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Erickson v. United States Postal Service – Recent Implications to 38 U.S.C. 4311 & 4312

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This article is a follow up to Law Review 0937.

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In a recent decision before the Federal Circuit, the Uniformed Services Employment and Reemployment Rights Act (hereinafter "USERRA") was retested and the service member yet again prevailed. Sergeant Major (SGM) Richard Erickson has been pursuing his USERRA rights since 2006 when he filed an appeal with the Merit Systems Protection Board (hereinafter "the Board") for discrimination based on his service in the uniformed services. SGM Erickson's claim arose because the USPS fired him in writing for taking "excess military leave".

While SGM Erickson has had some setbacks in pursuing his claim for discrimination, the recent Federal Court decision was a big victory in SGM Erickson's case and the second big win at the Federal Circuit (see Law Review 0937). This article will explore the recent implications of SGM Erickson's case, and the effects on USERRA as a result of the Federal Circuit's decision.

Background

SGM Erickson was employed by the USPS from 1988 until he was terminated from his position in 2000. SGM Erickson served with both the Army National Guard (ARNG) and the United States Army Reserve (USAR), prior to, during, and after his termination from the USPS.

The crux of SGM Erickson's termination appeal revolves around his military service while employed with the USPS. As a result of SGM Erickson having served in the uniformed service, the USPS terminated SGM Erickson's employment on March 31, 2000, citing excessive use of leave as the reason for his termination. At the time, SGM Erickson was still on active duty and therefore did not respond to the notification regarding his termination.

While SGM Erickson was absent on military leave for large periods of time prior to his termination, it is imperative to point out that SGM Erickson never exceeded the five-year limit for reemployment set forth in 38 U.S.C. § 4312. While SGM was absent from the USPS on military leave for a period greater than five-years, the majority of this time was excluded from the five-year reemployment determination as excepted service. *See* 38 U.S.C. § 4312(c).

In 2006, upon completion of his military service, SGM Erickson filed an appeal with the Board against the USPS citing USERRA's antidiscrimination provision for denial in retention of employment, and a violation of USERRA's reemployment provision. *See 38 U.S.C. §§4311, 4312, respectively.* The administrative judge who was assigned SGM Erickson's case originally found SGM Erickson had waived his USERRA rights due to his abandonment of his civilian career. SGM Erickson filed a petition for review by the full Merit Systems Protection Board ("the Board").

The Board affirmed the administrative judge's ruling but not all of his reasoning. The Board's decision ignored the issue of whether SGM Erickson abandoned his USERRA rights, and focused on the fact that the USPS could not have violated USERRA as SGM Erickson was terminated based on his absence from work and not his military service. As pointed out by the Federal Circuit on appeal, "the most significant and predictable consequence of reserve service with respect to the employer is that the employee is absent to perform that service. To permit an employer to fire an employee because of his military absence would eviscerate the protections afforded by USERRA." *Erickson v. United States Postal Service*, 571 F.3d 1364 (Fed. Cir. 2009)

(hereinafter "*Erickson I*"). The Federal Circuit rejected the Board's rationale and remanded the case to decide the specific issue of whether SGM Erickson waived his USERRA rights by potentially abandoning his civilian career with the USPS. *Id*.

On remand, the Board concluded that SGM Erickson had waived his USERRA rights when he abandoned his career with the USPS. The Board noted SGM Erickson's length of active service, his expressed preference for military over civilian service, and SGM Erickson's failure to respond to the USPS notice of proposed removal.

On SGM Erickson's second appeal to the Federal Circuit the Court remanded the Board's decision again, as the Board's decision lacked substantial evidence that SGM Erickson waived his USERRA rights. *Erickson v. United States Postal Service*, 2011 U.S. App. LEXIS 3815 (Fed. Cir. February 28, 2011) (hereinafter "*Erickson II*"). The Court held that because SGM Erickson's military service never exceeded the five-year time limit for reemployment, he could not have evidenced a clear intent to waive his USERRA rights. *Id.* Accordingly, the Federal Circuit remanded the case again for further determination of SGM Erickson's discrimination claim.

While the Federal Circuit in *Erickson I* Extended the 5-Year Reemployment Criterion of 38 U.S.C. 4312 to 38 U.S.C. 4311, the Court in *Erickson II* Refused to Expand Upon its Previous Rationale

In *Erickson I*, the Court held that 38 U.S.C. 4312's five-year reemployment criterion applied to SGM Erickson's claim for denial in retention of employment as a matter of equity. The Court rationalized, that "otherwise the five-year limit on an employer's obligation to rehire an employee who left work would be meaningless." *Erickson I*, 571 F.3d at 1368. The Court's rationale raised questions as to the applicability of the five-year reemployment criterion to cases other than discrimination resulting in termination. Unfortunately, the Court has done little to expand on its earlier decision. Regardless a brief review of USERRA is important, as the Court in *Erickson II* has again extended the five-year reemployment criterion to other aspects of USERRA.

