Law Review 1167

Unfavorable 8th Circuit USERRA Case

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

1.1.3.1—USERRA Applies to Voluntary Military Service
1.1.3.2—USERRA Applies to Regular Military Service
1.2—USERRA Forbids Discrimination
1.4—USERRA Enforcement
1.8—Relationship Between USERRA and other Laws/Policies

Lisdahl v. Mayo Foundation, 633 F.3d 712 (8th Cir. 2011).

Chad Leroy Lisdahl worked for Gold Cross Ambulance Service (a part of the Mayo Foundation in Duluth, Minnesota) from 1999 until May 2007, when he took medical leave (claiming Post Traumatic Stress Disorder or PTSD) under the Family Medical Leave Act (FMLA). He never returned from that leave and formally resigned his job in June 2008.[1]

Right to reinstatement under USERRA applies to those returning from Regular military service, as well as those returning from National Guard and Reserve service.

In 2002, after the terrorist attacks of September 11, Lisdahl enlisted in the regular Marine Corps and remained on active duty until 2006. During that time, he served three tours of duty in Iraq. After he was released from active duty, Lisdahl made a timely application for reemployment with Gold Cross and was reemployed.

Contrary to popular misconception, the Uniformed Services Employment and Reemployment Rights Act (USERRA) protects regular military service, as well as service in the National Guard and Reserve. I invite the reader's attention to Law Review 0719 (May 2007), available at www.servicemembers-lawcenter.org.[2]

Lisdahl was entitled to reemployment under USERRA because he met the five eligibility criteria. He left his Gold Cross job for the purpose of performing service in the uniformed services, and he gave the employer prior oral or written notice. He did not exceed the five-year cumulative limit on the duration of the period or periods of uniformed service, and he was released from the period of service without the kind of unfavorable discharge that would disqualify him from reemployment under section 4304 of USERRA, 38 U.S.C. 4304. After release from service, he made a timely application for reemployment with Gold Cross.

Professional licensing and reemployment

Lisdahl returned to work at Gold Cross in September 2006. Both before and after his military service, he worked as a paramedic. Before he enlisted in the Marine Corps, Lisdahl had a Minnesota paramedic's license and also maintained a certification with the National Registry of Emergency Medical Technicians, as required by Gold Cross.

The Court of Appeals decision states, "Before he entered active duty, Gold Cross advised him [Lisdahl] to maintain his Minnesota paramedic's license, because maintaining certification with the National Registry of Emergency Medical Technicians would be

extremely difficult (Gold Cross requires every paramedic to be nationally certified). If Lisdahl maintained his Minnesota licensure, upon returning he would be qualified to take the examinations for recertification by the National Registry. While in Iraq, Lisdahl allowed his National Registry certification to lapse. After he returned, Gold Cross allowed him a year to recertify, but Lisdahl's employment with Gold Cross terminated before the one-year period ended."

This recertification issue is not central to the outcome of this case, but the 8th Circuit decision seems to indicate a callous disregard for the difficulty of Lisdahl maintaining his Minnesota paramedic's license while on active duty in Iraq. While serving at the tip of the spear, Lisdahl needed to devote his entire attention to his military duties, not to continuing professional education requirements of the State of Minnesota and the National Registry of Emergency Medical Technicians. It should be noted that Lisdahl was not a paramedic in the Marine Corps, because the Marine Corps does not have paramedics. That function is performed by Navy Corpsmen.

The 8th Circuit decision seems to imply that Gold Cross gratuitously gave Lisdahl a year, after his reemployment, to recertify. It would have been a violation of USERRA if Gold Cross had delayed or denied reemployment for Lisdahl based on his failure to keep his state licensure current during his active duty period.

I invite the reader's attention to section 4302(b) of USERRA: "This chapter supersedes any State law (including a 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).

Under section 4302(b), USERRA overrides a Minnesota state law and a Gold Cross policy that require, as a condition to reemployment, an additional prerequisite—retained or restored state licensure as a paramedic. *See Petty v. Metro Government of Nashville-Davidson County,* 538 F.3d 431 (6th Cir. 2008). I discuss the implications of *Petty* in detail in Law Review 0864 (December 2008).

Section 4311 of USERRA forbids discrimination against those who have served, as well as those who currently serve.

After Lisdahl returned to work at Gold Cross in September 2006, he apparently had no further need for time off from work for military training or service.[3] The Court of Appeals decision does not mention drill weekends or annual training, or the possibility of recall to active duty, after September 2006.

In the overwhelming majority of USERRA discrimination cases, the unlawful discrimination is motivated by the employer's annoyance with the individual's recurring absences from work for military training and service. Those absences can cause inconvenience and expense for the civilian employer, and the employer may be tempted to avoid or rid himself of the inconvenience and expense by firing the employee who is a member of the National Guard or Reserve, or by not hiring Guard or Reserve members in the first place.

Section 4311(a) of USERRA provides: "A person who is a member of, applies to become 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." 38 U.S.C. 4311(a) (emphasis supplied).

