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As Civilian Employer, Army Harasses and Abuses Disabled Army Veteran

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***McKelvey v. Secretary of the Army,* No. 10-1172 (6th Cir. Dec. 14, 2011).**

1.2—USERRA-Discrimination Prohibited

1.3.2.9—Accommodations for Disabled Veterans

1.8—Relationship Between USERRA and other Laws/Policies

The facts of this case are so shocking that I would have difficulty believing them if they had not been established in a federal court, to the satisfaction of the jury and the court. [1] One would think that the Department of the Army, as a civilian employer, would be especially supportive of individuals who had become severely disabled as a result of their Army service. But one would be wrong, at least in the case of James McKelvey.

In February 2004, McKelvey was serving on active duty in Iraq. A roadside bomb exploded while McKelvey was attempting to defuse it. He lost his right hand and suffered injuries to his left hand, an eye, and his lungs. After recovering at a base in Germany and at the Walter Reed Army Medical Center, McKelvey was medically retired from the Army. He moved back to Michigan and took a job at the Selfridge Air National Guard Base and then at the Detroit Arsenal.

Alan Parks was McKelvey's immediate supervisor. In March or April 2006, one of McKelvey's coworkers told him that Parks was "going around telling everybody you're all fu…. up from the war, you're a piece of s…, that he should never have hired you, you're worthless." Parks did not assign McKelvey enough work to keep him busy, although his coworkers were overwhelmed with work. When Parks did assign work to McKelvey, it was generally menial work. When a coworker asked for help moving some boxes, Parks "kind of chuckled and he said … 'I'll send McKelvey down. He's worthless anyhow. I'll send the cripple down to you."

Other colleagues were equally abusive. Coworker Maurice Spaulding expressed indignation that McKelvey had been assigned a handicapped parking permit and Spaulding called McKelvey "lefty" or "cripple." McKelvey contacted Parks' supervisor, Deputy Garrison Commander Robert Graves, to request that Graves advise Parks and Spaulding to tone it down, but the harassment got much worse.

At one point, Parks sought out McKelvey to ask him to destroy boxes of paper in an industrial shredder. McKelvey said that he was not comfortable putting his only good hand in the machine. Parks replied, calling him a "fu….. cripple" and walked out of the room. Parks also excluded McKelvey from a meeting about a planning exercise that McKelvey was supposed to coordinate.

In January 2007, McKelvey met with Lieutenant Colonel Kevin Austin, the garrison commander. Austin told McKelvey, "All I can tell you is if you don't like the way you are being treated, go find another job." It is difficult to believe that a field grade Army officer would be so callous with respect to a disabled Army veteran, but the evidence established that this is exactly what Austin said.

For some time, McKelvey had been looking for another job, but finding another job was most difficult in an economically depressed area like Detroit. He finally found another job (paying substantially less money) with the Oakland County Sheriff's Department, and resigned from his armory job on February 16, 2007. He testified that he would have left the armory much sooner but he had a wife and child to care for.

In October 2007, McKelvey sued the Secretary of the Army in the United States District Court for the Eastern District of Michigan. Through his attorney, McKelvey alleged that the Department of the Army violated the Rehabilitation Act of 1973, 29 U.S.C. 791 *et seq*. The Uniformed Services Employment and Reemployment Rights Act (USERRA) was not raised in the complaint, apparently because McKelvey did not work for the Department of the Army, as a civilian, before he went on active duty in the Army.[2]

The case went to trial before a jury, and the jury ruled for McKelvey on both his hostile work environment claim and his constructive discharge claim. The jury awarded no compensatory damages on the hostile work environment claim. On the constructive discharge claim, the jury awarded McKelvey $4,388,302 in front pay. The idea is that McKelvey will earn substantially less money in the Oakland County job than he would have earned in the armory job, and since McKelvey is only 38 he has another 27 years in his expected working life, until he turns 65.

In an employment discrimination case, the normal remedy for an unlawful firing is a reinstatement order, and back pay to compensate the plaintiff for the pay lost between the date of the firing and the date of the reinstatement order. In an extraordinary case, if the facts are so egregious as to make it impracticable for the plaintiff to return to the employment of the defendant employer, a court may award front pay, representing the present value of the lost salary and benefits for the remainder of the plaintiff's working life, minus the salary and wages that the plaintiff could be reasonably expected to earn from mitigating employment.[3]

After the trial, the Secretary of the Army filed motions under Rules 50 and 59 of the Federal Rules of Civil Procedure, for judgment as a matter of law on the constructive discharge claim and to vacate the award of front pay. The district court granted both motions, holding that McKelvey had presented insufficient evidence to sustain a finding of constructive discharge and (in the alternative) that the proper remedy for a constructive discharge would be an order reinstating McKelvey to a job at the armory, not front pay.

McKelvey appealed to the United States Court of Appeals for the Sixth Circuit.[4] As is always the case in federal appeals, the appeal was heard and decided by a panel of three judges. In this case, Judges Jeffrey S. Sutton and Richard Allen Griffin and Senior Judge Alan E. Norris made up the panel. Judge Sutton wrote the ten-page decision, and Judges Griffin and Norris joined.[5]

The appellate court agreed with McKelvey's assertion that the district court should not have granted the Secretary's motion for judgment as a matter of law on the constructive discharge claim. The appellate decision states, "Reasonable jurors could have gone either way on this issue."

Judge Sutton's opinion seems to express great concern about the shocking facts of this case, but it agrees with the Secretary's alternative argument that the appropriate remedy is to reinstate McKelvey into an appropriate job at the armory, ordering the Department of the Army to ensure that there is no repetition of the harassment and abuse. I hope that the Department of the Army has learned its lesson and that McKelvey and other disabled veterans will never again face this sort of abuse in Department of the Army civilian employment.

The shocking facts of this case are further evidence that with respect to the employment of veterans federal agencies, even in the Department of Defense, are often the worst offenders, not the model employers.

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[1] All of the facts in this article come directly from the decision of the appellate court.

[2] McKelvey could have alleged that the hostile work environment and constructive discharge violated section 4311 of USERRA, in that the employer discriminated against McKelvey based on his past service in the uniformed services, but McKelvey's lawyer did not mention USERRA in his complaint. If he had made this a USERRA case,

McKelvey would have needed to file and litigate his case in the Merit Systems Protection Board, rather than federal district court.

[3] Please see Law Review 172 for a discussion of front pay in the context of a USERRA case. You can find more than 900 articles about USERRA and other military-relevant laws at www.servicemembers-lawcenter.org. You can also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

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

[5] The decision is marked "not recommended for full-text publication." I respectfully submit that the public interest would be served by the official publication of this decision in Federal Reporter, Third Series, because this is a most interesting set of facts and a well-written and instructive decision.