LAW REVIEW 1049

Injunctive Relief under USERRA

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1.4—USERRA Enforcement

Please note: This question and this situation are fictitious. I have written this to make an important point about the remedies that are available under USERRA. If you are aware of a situation like this, please contact me at 800-809-9448, ext. 730 or SWright@roa.org.

Q: I am the Commanding Officer of an Army Reserve unit and a life member of ROA. For several years, I have read your "Law Review" articles with great interest and have used them in my dealings with my employer about my Army Reserve activities.

I have been informed by higher headquarters that it is almost certain that our unit will be mobilized and deployed to Afghanistan sometime in the first few weeks of 2011. During our July drill weekend, I shared this information with the unit. I advised each unit member to give his or her civilian employer notice by way of a "heads up" of the overwhelming likelihood that we will be mobilized early in 2011.

One junior enlisted member of our unit took my advice and informed his employer on Monday after the drill weekend. On Tuesday the young man was fired, with no explanation. The employer insists that the young man is an "employee at will" and that no explanation is required and none will be provided, but that the impending mobilization was not a factor in the decision. I think that the timing of the employer's decision, one day after notification of the likely mobilization, as well as the individual's spotless work record, make it abundantly clear that the employer fired him *because* he will soon be mobilized.

The young man made a complaint to the National Committee for Employer Support of the Guard and Reserve (ESGR), but the employer refused to discuss the matter with the ESGR ombudsman, so he then made a formal complaint to the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). The young man and his family are in a world of hurt financially, because he has no income coming in and our mobilization is still six months away, but with the impending mobilization (as well as the recession) it will be almost impossible for him to find a new job. I would like to see a court *enjoin* the firing and order the employer to put the young man back on the payroll, at least until our unit is mobilized. Does the Uniformed Services Employment and Reemployment Rights Act (USERRA) make any provision for this sort of situation?

A: Yes. Section 4323(e) of USERRA provides: "The court *shall use, in any case in which the court determines that it is appropriate,* its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter." 38 U.S.C. 4323(e) (emphasis supplied). Congress amended section 4323(e) in 2008. Prior to the amendment, the subsection read as follows: "The court *may* use its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter." (emphasis supplied).

I invite your attention to *Bedrossian v. Northwestern Memorial Hospital,* 409 F.3d 840 (7th Cir. 2005), a case decided under section 4323(e) prior to the 2008 amendment. Dr. Carlos Bedrossian is a physician and a Colonel in the Air Force Reserve. His employer threatened him with firing, and he filed suit and sought interim (pre-trial) injunctive relief to enjoin the firing. The District Court denied him the interim injunctive relief, and he appealed to the Seventh Circuit, which affirmed the District Court. The Seventh Circuit is the federal appellate court that sits in Chicago and hears appeals from federal district courts in Illinois, Indiana, and Wisconsin.

A two-part test applies on the question of emergency injunctive relief. The party seeking such relief must show a likelihood of success on the merits (when the case finally goes to trial) and *irreparable* injury if the injunctive relief is denied. The Supreme Court has held that injunctive relief is not normally available to stop a firing, because a firing is not an *irreparable* injury. *Sampson v. Murray,* 415 U.S. 61 (1974). The argument goes that a firing is not irreparable because it can be repaired. If the court finds the firing to have been unlawful, when the case finally goes to trial, the court can order the employer to reinstate the unlawfully fired employee, and the court can award back pay and interest, thus repairing the injury caused by the firing.

I addressed *Bedrossian* in Law Review 200 (Oct. 2005). I wrote: "The Seventh Circuit failed to understand that … USERRA is different from all other federal laws that apply to the employment context. In USERRA, the focus is not only on doing justice for the individual; the focus is on the defense needs of the nation. If folks like Colonel Bedrossian … cannot be given a reasonable assurance that their jobs will be protected, they will not volunteer. Without such assurance, they will not be available to protect the nation in the National Guard or Reserve. Worse, others who learn of the situation will be dissuaded from enlisting or reenlisting. It is not sufficient to tell these folks, 'If you win, probably many years from now, you may receive back pay.'"

In Law Review 200, I urged Congress to amend section 4323(e) of USERRA to change "may" to "shall." Congress did so in 2008. Unfortunately, Congress also added the words "in any case in which the court determines it is appropriate." What does that mean? What standards are to be applied in determining whether or not it is "appropriate" to enjoin a USERRA violation? Does *Sampson v. Murray* apply?

I urge Congress to amend section 4323(e) again and to remove the "in any case in which the court determines it is appropriate" language. Congress should substitute a clear congressional finding that the national defense interests of the United States require that threatened or imminent USERRA violations are to be enjoined and that the possible availability of back pay later is not a sufficient reason, under USERRA, to deny preliminary injunctive relief.

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.