LAW REVIEW 1108

MSPB Holds that Disparate Impact Discrimination Is Not a Cognizable Claim under USERRA

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

1.2—USERRA Discrimination

***Harrellson v. United States Postal Service,* 2011 MSPB 3 (Merit Systems Protection Board Jan. 5, 2011).**

In a very recent decision, the Merit Systems Protection Board (MSPB) held that the disparate impact theory of discrimination is not available in cases arising under section 4311 of the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4311. The MSPB is a quasi-judicial agency created by the Civil Service Reform Act of 1978. The MSPB has three members, each of whom is appointed by the President with Senate confirmation. The MSPB is recently back up to full strength, and the three members are Susan Tsui Grundmann (Chairman), Anne M. Wagner (Vice Chairman), and Mary M. Rose (Member). Grundmann and Wagner were appointed by President Obama, and Rose was appointed by President George W. Bush and is nearing the end of her term of office.

The MSPB adjudicates cases involving federal employees and federal agencies as employers, under USERRA and many other federal statutes. A case is tried before an Administrative Judge (AJ) of the MSPB, and the losing party can appeal to the MSPB itself. MSPB decisions can be appealed to the United States Court of Appeals for the Federal Circuit, a specialized federal appellate court here in Washington. The Federal Circuit has nationwide jurisdiction, but only as to certain kinds of cases, including appeals from the MSPB.

In Law Review 1103 (Jan. 2011), I wrote: "The Federal Circuit has a long and distinguished history of reversing the MSPB for being insufficiently pro-veteran in USERRA and VEOA [Veterans' Employment Opportunities Act] cases. Please see Law Reviews 67, 91, 151, 159, 189, 0614, 0637, 0722, 0726, 0729, 0747, 0752, 0755, 0764, 0826, 0826 Update, 0850, 0901, 0901 Update, 0904, 0921, 0927, 0937, 0958, and 1028.[1] With two new members since January 2009, the MSPB finally seems to be catching on, and the *Dean* case [*Dean v. Office of Personnel Management,* 2010 MSPB 213 (MSPB Nov. 2, 2010)] is a good illustration of this favorable development." *Harrellson* has caused me to reconsider this recent encomium to the new leadership of the MSPB.

The United States Postal Service (USPS) is a semi-independent entity within the Executive Branch of the Federal Government. *See* 39 U.S.C. 101. The USPS has its own separate personnel system and is exempted from some (but not all) of the laws that Congress has enacted to govern federal civilian employment generally. For purposes of USERRA, the USPS is explicitly defined as a "Federal executive agency" and is subject to USERRA, and to MSPB jurisdiction to enforce USERRA, just like any other agency in the Executive Branch of the Federal Government. *See* 38 U.S.C. 4303(5).

USERRA is the 1994 rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA is codified in title 38, United States Code, sections 4301-4335 (38 U.S.C. 4301-4335). USERRA applies to essentially all employers in this country, including the Federal Government, the states and their political subdivisions (counties, cities, school districts, etc.), and private employers, regardless of size. A case against a state or local government or private employer is filed in the United States District Court for any district where the employer maintains a place of business. 38 U.S.C. 4323. A case against a federal agency employer is filed in the MSPB. 38 U.S.C. 4324.

Like the VRRA, USERRA gives an individual the right to *reemployment* after a period of voluntary or involuntary service in the uniformed services. The individual must have given the employer prior oral or written notice prior to leaving a position of employment for service and must have made a timely application for reemployment after release from the period of service without having exceeded the cumulative five-year limit and without having received a punitive or other-than-honorable discharge. An individual who meets these conditions must be reemployed promptly and must be treated as having been continuously employed by the civilian employer during the period of service, for seniority and pension purposes.

As originally conceived in 1940, reemployment was a once-in-a-lifetime occurrence. The individual enlisted or was drafted, and after the war ended the individual returned to his or her pre-service civilian job. In the 1950s and 1960s, Congress amended the reemployment statute to cover active duty for training and inactive duty training, as well as active duty. As the reemployment statute came to apply to *recurring* periods of military training or service, such as periodic training for National Guard and Reserve personnel, civilian employers were tempted to rid themselves of the inconvenience of accommodating those recurring military-related absences from work, by firing the individual.

In 1968, Congress amended the VRRA to make it unlawful for an employer to deny an employee retention in employment or a promotion or advantage of employment because of obligations as a member of a Reserve Component of the armed forces. In 1986, Congress expanded this protection to make it apply to discrimination in initial employment as well.[2] USERRA's provision outlawing employment discrimination reads as follows:

(a) 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.