USERRA prohibits private employers from discriminating against their employees on the basis of military service. *Erickson II*. USERRA's antidiscrimination provision provides "[a] person who is a member of... a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by any employer on the basis of that membership." *38 U.S.C. 4311(a)*. USERRA defines "benefit of employment" broadly as "any advantage, profit, privilege, gain, status, account, or interest that accrues by reason of an employment contract or agreement." *38 U.S.C. 4302(2)*.

Supplementing the antidiscrimination provision, USERRA's reemployment protection in Section 4312 provides for the right to reemployment so long as the service member meets each of the qualifying conditions:

1. The service member left civilian employment in order to perform service in the uniformed services;

2. The service member gave the employer prior oral or written notice;

3. The cumulative period of service for which the service member is performing military service, absent certain statutory exemptions, does not exceed five years;

4. The service member was released from service with a discharge other than a punitive or other-than-honorable discharge;

5. The service member timely applied for reemployment after release from service.

The deadline to apply for reemployment, after release from a period of service, depends upon the duration of the period of service from which the individual is returning. If the period of service was 181 days or more, the individual has 90 days, starting on the date of release, to apply for reemployment.

Although Sections 4311 and 4312 provide similar protection to service members who have been discriminated against on the basis of their service in the uniformed service, it is important to note that Sections 4311 and

4312 provide distinctive relief. As evidenced by SGM Erickson's case, a service member can pursue a cause of action for an employer's violation of the antidiscrimination protections of 4311 and simultaneously pursue a claim for denial of reemployment under 4312.

Although the two provisions are mutually exclusive, the court in *Erickson I* found that the five-year cap for reemployment also applied to section 4311's antidiscrimination provision in the limited case of SGM Erickson, where "the alleged discrimination consists of the employee's removal because of his military related absence." *Erickson I*, 571 F.3d at 1369. The Court justified the application of Section 4312's five-year eligibility criterion because "otherwise, the five-year limit on an employer's obligation to rehire an employee who left work to serve in the military would be meaningless." *Id*. The Court in *Erickson II* has done nothing to expand upon this extension of the five-year requirement of 4312 to 4311 other than to reiterate its previous dicta. *Erickson II*, 2011 U.S. App. LEXIS 3815.

***Erickson II* Applies 4312's 5-Year Reemployment Cap to Abandonment Inquiry**

The administrative judge, who was initially assigned SGM Erickson's appeal, and subsequently the full Board, held that SGM Erickson had abandoned his military career and accordingly waived his USERRA rights. In *Erickson II*, the Federal Circuit reversed the decision and found insubstantial evidence to support abandonment. Accordingly, SGM Erickson was entitled to retain his USERRA antidiscrimination rights and his case was remanded again.

In a further expansion of USERRA's statutory language, the court in *Erickson II* extended the five-year reemployment cap to its interpretation of the abandonment doctrine. The abandonment doctrine provides that a civilian employee who abandons his civilian job in favor of a career in the military can waive his USERRA rights. *See Woodman v. Office of Personnel Management*, 58 F.3d 1372 (Fed. Cir. 2001). Although *Woodman* was decided under USERRA's predecessor, the Veteran's Reemployment Rights Act of 1974 ("VRRA"), both statutes draw the same distinction between career and non-career service.

USERRA's introductory paragraph sets forth its purpose; "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result form such service." *38 U.S.C. 4301* (*emphasis added*). It is clear that Congress intended for USERRA, much like the VRRA, to apply only with respect to non-career military service. *Woodman v. Office of Personnel Management*, 258 F.3d 1372, 1377 (Fed Cir. 2001).

In reaching its decision, the court in *Woodman* looked to legislative authority and prior treatment of noncareer status under the VRRA. The court particularly noted *Paisley v. City of Minneapolis*, wherein the court held that VRRA's reemployment rights did not extend to an employee who served in the military for over fourteen (14) years. The*Paisley* court stated:

There is a legally significant distinction between an intent to take a true leave of absence from civilian employment, the length of which is not subject to a reasonableness standard, and an intent to make the military a career, which suggests a choice to forsake one's civilian job and any reemployment rights attached thereto.

Paisley v. City of Minneapolis, 79 F. 3d 722, 725, n. 5 (8th Cir. 1996).

