LAW REVIEW 1082

USERRA and Federal Rule of Civil Procedure 68, Offer of Judgment: Awards of Plaintiff's Attorney Fees and Prohibition of Charging Costs Under USERRA Are Not Affected by Rule 68.

By Thomas G. Jarrard, JD., MBA[1].

1.4--USERRA Enforcement
1.8--USERRA—Relationship Between USERRA and other Laws/Policies

Q: I represent the plaintiff in a USERRA case. After filing the complaint in federal district court, defendant's counsel and I broached the issue of settlement; we had few fruitless discussions. So, seeing no serious effort on defendant's behalf, and not to be stalled by that, I continued in earnest to keep the case moving ahead. A few weeks later, however, I received the defendant's Federal Rule of Civil Procedure, 68, Offer of Judgment. How does a Rule 68 offer work in a USERRA case? Can I still obtain attorney fees for my client if we reject the offer and move ahead and do not beat the offer? Does Rule 68 shift defendant's post offer costs to my client?

A: The short answer to your questions is Fed. R. Civ. P. 68, Offer of Judgment, does not operate as a bar to the recovery of attorney fees and litigation expenses incurred by a USERRA plaintiff after an offer is rejected, and no defendant's costs may be "charged" or shifted to a USERRA plaintiff.

For the sake of other readers: The Federal Civil Rules of Procedure are the ground rules for how a case moves along in federal court. An offer of judgment under Rule 68 is simply an offer to settle a matter for a certain amount. The purpose of the rule is to encourage settlement, and thereby clearing up matters without consuming too much of the federal court's time. Some of the ideas behind the rule are: (1) if a matter can be settled it is better for both parties to settle early, saving money; (2) rather than waiting, and taking up time in the court, settle early; and for the similar reasons (3) the court's time could be put to better use in matters that really need its involvement to reach resolution. As a consequence, the rule was designed to create real incentives for both defendants and plaintiffs to settle; trading risk of loss for cost savings down the road.

Q: How does Rule 68 normally work?

A: In the ordinary course of civil litigation, *a plaintiff who rejects a Rule 68 offer and prevails at trial for an amount not exceeding the offer forfeits not only costs moving forward from the offer, but also all post-offer attorneys' fees that a prevailing plaintiff would otherwise receive by virtue of a federal statute. Marek v. Chesny*, 473 U.S. 1, 9, 87 L. Ed. 2d 1, 105 S. Ct. 3012 (1985). Federal Rule of Civil Procedure, 68(d) provides: "[i]f the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made." *Ibid.*

In *Marek v. Chesny*, the Supreme Court applied Rule 68 to a 42 U.S.C. § 1983 case. The Court held that where the plaintiff recovered less than the defendant's Rule 68 offer, the plaintiff could not recover attorney fees after that offer if "the underlying statute defines

'costs' to include attorney's fees." *Marek v. Chesny*, 473 U.S. at 9. Since Rule 68 does not define "costs," "it incorporates the definition of costs that otherwise applies to the case," *e.g.* the underlying statute. *Id*. at 9 n.2. Thus, absent congressional intent to the contrary, where the underlying statute defines costs to include attorney's fees, such fees are to be included as costs for purposes of Rule 68. *Id*. So, Rule 68 can be used to create a real incentive for settlement.

Q: How does Rule 68 not work in a USERRA case?