(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person

(1) has taken an action to enforce a protection afforded any person under this chapter,

(2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter,

(3) has assisted or otherwise participated in an investigation under this chapter, or

(4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c) An employer shall be considered to have engaged in actions prohibited—

(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

(2) under subsection (b), if the person's

(A) action to enforce a protection afforded any person under this chapter,

(B) testimony or making of a statement in or in connection with any proceeding under this chapter,

(C) assistance or other participation in an investigation under this chapter, or

(D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312 (d)(1)(C) of this title.

38 U.S.C. 4311.

Patrick K. Harrellson worked for the USPS and resigned (not for uniformed service) in 2000, and he later sought reinstatement. Harrellson is a disabled veteran with a ten-point preference under the Veterans Preference Act (VPA). The MSPB earlier rejected his VPA claim and remanded the case to the AJ to consider his USERRA claims. *See Harrellson v. United States Postal Service,* 113 M.S.P.R. 534 (2010).

As he sought reinstatement with the USPS, Harrellson applied for numerous custodian positions but was not selected. Two of those positions are at issue in this case. Harrellson learned that the USPS had waived custodian examination for non-maintenance internal candidates and that the positions at issue were filled internally through reassigning other employees whose positions had been eliminated. Harrellson asserted that the USPS decision to fill these positions internally enabled the USPS to consider a greater number of internal, non-veteran candidates, rather than external candidates who were preference-eligible veterans, like Harrellson.

The AJ characterized this argument by Harrellson as a "disparate impact" discrimination claim, and she asked the parties to brief the question of whether section 4311 of USERRA has a disparate impact component. The USPS argued that section 4311 does not have such a component, and the AJ agreed. The AJ permitted Harrellson to make an interlocutory appeal[3] to the MSPB itself on this important issue of law, and the MSPB agreed to decide the issue on an interlocutory basis. The MSPB affirmed the AJ's ruling that disparate impact is not a viable theory under section 4311.[4]

The Supreme Court established disparate impact theory in the case of *Griggs v. Duke Power,* 401 U.S. 424 (1971). *Griggs* arose under Title VII of the Civil Rights Act of 1964—the law that forbids employment discrimination on the basis of race, color, sex, religion, or national origin. The employer had established a rule that power company linemen had to have high school diplomas. There was no evidence that the employer had established the rule with the intent of discriminating against African Americans, but in the years immediately following the end of the lamentable "Jim Crow" era of segregated and unequal educational systems the high school diploma rule had the effect of disqualifying a greater proportion of black candidates than white candidates. The Supreme Court held that a rule that disproportionately disqualifies members of a protected class under Title VII will be considered unlawful unless the employer can establish a business necessity for the rule.

The AJ and the MSPB distinguished *Griggs*—noting differences between the language of Title VII and the language of section 4311 of USERRA. The MSPB held that section 4311 outlaws only purposeful discrimination, where the employer or prospective employer had a "motive to discriminate."

I am concerned that foreclosing the disparate impact theory as a means of establishing a USERRA violation will harm the legitimate interests of veterans in some cases. I invite the reader's attention to Law Review 162 (March 2005), concerning a real situation that did not result in a published court decision because the two veterans involved chose not to sue. A state juvenile justice services department established a rule for hiring corrections officers—to be hired the applicant had to answer "no" truthfully and without explanation the "have you ever tried to hurt somebody" question. The question was *not* "have you ever *unlawfully* tried to hurt somebody?" This question had a disqualifying disparate impact on all veterans who had served in combat.

We will keep the readers informed of developments on this important issue. We will consider the need for a USERRA amendment to overrule *Harrellson* and to establish disparate impact as a viable basis for claiming discrimination under USERRA.

---

[1] You can find more than 750 "Law Review" articles about USERRA and other military-pertinent laws atwww.roa.org/law_review, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

[2] For a detailed description of the history of the anti-discrimination provision of the reemployment statute, please read the ROA *amicus curiae* brief in the Supreme Court, in the pending case of *Staub v. Proctor Hospital.* Go towww.roa.org/law and scroll down to "read the brief."

[3] An interlocutory appeal is an appeal of an important ruling in the case that does not, by itself, entirely resolve the case.

[4] The MSPB also noted: "Denying an appellant's ability to pursue a claim under a disparate impact theory does not preclude an appellant from using evidence of disparate impact of an agency's policies or practices as circumstantial evidence of intentional discrimination in violation of 38 U.S.C. 4311. *Sheehan v. Department of the Navy,* 240 F.3d 1009, 1014 (Fed. Cir. 2001). A policy that does not further a legitimate business interest and has a known disparate impact may indeed serve as a persuasive basis for supporting a claim that the agency's action was motivated by discriminatory animus and is therefore prohibited under USERRA."