Relying on the holdings of *Woodman* and its progeny, *Erickson II* analyzes SGM Erickson's noncareer status in determining whether or not SGM Erickson abandoned his USERRA rights. In contrast to SGM Erickson, the courts in*Moravec v. Office of Personnel Management*, 393 F.3d 1263 (Fed. Cir. 2004), and *Dowling v. Office of Personnel Management*, 393 F.3d 1260 (Fed. Cir. 2004) found that both employees had abandoned their civilian careers, and therefore waived their USERRA rights after particularly long absences from their civilian service. Mr. Moravec and Mr. Dowling served for sixteen (16) years and twelve (12) years, respectively, on active duty before rejoining civilian service.

The Court in *Erickson II* reaffirmed that "the duration of an employee's military service is frequently relevant to the abandonment inquiry." *Erickson II*, 2011 U.S. App. LEXIS 3815. While "there is no minimum period of military service that will trigger the assumption that the employee has abandoned their civilian career," the Court needed some framework to evaluate when a service member has evidenced their intent to abandon their civilian career. *Id*.

In analyzing SGM Erickson's case the Court in *Erickson II* extended the five-year reemployment criterion of section 4312 to its interpretation of the abandonment inquiry. The Court held that "absent clear evidence to the contrary, employees who have not exceeded [the five-year] period do not intend to abandon their civilian positions." As SGM Erickson's absence at the time of his termination from the USPS was less than the five-year reemployment cap of Section 4312, the court found it reasonable to assume that SGM Erickson did not intend to abandon his civilian career.

The courts in *Dowling*, *Moravec*, and *Woodman*, found absences of twelve (12), sixteen (16) and twenty (20) years sufficient to establish abandonment. Juxtaposed this line of cases, the Court in *Erickson II* found absences less than five years to create a presumptive bar to the abandonment inquiry. Noticeably, the Court's decision in *Erickson II* is silent on how much weight should be given to absences greater than five-years and less than twelve-years. *Erickson II*, 2011 U.S. App. LEXIS 3815. We are left to wonder how the Court will evaluate these 'gray area' military absences in future abandonment inquiries.

Conflicts Between *Erickson II* and Prior Case Law

While the decision reached in *Erickson II* is favorable, the Court's interpretation of the abandonment doctrine contradicts long-standing USERRA case law. As set forth in the quintessential case of *Leonard v. United Air Lines*, a service member's USERRA rights cannot be waived absent "clear, convincing, specific, unequivocal, and [a waiver] not under duress." *Leonard v. United Air Lines*, 972, F.2d 155, 159 (7th Cir. 1992). Furthermore, only known rights, which are already in existence, may be waived. *Id*.

In a particularly enlightening discussion as to the rationale behind USERRA's waiver policy, the court stated in *Leonard*:

War is hell, and a call to arms is harrowing. Faced with this unavoidable disruption in their lives, inductees may make choices that are sensible when death looms, but cease to make sense when they discover that they have survived. The reemployment rights provided by the act are necessarily directed to the survivors, and Congress intended that they be able to return to civilian life as easily as possible. Veterans should not be burdened by the choices they make when called to arms.

Leonard, 972 F.2d at 159-60. Two years after *Leonard*, this same principle, that an employee cannot waive USERRA's rights until they have matured, was codified by USERRA's enactment. *See generally 20 CFR §§ 1002.88, 1002.152*. Congress clearly intended to afford service members the greatest protections available in returning to the civilian world after leaving military service.

In contrast to the long-standing principles regarding waiver of USERRA rights, the Court's dicta in *Erickson II* suggests that an employee maybe able to abandon his civilian career, and waive his USERRA rights, merely upon a showing of "clear evidence" on the employee's part to abandon his civilian career in favor of a career in the military. *Erickson II*, 2011 U.S. App. LEXIS 3815. The Court's language not only contradicts *Leonard's* strict requirements for a waiver, but also contradicts the principle that a waiver can only be effective for "rights already in existence." *Leonard, F.2d at 159*.

The fact that the Court in *Erickson II*, does not even raise the long-standing waiver principle or cite the most quintessential USERRA case law on the matter, suggests that the Court failed to consider these implications in rendering its decision. Accordingly, the long-standing 'waiver' precedent set forth in *Leonard*, and subsequently codified, should remain binding, and "in all but the most unusual circumstances, a veteran cannot expressly or impliedly waive" his USERRA rights. *Leonard*, 972 F.2d at 159.

In light of *Erickson II*, a clear intent to give up your civilian job will likely result in abandonment based on this latest legal development. USERRA is extremely complex and if you have a complex case only a handful of attorneys in the country are truly qualified to handle a USERRA case from start to finish, so ensure you find an attorney like me that has more favorable precedent setting USERRA wins than nearly any other attorney.