LAW REVIEW 1046

USERRA Damages Can Be Awarded for Lost Military Pay

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1.1.1.7—USERRA Application to State and Local Governments

1.4—USERRA Enforcement

***Kolkhorst v. Tilghman,* 897 F.2d 1282 (4th Cir. 1990), *cert. denied,* 502 U.S. 1029 (1992).**

Kolkhorst was decided 20 years ago. Nonetheless, it remains an important case on the degree of burden that the federal reemployment statute can put on civilian employers (including state and local governments) and on the kind of damages that can be awarded for employer violations.

Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) in 1994, as a complete rewrite of the Veterans' Reemployment Rights Act (VRRA), which can be traced back to 1940. The United States Court of Appeals for the 4th Circuit decided *Kolkhorst* in 1990, four years before Congress enacted USERRA. The 4th Circuit includes Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

USERRA's legislative history makes clear the intent of Congress that VRRA case law is generally applicable in interpreting USERRA provisions: "The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protection against employment-related discrimination, and protection of certain other rights and benefits have been eminently successful for over fifty years. Therefore, the Committee [House Committee on Veterans' Affairs] wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act, remains in full force and effect in interpreting these provisions. This is particularly true of the basic principle established by the Supreme Court that the Act is to be 'liberally construed.' *See Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946); *Alabama Power Co. v. Davis,*431 U.S. 581, 584 (1977)." House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News*2449, 2452.

Eric Kolkhorst served on active duty in the Marine Corps from 1973 to 1977. After he left active duty, he affiliated with the Marine Corps Reserve, and he alternated between the Selected Reserve (paid to perform inactive duty training or drills and required to participate in periodic training) and the Individual Ready Reserve (IRR) (not paid for inactive duty training and not required to engage in periodic training but subject to mobilization in an emergency). In 1982, at the time he applied for employment as a police officer for the City of Baltimore, he was a member of the IRR.

As a result of a settlement in an unrelated case in 1979, the Baltimore Police Department (BPD), which had approximately 2,900 officers, established a 100-person limit on the number of police officers permitted to be members of active National Guard or Reserve units. Under the BPD's rules, once the 100-person limit was reached an officer seeking to join a National Guard or Reserve unit was placed on a waiting list and would be permitted to join only when a space opened in the 100-person limit because of a police officer retiring from or otherwise leaving a reserve component or leaving the BPD. An officer might spend years on the waiting list. When a space finally opened for the individual, he or she might be unable to join because of age and years away from active duty or reserve participation. In any case, the officer would lose several years of military drill pay, annual training pay, and retirement credit while on the waiting list and precluded from joining a National Guard or Reserve unit.

In 1968, Congress enacted section 2021(b)(3) of the VRRA, which made it unlawful for an employer to deny an employee retention in employment (to fire the employee) or a promotion or incident or advantage of employment because of obligations as a member of a reserve component of the armed forces. In 1986, Congress amended section 2021(b)(3) to outlaw discrimination *in initial employment* as well. The federal reemployment statute has applied to the Federal Government and to private employers since 1940. In

1974, Congress amended the VRRA to expand the applicability to include state and local governments as well.

The BPD made an exception to its 100-person limit for new hires who were members of National Guard or Reserve units when they applied for BPD employment. When Kolkhorst applied to the BPD, there were 126 police officers who were active members of National Guard or Reserve units, and there were 33 BPD officers on the waiting list.

When Kolkhorst applied for BPD employment, he informed the personnel office of his status as a member of the Marine Corps Reserve IRR. The personnel office instructed him to indicate on the application form that he was not a member of an active reserve unit that regularly drilled and that he had no periodic training requirements. After he was hired, Kolkhorst applied for permission to join an active Marine Corps Reserve unit, but the BPD did not respond to his first two applications. When he applied a third time, he was informed that his name had been placed on the waiting list.

Kolkhorst joined a reserve unit and started participating in weekend training. He informally arranged for leaves of absence with his immediate BPD supervisors, and that arrangement worked well for several months, until Kolkhorst was ordered to participate in two weeks of annual training with his unit. The BPD then gave him a direct written order to disaffiliate from the Marine Corps Reserve, and he reluctantly complied with the order the very next day.

Kolkhorst then filed suit against the BPD in the United States District Court for the District of Maryland. The facts were not in dispute, and the court decided the case on cross motions for summary judgment. The BPD argued that its obligation to accommodate military service among employees was subject to a "rule of reason" and that the 100-person limit was a reasonable accommodation of the needs of the employer and the needs of the military. The District Court rejected that argument, denied the BPD's motion for summary judgment, and granted Kolkhorst's motion for summary judgment. The court ordered the BPD to permit Kolkhorst to affiliate with the Marine Corps Reserve and also to pay him $4,164 to compensate him for pay and benefits that he lost by complying with the unlawful BPD order that he disaffiliate with the Marine Corps Reserve.

As I explained in Law Review 30 (Oct. 2001) and Law Review 0929 (July 2009), there was a long argument under the VRRA as to whether the employer's obligation to accommodate National Guard and Reserve service by employees was limited by a "rule of reason." That argument finally ended in 1991 when the Supreme Court unanimously and unambiguously held that no such rule of reason limits the obligations of the employer. *King v. St. Vincent's Hospital,*502 U.S. 215 (1991). Section 4312(h) of USERRA [38 U.S.C. 4312(h)] unambiguously codifies *King* in the current reemployment statute.

If it had not been for *Kolkhorst,* the Supreme Court might never have agreed to hear *King.* With certain exceptions not here pertinent, the Supreme Court only hears those cases that it chooses to hear. A party that has lost at the Court of Appeals level can apply to the Supreme Court for *certiorari* (discretionary review). Four of the nine Justices must affirmatively vote for *certiorari,* or *certiorari* is denied and the case is final. *Certiorari* is denied more than 95% of the time, as the Court is very selective as to the cases that it will hear.

To get *certiorari,* you must convince at least four Justices that the case is really important and worthy of the attention of the Supreme Court. The most common way to get *certiorari* is by showing the Court that there is a *conflict among the circuits.* There are 11 numbered circuits, plus the District of Columbia Circuit and the Federal Circuit. It is considered unsatisfactory for the same federal statute to mean different things in different parts of the country. If you can show the Court that there are inconsistent precedents in two or more circuits on an important issue of law, it is likely that the Supreme Court will grant *certiorari* to resolve the inconsistency. Prior to *Kolkhorst,* the circuits that had addressed the "rule of reason" issue (3rd, 5th, and 11th Circuits) all agreed that a "rule of reason" applied. *Kolkhorst* created a conflict among the circuits and thus led to the grant of *certiorari* in *King.*

Kolkhorst is also important because it stands for the proposition that the remedy in a reemployment rights case can include lost *military* pay and benefits, as well as lost civilian pay and benefits (the much more common situation). After the 4th Circuit decided *Kolkhorst,* several dozen BPD officers and retired officers made "me too" claims—that they had lost reserve pay and reserve retirement benefits because they were

forced to wait years for permission to join National Guard or Reserve units. The BPD's unlawful 100-person limit ended up costing the City of Baltimore a lot of money, but the City never acknowledged just how much.

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