

LAW REVIEW 1012

You Only Get One Chance To Make Your Case

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

1.1.1.8—USERRA-Applicability to Federal Government

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Q: From 1998 to 2008, I was a civilian employee of the Department of the Air Force and a Marine Corps Reservist. For years, my civilian supervisors at the Air Force Base gave me a hard time about my Marine Corps Reserve service and the occasional inconveniences for my civilian employer caused by my need to be away from work for military training and service.

The base commander fired me, citing the mistakes that I had allegedly made in one of my collateral duties. I think that the real reason was that he was annoyed with me about my Marine Corps Reserve service. I believe that firing me violated the Uniformed Services Employment and Reemployment Rights Act (USERRA).

I appealed the firing to the Merit Systems Protection Board (MSPB). I am not a lawyer, and I could not afford a lawyer, but the president of the local union assisted me. The case went to trial before an Administrative Judge (AJ) of the MSPB, and she ruled against me. I appealed to the MSPB itself, which affirmed the AJ's decision without comment.

I then filed a congressional complaint with my Congressman. The Congressman sent my letter to the base commander and later provided me a copy of the base commander's response. In his letter to my Congressman, the base commander acknowledged that he was annoyed with me concerning my Marine Corps Reserve service. But I am still without a job. Help!

A: Your next step, after the MSPB affirmed the AJ's decision, was to appeal to the United States Court of Appeals for the Federal Circuit. Writing a letter to your Congressman in no way substituted for filing a timely appeal to the Federal Circuit. You had a limited time to file that appeal, and that deadline has long since passed. Your case became final when the deadline for the appeal passed. Under the legal doctrine of *res judicata* (Latin for "the thing has been adjudicated"), you cannot file a new case about the firing.

Q: This is not fair! In his letter to my Congressman, the base commander impliedly admitted that the firing was motivated by my Marine Corps Reserve service, not by the problems I encountered in a collateral duty. I have learned that ten years ago at this base there was a case where a civilian employee made a similar mistake in the same collateral duty. That civilian employee was "counseled" about the mistake but was not fired or suspended.

A: In a civil case in court or in a quasi-judicial board like the MSPB, you only get one chance to make your case, and your chance was in the trial before the MSPB AJ. An appeal is not a new trial, and you do not get a chance to offer new evidence on appeal. On appeal, the appellate board or court looks to the record of the trial that has already been conducted. If you did not offer during the trial admissible and convincing evidence on an issue where you have the burden of proof, you lose.

To prevail in your USERRA claim about the firing, you would need to establish, by a preponderance of the evidence, that your Marine Corps Reserve service was a *motivating factor* in the decision to fire you. You need not establish that the Reserve service constituted the *reason* for the firing—it is sufficient for you to establish that it was one of the reasons. If you prove that, the burden of proof shifts to the employer to prove that it would have fired you anyway, for lawful reasons unrelated to your service, even if you had not been a reservist.

Even if you had made a timely appeal to the Federal Circuit, the court would not have considered the base commander's letter to your Congressman, because that was new evidence not presented in the trial before the MSPB AJ. Similarly, the evidence about the ten-year-old case where the civilian employee who made a similar mistake was not fired would be useful evidence for you, but if you did not present that evidence during the trial before the AJ, you lost your opportunity to present that evidence.

Q: In your Law Review 0925 (June 2009), you wrote that there is "No time limit on justice for the returning veteran." It seems to me that I should be able to appeal to the Federal Circuit now, although the deadline has passed. What gives?

A: On Oct. 10, 2008, President Bush signed into law the Veterans' Benefits Improvement Act, which made several amendments to USERRA. One of the amendments was to enact a new section 4327, which provides, in pertinent part, as follows: "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).

There is now *no statute of limitations* with respect to *initiating* USERRA cases based on causes of action that accrued on or after Oct. 10, 2008. How this new "no statute of limitations" rule applies to causes of action that accrued before Oct. 10, 2008 is still an open question. But section 4327(b) has no pertinence to your case. You *initiated* your case in a timely manner when you filed your MSPB appeal. Once you have initiated a case, section 4327(b) does not excuse you from deadlines for subsequent steps in that case. Your case became final when you missed the deadline to appeal to the Federal Circuit. You lost, and the lawfulness of your firing cannot be relitigated.

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.