A: Rule 68's post offer consequences do not apply in all civil actions; and particularly not in USERRA cases. For example, it is well settled that an award of attorney fees under the Fair Labor Standards Act (FLSA) is not affected by operation of Rule 68. *See Fegley v. Higgins*, 19 F.3d 1126, 1135 (6th Cir.), cert. denied, 130 L. Ed. 2d 134, 115 S. Ct. 203 (1994); *Cox v. Brookshire Grocery Co.*, 919 F.2d 354, 358 (5th Cir. 1990); *Dalal v. Alliant Techsystems, Inc.*, 182 F.3d 757, 760 (10th Cir. Colo. 1999); *Haworth v. Nevada*, 56 F.3d 1048, 1052 (9th Cir. Nev. 1995)(concluding that Rule 68 did not bar the plaintiffs from recovering reasonable attorney fees for services rendered in their FLSA action after the Rule 68 settlement offer was made.) Unlike § 1983 claims, the FLSA defines attorney fees separately from costs; "attorney's fee" and "the costs of the action" are expressly separate items under 29 U.S.C. § 216(b). Thus, a Rule 68 offer does not affect the trial court's award of attorney fees under § 216(b). *See Marek*, 473 U.S. at 13, 43-44 (Brennan, J., dissenting) (noting that for "statutes that do not refer to attorney's fees as part of the costs [such as § 216(b) of the FLSA, 473 U.S. at 50]. . . . where an action otherwise is governed by Rule 68, attorney's fees that are potentially awardable under these statutes are not subject to Rule 68 and instead are to be evaluated solely under the reasonableness standard. . . ."). Accordingly, unlike attorney fees in a §1983 action, attorney fees in an FLSA action are not automatically shifted by Rule 68. *Id.*

Likewise, the remedies listed in USERRA, 38 U.S.C. 4323, are also conspicuously separated from costs. The USERRA provides:

(h) Fees, court costs.

(1) No fees or court costs may be charged or taxed against any person claiming rights under this chapter [38 USCS §§ 4301 et seq.].
(2) In any action or proceeding to enforce a provision of this chapter [38 USCS §§ 4301 et seq.] by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses.

38 U.S.C. § 4323(h). This means that when a USERRA plaintiff prevails, they are entitled to an award of reasonable attorney fees, expert witness fees, and other litigation expenses. *Id.* [2]

Like 29 U.S.C. § 216(b), the remedy provisions of USERRA[3] also differ significantly from § 1983 remedies. First, while § 1983 defines *attorney fees as costs*; 38 U.S.C. 4323(h)(2) defines attorney fees as "litigation expenses." Second, attorney fees and other litigation expenses are listed separate and apart from costs and fees. *Compare* 38 U.S.C § 4323(h)(2) *and* (h)(1). Also worthy of notice is that 38 U.S.C. 4323(h)(1) prohibits the shifting of any defendant's fees or costs to a USERRA plaintiff, "[n]o fees or court costs may be charged or taxed against any person claiming rights under this chapter."

In sum, the intent of Congress is clear and unambiguous; fees and costs in USERRA litigation are *separate* from attorney fees and other litigation expenses. Thus, rejection of a Rule 68 offer does not operate to divest a prevailing USERRA plaintiff from recovering attorney fees and other litigation expenses as contemplated by 38 U.S.C. § 4323(h)(2). Furthermore, because USERRA bans charging any fees or costs against a USERRA plaintiff, 38 U.S.C. § 4323(h)(1), no defendant may use Rule 68 as a mechanism to shift any fees or costs to a USERRA plaintiff.

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[2] Notably, 38 U.S.C. § 4302 speaks directly to the relation between USERRA and other laws or rules; it preempts any infringement that would impose a limit or otherwise eliminate any of the rights provided under USERRA. 38 U.S.C § 4302(b); 20 C.F.R. 1002.7(b). Therefore, any application of Rule 68 that works to divest a USERRA plaintiff of any of their remedies under § 4323 directly contradicts the mandate of the USERRA, both §§4302 and 4323.

[3] The USERRA is "to be liberally construed for the benefit of those who left private life to service their country in its hour of great need." *Alabama Power Co. v. Davis*, 431 U.S. 581, 587, 97 S. Ct. 2002, 52 L. Ed. 2d 595 (1977) (quoting*Fishgold v. Sullivan Drydock & Repair Corp*., 328 U.S. 275, 285, 66 S. Ct. 1105, 90 L. Ed. 1230 (1946)); *See also Kirdendall v. Dep't of Army,* 479 F.3d 830, 834 (Fed.Ct.,2007) (Veteran's benefit statutes are construed in the veteran's favor) *citing, King v. St. Vincent's Hosp.,* 502 U.S. 215, 220 n.9, 112 S.Ct. 570, 116 L.Ed.2d 578 (1991)("even if this were a close case, which it is not, the canon that veterans' benefits statutes should be construed in the veteran's favor would compel us to find that [the statute] is subject to equitable tolling.").