LAW REVIEW 1110

USERRA Section 4302 Does Not Bar Settlement of USERRA Claim

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1.3.1.4—USERRA, Affirmative Defenses
1.3.2.8—Training or Retraining
1.3.2.12—Special Protection Against Discharge, Except Cause
1.4—USERRA Enforcement
1.8—Relationship Between USERRA and other Laws/Policies

***Wysocki v. International Business Machines Corp.,* 607 F.3d 1102 (6th Cir. 2010), *cert. denied,* 79 U.S.L.W. 3401 (2011).**

"Nothing in this chapter [USERRA] shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), *contract, agreement,* policy, plan, practice, or other matter that establishes a right or benefit *that is more beneficial than or is in addition to* a right or benefit provided such person under this chapter."

38 U.S.C. 4302(a) (emphasis supplied).

"This chapter supersedes any State law (including any local law or ordinance), *contract, agreement,* policy, plan, practice, or other matter that *reduces, limits, or eliminates* in any manner any right or benefit provided by this chapter, *including the establishment of additional prerequisites* to the exercise of any such right or the enjoyment of any such benefit."

38 U.S.C. 4302(b) (emphasis supplied).

George Wysocki worked for International Business Machines (IBM) as a data administrator when he was called to active duty and deployed to Afghanistan. He returned from active duty in July 2007 and met the eligibility criteria for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA).[1] He returned to work shortly thereafter, but IBM terminated his employment on Oct. 15, 2007.

Section 4313(a)(2)(B) requires the employer to make "reasonable efforts … to qualify" the returning veteran who is eligible for reemployment under USERRA. 38 U.S.C. 4313(a)(2)(B). This obligation is particularly important in a fast-changing career field like information technology. In such a field, even a few months away from the field (while serving in combat in Afghanistan) can render the returning veteran's civilian job skills rusty and irrelevant.

This was not Wysocki's first call to the colors. After previous active duty periods, IBM provided Wysocki shadowing and assistance from other employees to enable him to reintegrate into the civilian workforce, which had changed somewhat during his absence. When Wysocki returned to work in July 2007, he notified his IBM supervisor that his skills had diminished while he had been on active duty and that he would need time to update his knowledge of IBM's programs, software, and technology. Wysocki alleged that, contrary to past practice, IBM refused to provide reintegration assistance to Wysocki and terminated his employment, without cause, on Oct. 15, 2007.

In accordance with its standard practice, IBM offered Wysocki severance pay of $6023 as part of an Individual Separation Allowance Plan. As a condition precedent to receiving the severance pay, Wysocki signed a general release drafted by IBM. IBM gave Wysocki a 21-day period to consider the offer and a 7-day period, after signing, to revoke his signature. Wysocki signed the agreement and did not revoke his signature during the 7-day revocation period. He received the $6023 and spent it. The release form specifically instructed Wysocki to consult with an attorney before signing, but he did not take that

advice. The form did not specifically mention USERRA, but it did mention that the release included claims of discrimination based upon "veteran status."

Months passed before Wysocki retained an attorney. On May 12, 2008, he sued IBM in the United States District Court for the Western District of Kentucky. The case was soon transferred to the Eastern District of Kentucky. IBM filed a motion for summary judgment, based upon the release that Wysocki had signed in exchange for the severance pay. The District Court granted the employer's summary judgment motion, and Wysocki appealed to the United States Court of Appeals for the 6th Circuit.[2]

The 6th Circuit affirmed the District Court on June 6, 2010, and Wysocki applied to the Supreme Court for *certiorari*(discretionary review). The Supreme Court denied *certiorari* on January 10, 2011, which made the case final. The denial of *certiorari* does not make this a Supreme Court precedent, but it does add somewhat to the precedential value of the 6th Circuit decision.

The losing party in the Court of Appeals can apply for *certiorari* and file a brief explaining why the case is so important that the Supreme Court should agree to decide it. If four or more Justices vote to grant *certiorari* the case is added to the Supreme Court docket and set for briefing on the merits and oral argument. If three or fewer Justices vote for*certiorari* then it is denied and the Court of Appeals case becomes final. In federal civil cases *certiorari* is denied about 99% of the time.

In his District Court complaint, Wysocki alleged that IBM violated section 4313(a)(2)(B) when it refused to make reasonable efforts to assist Wysocki in requalifying for his IBM position after returning from active duty. He also alleged that IBM violated section 4316(c)(1), when it fired him, without cause, within one year after his reemployment following uniformed service. Wysocki might well have prevailed on these claims, but for the release that he had signed.

When IBM filed the motion for summary judgment, based on the release, Wysocki argued, through counsel, that section 4302(b) of USERRA (quoted above) overrode the release. The District Court rejected this argument, and the 6th Circuit affirmed this determination. I agree that section 4302(b) does not render unenforceable a release of this kind.

USERRA's legislative history contains an instructive paragraph about the purpose and effect of section 4302: "The Committee [House Committee on Veterans' Affairs] wishes to stress that rights under chapter 43 [USERRA] belong to the claimant, and he or she may waive those rights, either explicitly or impliedly, through conduct. Because of the remedial purposes of chapter 43, any waiver must, however, be clear, convincing, specific, unequivocal, and not under duress. Moreover, only known rights which are already in existence may be waived. *See Leonard v. United Airlines, Inc.,* 972 F.2d 155, 159 (7th Cir. 1992). An express waiver of future statutory rights, such as one that an employer might wish to require as a condition of employment, would be contrary to the public policy embodied in the Committee bill and would be void." House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2453.

I think that the 6th Circuit got it right in this case. Moreover, this scenario is very common. If your employer discharges you or lays you off, the employer will likely offer you something by way of severance pay. The employer will require you to sign a general release in exchange for the severance pay—the employer wants "legal peace." You are an adult, and you are responsible for what you sign. If you sign the release, it almost certainly extinguishes any USERRA claim or other claim that you may have. You cannot have your cake and eat it too.

Before you sign the release, you need to find out if you have a viable claim to make, and you need to decide whether you want to initiate a lawsuit. If you have no viable claim, or if you do not wish to bring a lawsuit, take the severance pay offered and sign the release. But remember that your decision is probably irreversible. You should seek legal advice to help you make this important decision.

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[1] Mr. Wysocki left his IBM job for the purpose of performing uniformed service, and he gave IBM prior oral or written notice. He was released from the period of service without a punitive or other-than-honorable

discharge and without having exceeded the cumulative five-year limit on the duration of the periods of service, relating to IBM. He made a timely application for reemployment after release from service.

[2] The 6th Circuit is the federal appellate court that hears appeals from Kentucky, Michigan, Ohio, and Tennessee.