LAW REVIEW 1174

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Why Does a Case Take so Long?

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1.4—USERRA Enforcement

Q: I read with great interest your Law Review 1170, about *Serricchio v. Wachovia Securities LLC, 658 F.3d 169* (2nd Cir. 2011). I think that this is a great victory, but I also noticed the great delay involved. It has been ten years since Sergeant Serricchio was called to the colors, in September 2001, and almost eight years since he returned from service, in October 2003. And his case is not yet over, you indicated in your article. The defendant employer can still ask the 2nd Circuit for rehearing *en banc* and can still petition the United States Supreme Court for a writ of *certiorari.* Whatever happened to the old adage that "justice delayed is justice denied?" What can be done to speed up these cases? Telling the Reserve Component (RC) member that he or she will probably get the civilian job back a decade or more after returning from service is hardly the kind of reassurance that we need to give these folks to persuade them to join the military and stay in.

A: First, I invite your attention to Act III, Scene 1 of *Hamlet,* written by William Shakespeare in 1602. This is the famous "to be or not to be" soliloquy contemplating suicide. While contemplating offing himself, Prince Hamlet outlines all that is wrong with human life. One item in a long list is "the law's delays." That situation has not improved in the intervening 409 years.

The 6th Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall have the right to a *speedy* and public trial." (Emphasis supplied.) But that guarantee only applies to criminal trials, which are given priority on federal and state court dockets. The civil cases compete for the limited time that is left, after the criminal trials have been accommodated. The dockets are crowded, and it just takes a long time for the parties to complete the discovery process and then for the court to find time to schedule a trial.

Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) in 1994, as a long-overdue replacement for the Veterans' Reemployment Rights Act (VRRA), which goes back to 1940. Until the 1980s, the VRRA had a "priority on the docket" clause, giving VRRA cases head of the line privileges on federal court dockets. Congress repealed this docket priority clause, as part of comprehensive legislation repealing docket priority clauses throughout the United States Code. There were so many docket priority clauses that they did not work well. As Frederick the Great said, "He who defends everything defends nothing."

As I explained in Law Review 200 and Law Review 1049,[1] there are limited circumstances wherein it is feasible to get a court to order another party to do something, or to refrain from doing something, *even before the trial is held.* To get such emergency injunctive relief, one must show both a *likelihood of success on the merits* (when the case finally goes to trial) and *irreparable injury* if the emergency injunctive relief is denied.

The problem is that the Supreme Court has held that it is not ordinarily possible to get injunctive relief to stop a firing. *See Sampson v. Murray,* 415 U.S. 61 (1974). The idea is that a firing, even if ultimately held to be unlawful, is not an *irreparable* injury. If a court eventually finds that the firing was unlawful, the court can order the employer to reinstate the individual and to pay back pay and interest, to compensate the unlawfully fired person for salary, wages, and benefits lost during the interim period, between the firing and the eventual court decision. Because the injury caused by the firing can be repaired, it is not an irreparable injury, or so the argument goes.

In Law Review 200 and Law Review 1049, I discussed *Bedrossian v. Northwestern Memorial Hospital,* 409 F.3d 840 (7th Cir. 2005). The United States Court of Appeals for the Seventh Circuit[2] relied on *Sampson v. Murray* and held that Colonel Carlos Bedrossian (an Air Force Reserve physician) was not entitled to emergency injunctive relief to stop his civilian employer from firing him because of his Air Force Reserve activities.

I do not question the general validity of *Sampson v. Murray,* but I assert that *USERRA is different.* I wrote in Law Review 200: "The 7th Circuit failed to understand that … USERRA is different from all other federal laws that apply to the employment context. In USERRA, the focus is not only on doing justice for the individual; the focus is on the defense needs of the nation. If folks like Colonel Bedrossian … cannot be given a reasonable assurance that their jobs will be protected, they will not volunteer. Without such assurance, they will not be available to protect the nation in the National Guard and Reserve. Worse, others who learn of the situation will be dissuaded from enlisting or reenlisting. It is not sufficient to tell these folks, 'If you win, probably many years from now, you may receive back pay.'" I adhere to these remarks, *now more than ever.*

As enacted in 1994, and as in effect at the time that the 7th Circuit decided *Bedrossian,* USERRA provided: "The court *may* use its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits under this chapter." 38 U.S.C. 4323(e) (emphasis supplied).

In Law Review 200, I urged Congress to amend section 4323(e), changing "may" to "shall." Congress did this in 2008. Unfortunately, Congress also added some additional language that only serves to confuse the matter further. As amended, section 4323(e) reads as follows: "The court *shall* use, *in any case in which the court determines that it is appropriate,* its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights and benefits of persons under this chapter." 38 U.S.C. 4323(e) (emphasis supplied).

Neither the text of section 4323(e) nor the legislative history of the 2008 amendment shed any light on what standards a court is to use in determining whether it is "appropriate" to enjoin an employer from firing an RC member or to require the employer to reemploy the member promptly upon his or her return from duty. Does *Sampson v. Murray* apply?

I urge Congress to amend section 4323(e) again and to eliminate "in any case in which the court determines that it is appropriate." In place of this language, Congress should include an explicit congressional finding that the urgent national defense needs of the nation require that the courts use their equity powers to make employers comply with USERRA, sooner rather than later.

Over the past decade, I have received many e-mails from RC members called to duty and deployed to Iraq and Afghanistan. When they left their civilian jobs to report for duty, their employers told them: "Don't even think about coming back to work here. You have made it clear that you are more interested in playing soldier than you are in working here. There is no job for you here." The best advice I could offer was to *apply for reemployment* upon release from service, although it is clear that your application will almost certainly be rejected. But a timely application for reemployment, after release from service, is essential to enforcing your right to reemployment under USERRA.

The principal purpose of USERRA, along with the Servicemembers Civil Relief Act (SCRA), is to take these civilian concerns off the service member's mind, to the maximum extent feasible, while the member is serving at the tip of the spear, in order to enable the member to devote his or her full attention to the military duties at hand.

This is a safety issue, for the individual service member and for his or her colleagues in arms. If I am in the foxhole next to Josephine Smith, I should not have to worry that she is not paying full attention to her sector of the perimeter, because she cannot put out of her mind her concern about her civilian job back home.

** Update 8/2/2012. No appeal of this case has been filed from Serricchio v. Wachovia Securities, LLC and the time for doing so has expired. This case is final.

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[1] More than 800 articles are available at www.servicemembers-lawcenter.org, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

[2] The 7th Circuit is the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.