, but it is quite likely that the agency had good reason for concluding as it did.

Lawsuit filed Aug. 2006

In the months following the Dec. 1999 DOL-VETS letter, Mr. Risner did not request that DOL-VETS refer his case to the Attorney General, and he did not retain an attorney and file suit. He did nothing further to pursue his case until early 2006, when Ms. Kathy Scott (the person selected over Mr. Risner for the 1999 promotion opportunity) informed him that she had heard Ms. Haines make discriminatory comments in 1999 about Mr. Risner's Air Force Reserve service. On Aug. 15, 2006 Mr. Risner filed suit against the ODRC, Ms. Haines, and other defendants, alleging that his USERRA rights had been violated when he was denied the 1999 promotion.

Suing a state government employer is difficult.

The 11th Amendment to the United States Constitution presented a serious problem to Mr. Risner's lawsuit against the ODRC, a part of the state government of Ohio. The 11th Amendment provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." By its terms, the 11th Amendment refers to a suit against a state by a citizen of another state, but the Supreme Court has held that 11th Amendment immunity also bars a suit against a state by a citizen of the same state. *See Hans v. Louisiana*, 134 U.S. 1 (1890).

As originally enacted in 1994, USERRA authorized an individual to sue a state government employer (as well as local governments and private employers) in federal court. Four years later, the United States Court of Appeals for the 7th Circuit (the federal appeals court for cases from Illinois, Indiana, and Wisconsin) held that USERRA was unconstitutional (under the 11th Amendment) insofar as it authorized an individual to sue a state in federal court. *See Velasquez v. Frapwell*, 160 F.3d 389 (7th Cir. 1998), citing *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

Later in 1998, Congress amended USERRA to address the *Velasquez* problem. "In the case of such an action [brought by the Attorney General] against a State (as an employer), the action shall be brought *in the name of the United Statesas the plaintiff in the action."* 38 U.S.C. 4323(a)(1) (final sentence) (emphasis supplied). "In the case of an action against a State (as an employer) by a *person,* the action may be brought *in a State court of competent jurisdiction in accordance with the laws of the State."* 38 U.S.C. 4323(b)(2) (emphasis supplied).

In Dec. 1999, when DOL-VETS advised Mr. Risner of the results of the DOL-VETS investigation, DOL-VETS also advised him that he could request that DOL-VETS refer the matter to the Attorney General. If Mr. Risner had made such a request, his case would have been referred. If the Attorney General had agreed that the Risner case had merit, the Attorney General would have filed suit against the State of Ohio in federal court, in the name of the United States, as plaintiff. This was Mr. Risner's best opportunity to get relief. He gave up that opportunity when he failed to act upon the Dec. 1999 DOL-VETS letter. If the Attorney General had filed suit in the name of the United States, there would not have been an 11th Amendment problem, because the 11th Amendment does not bar a suit against a state by the United States.

Instead, Mr. Risner waited until Aug. 2006 and then sued the State of Ohio, in his own name, in federal court. Not surprisingly, the court dismissed his suit, based on the 11th Amendment.

Mr. Risner sued individual supervisors.

In addition to naming the State of Ohio, Mr. Risner's suit also named Ms. Haines and other individual ODRC supervisors, in their personal capacities. USERRA defines 16 terms used in this law, including the term "employer." That definition includes "a *person*, institution, organization, or other entity to whom the employer has delegated employment-related responsibilities." 38 U.S.C. 4303(4)(A)(i) (emphasis supplied).

Mr. Risner's theory was that Ms. Haines was an "employer" for USERRA purposes because his employer (ODRC) had delegated employment-related responsibilities to her, and that she had utilized her delegated responsibilities to discriminate against him based on his military obligations. Ms. Haines is not a state, and the 11th Amendment does not bar a suit against her. This is an interesting theory, and it might have worked, but Mr. Risner waited too long to file this lawsuit.

Was Mr. Risner's Aug. 2006 lawsuit untimely?

The reemployment statute (originally enacted in 1940) has never had a statute of limitations, and in 1974 Congress added language to the effect that "no State statute of limitations" shall be applied in reemployment rights cases. That language was carried over into USERRA, the 1994 recodification of the 1940 reemployment statute. *See* 38 U.S.C. 4323(i).

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 4 years after the cause of action accrues." 28 U.S.C. 1658(a). Does this four-year default statute of limitations apply to USERRA cases? There are court decisions on both sides of that question, but the more recent decisions are coming out on the "yes, it applies" side.

2008 USERRA amendment

On Oct. 10, 2008, President Bush signed into law the Veterans' Benefits Improvement Act of 2008, Public Law 110-389, 122 Stat. 4163 (VBIA). This new law made several amendments to USERRA, including adding a new section 4327. "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) (emphasis supplied).

With respect to USERRA causes of action accruing on or after Oct. 10, 2008, there is *no statute of limitations*. But what about causes of action that accrued before Oct. 10, 2008? In Law Review 0925 (June 2009), I expressed the opinion that this "no statute of limitations" rule also applies to USERRA causes of action that accrued before Oct. 10, 2008. Unfortunately, the United States Court of Appeals for the 7th Circuit disagreed with my conclusion. *See Middleton v. City of Chicago*, 578 F.3d 655, 658 (7th Cir. 2009). I discuss Middleton and its implications in detail in Law Review 0948. I invite the reader's attention to www.roa.org/law_review. In *Risner*, the United States District Court for the Northern District of Ohio agreed with the 7th Circuit that the new (as of Oct. 10, 2008) "no statute of limitations" rule *does not apply* to causes of action that accrued before Oct. 10, 2008.

Don't sleep on your rights.

Let this be a lesson. Sleeping on your rights is always a bad idea. If you sleep on your rights, you are likely to find that you have no enforceable rights when you awake. If you believe that your rights under USERRA or any other law have been violated, you should seek legal advice as soon as possible. If your lawyer believes that you have a case worth pursuing, you should file suit sooner rather than later.

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.