Section 4311 further provides: "An employer shall be considered to have engaged in actions prohibited—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." 38 U.S.C. 4311(c)(1) (emphasis supplied).

Constructive discharge under USERRA

After Congress enacted the National Labor Relations Act (NLRA) in 1935, the National Labor Relations Board developed the doctrine of "constructive discharge." Since the NLRA made it unlawful for an employer to fire an employee for trying to persuade fellow employees that they should organize a union, the NLRB held that it was equally unlawful for the employer to make the employee's work life so intolerable that the employee would be effectively forced to quit.

Under USERRA and other laws, "constructive discharge" is a difficult thing to prove, and there is a heavy burden on the former employee claiming constructive discharge. The former employee must show that the situation was "objectively intolerable," not merely unpleasant. Both the District Court and the Court of Appeals rejected Lisdahl's claim that Gold Cross constructively discharged Lisdahl because of his military service. One factor that militated against Lisdahl's claim is that he did not complain to the company, during his employment, about the alleged mistreatment by his supervisor.

After he returned to work in September 2006, Lisdahl's immediate supervisor at Gold Cross was David Johnson. Prior to Lisdahl's return, Johnson incorrectly told Lisdahl's co-workers at least once that Gold Cross was not required to reemploy Lisdahl because he had volunteered for military service. This is a common misconception about the federal reemployment statute, which was originally enacted in 1940 as part of the Selective Training and Service Act, the law that led to the drafting of millions of young men (including my late father) for World War II. In 1941, as part of the Service Extension Act, Congress amended the reemployment statute to make it apply equally to voluntary and involuntary military service. Today, all military service is essentially voluntary, since our government has not drafted anyone since 1973.

Johnson's misunderstanding of USERRA, with respect to voluntary service, is interesting but not especially relevant, because Lisdahl was in fact reemployed, and Johnson was not the company's personnel director. Johnson also was alleged to have made some jokes at the expense of the military, to the effect that Army Reserve Soldiers do nothing but play cards and that the National Guard must be a joke because a certain co-worker who was obese was a National Guard member. These jokes were not directed at Lisdahl and were not relevant, according to the 8th Circuit.

Johnson and Lisdahl had a verbal confrontation after Johnson criticized co-worker Roger Swor for repeatedly exceeding the minutes allowed for Gold Cross cell phones that employees carried. Lisdahl spoke up to defend his friend Swor. This confrontation is not relevant because it did not involve Lisdahl's military service.

On another occasion, Johnson threatened to rip off the face of another Gold Cross employee if that employee made another comment to the effect that Johnson's wife was having an extra-marital affair. That confrontation was not relevant because it did not involve Lisdahl or military service.

In May 2007, Lisdahl took leave from his Gold Cross job, under the Family Medical Leave Act (FMLA). He never returned from the leave, and he formally resigned from his Gold Cross job in June 2008.

When Lisdahl requested FMLA leave, he claimed to be suffering from serious health problems (PTSD and bad knees) resulting from his military service. He said nothing about fear of Johnson or bad treatment by Johnson, nor did he claim that he had been constructively discharged.

While on FMLA leave from Gold Cross, Lisdahl applied for disability and unemployability benefits from the United States Department of Veterans Affairs (VA), and he applied for long-term disability benefits with Gold Cross, for his PTSD. The employer's disability insurance company denied Lisdahl's claim, because the insurance policy did not cover disabilities caused by acts of war. The VA awarded him some benefits but did not find him to be unemployable.

Let this be a lesson in "keeping your story straight." If you make inconsistent claims in two or more separate proceedings, the logical inference is that at least one of those claims is untruthful. If you make factual assertions in one legal context, those assertions may come back to haunt you later in another legal context. Of course, if you are truthful at all times, and if you refrain from making untruthful claims, you will not have this problem.

Lisdahl's suit went to a bench trial (without a jury).[4] The judge found that Lisdahl did not prove that he was subjected to any adverse personnel actions, firmly rejecting his claim that he was constructively discharged, and the court did not find any animus against Lisdahl based on his earlier military service. The 8th Circuit affirmed. Lisdahl did not apply to the Supreme Court for a writ of *certiorari,* and the deadline for doing so has passed. This case is now over and final.

---

[1] All of the facts stated in this article come from the published decision of the United States Court of Appeals for the 8th Circuit. I have never met Lisdahl, nor have I spoken to him by telephone or exchanged e-mails with him.

[2] I initiated the Law Review series in 1997, and we add 1-3 new articles per week. We now have more than 800 articles, mostly about USERRA. We have outgrown the ROA website and recently established this separate website for the Service Members Law Center (SMLC).

[3] When Lisdahl enlisted in the Marine Corps in 2002, he certainly would have been required to sign the standard enlistment contract, which contains an eight-year total obligation. Thus, he would not have been discharged altogether until 2010, on the eighth anniversary of his 2002 enlistment, unless he was discharged early because of medical issues or for other reasons.

[4] Under USERRA, unlike the reemployment statute in effect prior to the 1994 enactment of USERRA, it is possible to get a jury (see Law Review 0902), but Lisdahl's attorney chose not to request a jury.