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USERRA Claims Should Not Be Subject to Binding Arbitration Agreements

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1.5—USERRA Arbitration

In Law Reviews 149, 0619, and 0639, Colonel John S. Odom, Jr., USAF (Ret.) and I have discussed in detail the case of *Garrett v. Circuit City Stores Inc.*, 449 F.3d 672 (5th Cir. 2006).

LtCol Michael T. Garrett, USMCR, was employed by Circuit City from 1994 until 2003, when he was fired. He had difficulties with his employer related to his USMCR activities during his entire period of employment with the company. Beginning in late 2002, when it became clear that U.S. military action against Iraq might be imminent, he began to receive unjustified criticism and discipline from his Circuit City supervisors, culminating in his March 2003 firing, on the eve of the invasion of Iraq.

LtCol Garrett retained private counsel (Robert G. Goodman, Esq., of Dallas) and sued Circuit City in the U.S. District Court for the Northern District of Texas. The employer responded with a motion to compel arbitration, and that is where I came in. As requested by Mr. Goodman and LtCol Garrett, I filed on behalf of ROA an *amicus curiae* brief ("friend of the court"), arguing that section 4302(b)[1] of the Uniformed Services Employment and Reemployment Rights Act (USERRA) supersedes the agreement to submit future disputes to binding arbitration. Colonel Odom participated, on behalf of ROA, in the district court oral argument on the motion to compel arbitration.

In 1995, a few months after LtCol Garrett went to work for Circuit City, the employer adopted its Associate Issue Resolution Program (AIRP), a nationwide policy for resolving employee disputes through binding arbitration rather than litigation in court. The employer sent each employee (including LtCol Garrett) a letter about the AIRP, including an "opt-out" form. Each employee was given 30 days after receipt of the AIRP package to opt out of the agreement. As with most Circuit City employees, LtCol Garrett failed to respond.

Circuit City asserted that the failure to respond amounted to an agreement to submit future claims to arbitration, and that the District Court should order LtCol Garrett to submit his USERRA claim to arbitration. U.S. District Judge Barbara Lynn, however, agreed with the plaintiff and declined to order binding arbitration. *Garrett v. Circuit City Stores Inc.*, 338 F. Supp. 2d 717 (N.D. Tex. 2004). I have also found two other District Court decisions holding that USERRA overrides arbitration agreements. *See Breletic v. CACI Inc.,* 2006 U.S. Dist. Lexis 4916 (N.D. Ga. January 24, 2006) and *Lopez v. Dillard's Inc.*, 382 F. Supp. 2d 1245 (D. Kansas 2005).

Circuit City appealed to the United States Court of Appeals for the Fifth Circuit, the federal appellate court that sits in New Orleans and hears appeals from district courts in Texas, Louisiana, and Mississippi. ROA filed an *amicus curiae* brief in the 5th Circuit, but that court rejected the argument advanced by LtCol Garrett's counsel and ROA that section 4302(b) of USERRA overrides agreements to submit future USERRA disputes to binding arbitration. *Garrett v. Circuit City Stores Inc.,* 449 F.3d 672 (5th Cir. 2006). One other federal appellate court has addressed this question and has agreed with the 5th

Circuit that section 4302(b) of USERRA does not preclude enforcement of agreements to submit future disputes to binding arbitration. *Landis v. Pinnacle Eye Care LLC,* 537 F.3d 559 (6th Cir. 2008).[2]

In a case like *Garrett,* the person claiming that his or her USERRA rights have been violated is put at a distinct disadvantage in arbitration, as opposed to a trial in federal court. In an arbitration, there is only a very limited opportunity (if any opportunity at all) to obtain documents and witnesses from the employer-defendant, in order to prove one's case. In court, there is a detailed discovery process for this purpose.

In court, the district judge will apply the terms of USERRA and the relevant case law, and on appeal there is a *de novo* (as of new) reconsideration of the district court's conclusions of law. An arbitrator is supposed to apply the relevant substantive law, but if he or she fails to do so there is no remedy, as no court will review the arbitrator's findings of fact or conclusions of law.

For the arbitrator, the employer is likely a good repeat customer, while for the individual employee arbitration is a once in a lifetime experience. There is a strong economic incentive for the arbitrator to rule for the employer, to set up the possibility of repeat business with that employer.

We need to overturn *Garrett* either by case law development or by statutory amendment. If another Court of Appeals in another part of the country reaches a result on this issue that is contrary to the result reached by the Fifth Circuit and now the Sixth Circuit, the Supreme Court likely will grant *certiorari* (discretionary review) in order to resolve the conflict among the circuits. Presently, there is no conflict among the circuits. Now that the Sixth Circuit has followed the Fifth Circuit, it seems less likely that another circuit will come to the opposite conclusion.

If we are to overturn *Garrett*, it is likely to be through a statutory amendment, not case law development. During the 110th Congress (2007-08), S. 3432, the proposed Servicemembers Access to Justice Act (SAJA), would have made many helpful amendments to USERRA. Section 3 of SAJA would have added a new section 4327. That section would have provided, "Notwithstanding any other provision of law, any clause of any agreement between an employer and an employee that requires arbitration of a dispute under this chapter shall not be enforceable." I strongly support this approach.

SAJA was not enacted during the 110th Congress, but some individual pieces of it were enacted during the 110th and 111th Congresses. Congress has not yet addressed the arbitration issue in the context of USERRA.

This problem can be solved by legislation specifically related to USERRA, or it can be solved by broader legislation to restore fairness to the arbitration process. During the 112th Congress (2011-12), H.R. 1873 and S. 987 would prohibit pre-dispute forced arbitration of employment and consumer claims. I support that approach as well.

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[1] Section 4302(b) provides: "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).

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