Law Review 1152

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DOL Closing Case as "Without Merit" Does Not Bind Claimant

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1.4—USERRA Enforcement

Q: I am attorney with a potential client (let's call him "Joe Smith") who has a claim under the Uniformed Services Employment and Reemployment Rights Act (USERRA). He filed a claim with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), and that agency sent him a letter saying that his claim is "without merit." Does the DOL-VETS "no merit" determination preclude me from filing suit on this individual's behalf? Do I have to show that the DOL-VETS determination is "clearly erroneous?" The employer is a large nationwide corporation (let's call it Daddy Warbucks Industries or DWI) with thousands of employees in 40 states.

A: The DOL-VETS determination that the case is "without merit" has no preclusive effect, and that determination is not relevant or admissible in the case that you may file against the employer.

"A person may commence an action against a State (as an employer) or a private employer if the person—(A) has chosen not to apply to the Secretary [of Labor] for assistance under section 4322(a) of this title; (B) *has chosen not to request that the Secretary refer the complaint to the Attorney General under paragraph (1);* or (C) has been refused representation by the Attorney General with respect to the complaint under such paragraph." Title 38, United States Code, section 4323(a)(3) [38 U.S.C. 4323(a)(3)] (emphasis supplied).

If DOL-VETS has completed its investigation of Smith's complaint, the agency is required to notify him of the results of its investigation and to explain to him his options regarding referral of his complaint to the Attorney General. 38 U.S.C. 4322(e).

After receiving that notification, Smith can request that DOL-VETS refer the case file to the Attorney General, and DOL-VETS is required to refer as requested. 38 U.S.C. 4323(a)(1). Of course, in the situation you posit it is likely that DOL-VETS will refer the case file with a negative recommendation.

Within the Department of Justice (DOJ), USERRA cases are referred to the Employment Litigation Section (ELS) of the Civil Rights Division. Within 60 days after receiving the referral from DOL-VETS, the head of the ELS will advise Smith, by letter, either that DOJ will act as his attorney and initiate the lawsuit against DWI or that DOJ has chosen not to represent Smith. 38 U.S.C. 4323(a)(2).

It is difficult enough to get DOJ to initiate lawsuits in cases that come from DOL-VETS with positive referrals. Since Smith's case will likely go to DOJ with a negative referral, it is very likely that DOJ will decline representation. Accordingly, it is probably in Smith's best interest to decide not to request such a referral, especially if you are willing to represent him.

If you undertake to represent Smith, one of your first steps should be to make a request, on Smith's behalf, of DOL-VETS, under the Privacy Act and the Freedom of Information Act, for the investigative file. The agency will likely give you most of the file, withholding only the legal analysis prepared by the Solicitor of Labor.

I invite your attention to my Law Review 0758 (Nov. 2007), titled "Taking the Leap: Employer cover-up fools DOL but not the jury." You can find more than 750 articles at www.roa.org/law_review, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

Law Review 0758 shows how a diligent and imaginative attorney put the DOL-VETS case file to good use. I am referring to James Beck, Esq., of Gordon Thomas Honeywell Malanca Peterson & Daheim of Tacoma, Washington. Mr. Beck represented SSGT Gerald Delay, USAFR.

Delay was called to active duty from February 2003 to February 2005 and spent most of that time in Iraq. Before he was called to the colors, he worked for Ace Heating Co. of Seattle. Delay met the USERRA eligibility criteria as to prior notice to the employer, not exceeding the cumulative five-year limit on service, release from service under honorable conditions, and timely application for reemployment.

Delay worked a 40-hour schedule before he was called up, but after he returned to work he was limited to 30 hours per week. Other employees continued to work full-time, and there was no evidence that Delay would have been reduced to part-time status even if he had not gone away for service.

Delay contacted an Air Force legal assistance attorney for advice and assistance. The legal assistance attorney sent a letter to Timothy Hayes, the owner of Ace Heating, advising him that reducing Delay's hours could be a USERRA violation. Hayes fired Delay one hour after receiving the letter.

Delay complained to DOL-VETS, alleging that Ace Heating violated USERRA by reducing his hours and later by firing him in reprisal for his request for assistance to the legal assistance attorney. A DOL-VETS investigator contacted Hayes, and Hayes provided what purported to be Ace Heating business records, claiming that Delay had been sloppy and insubordinate in his work starting soon after he returned to work in February 2005. Hayes convinced the investigator that Delay was fired because of his sloppy work and insubordination, not because of his USERRA complaint, and DOL-VETS closed the case as "without merit."

When attorney Beck obtained the DOL-VETS file, he noticed something very interesting. The first Ace Heating Co. business record was dated February 29, 2005. Of course, 2005 was not a leap year. Attorney Beck was able to prove that Hayes created these purported business records only after Delay filed his USERRA complaint. The jury found for Delay and awarded him $146,000 in lost pay and economic damages, $146,000 in liquidated damages (because the violation was found to be willful), and another $250,000 for defamation.

In most cases, a USERRA claimant is better of with diligent private counsel, like you, rather than DOL-VETS and DOJ, for two reasons. First, you will approach the case as an advocate, not as a neutral investigator. Second, you can consider other legal theories and remedies, beyond USERRA, as attorney Beck did.

Q: DWI has offices and facilities in 40 states, including a small office here in San Francisco (Northern District of California) where Joe Smith worked before he was fired, on the eve of his mobilization in the Coast Guard Reserve. DWI's headquarters is located on Wall Street in Manhattan, in the Southern District of New York. It would be much more convenient for me and Smith to bring this lawsuit in the Northern District of California, but DWI insists that any suit against the company can only be brought in the Southern District of New York. What do you think?

A: "In the case of an action against a private employer, the action [to enforce USERRA] may proceed in the United States district court for any district in which the private employer maintains a place of business." 38 U.S.C. 4323(c)(2). Because DWI maintains a place of business in San Francisco, you can bring the action in the Northern District of California.