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Oklahoma Attorney General Gets It Wrong on USERRA

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

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Rex Duncan is a Colonel in the Oklahoma Army National Guard. He served three two-year terms in the Oklahoma House of Representatives, from 2004 to 2010. In 2010, he ran for and was elected District Attorney for District 10 (Osage and Pawnee Counties in Oklahoma). He was elected to a four-year term, to run from January 2011 to January 2015.

Shortly after he took office as District Attorney, the Army called him to active duty. He is currently in Afghanistan, commanding a security and transition team training the Afghan National Army and police. His deputy ran the District Attorney's office in Duncan's office until September. On September 27, 2011, Oklahoma Attorney General E. Scott Pruitt issued an opinion, stating that the Oklahoma Constitution precludes Duncan from holding a state office (District Attorney) while simultaneously holding the office of Army Colonel on active duty.

The Attorney General's opinion also states that the Uniformed Services Employment and Reemployment Rights Act (USERRA) does not apply to persons holding *elected* office, like Duncan. The logic and authority supporting that conclusion is sorely lacking and will not hold up, I predict.

The Attorney General's opinion cites USERRA's legislative history to the effect that the definition of "employee" under USERRA is to be construed like the determination of "employee" status under the Fair Labor Standards Act (FLSA), the federal minimum wage and overtime law. The opinion points out that employees of states and political subdivisions of states who do not have civil service protections are excluded from FLSA coverage, citing 29 U.S.C. 203(e)(2). This legislative history is taken out of context and does not support the conclusion reached by the Oklahoma Attorney General.

Congress enacted USERRA in 1994, as a long-overdue recodification of the Veterans' Reemployment Rights Act (VRRA), which was enacted in 1940. USERRA's legislative history makes clear that the VRRA case law is to be applied in determining the meaning of USERRA provisions: "The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protections against employment-related discrimination, and the protection of certain other rights and benefits have been eminently

successful for over fifty years. Therefore, the Committee [House Committee on Veterans' Affairs] wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act [USERRA], remains in full force and effect in interpreting these provisions. This is particularly true of the basic principle established by the Supreme Court that the Act is to be 'liberally construed.' *See Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946); *Alabama Power Co. v. Davis,* 431 U.S. 581, 584 (1977)." House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News (USCCAN)* 2449, 2452.

USERRA's legislative history makes clear the intent of Congress that the distinction between employees and independent contractors is to be made based on the same expansive treatment afforded under the FLSA, citing *Brock v. Mr. W Fireworks, Inc.,* 814 F.2d 1042 (5th Cir. 1987). 1994 *USCCAN* at 2454. In that case, the "independent businessmen" who sold fireworks for Mr. W Fireworks Company were determined to be employees of the company, for FLSA purposes. Congress intended that the same broad interpretation of "employee" (as opposed to "independent contractor") should apply under USERRA.

The legislative history that the Oklahoma Attorney General cited supports the conclusion that Congress intended USERRA to be *broadly* construed in favor of coverage, in the context of making the distinction between an employee and an independent contractor. Citing that same legislative history in support of a *narrow* coverage of USERRA is sophistic. Nothing in USERRA limits coverage to employees who have civil service protections under state or federal law.

But it appears to me that both Colonel Duncan and Attorney General Pruitt are missing an important point. USERRA does not make it unlawful for the employer to fill the position of an employee who has been called to the colors, but the fact that the job has been filled does not defeat the returning veteran's right to reemployment. There are circumstances where the employer must displace the replacement in order to reemploy the returning veteran.

I invite your attention to Law Review 0829 (June 2008), concerning the rights of the replacement employee—the replacement has no rights. The economic interest of the replacement does not override the employer's obligation to the returning veteran. The fact that the job has been filled does not defeat the reemployment rights of the veteran.

I invite your attention to www.servicemembers-lawcenter.org. You will find more than 700 "Law Review" articles about USERRA and other military-relevant laws, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add 1-5 new articles per week. We recently established a separate website for the Service Members Law Center, because we had outgrown the ROA website.

As I explained in Law Review 0766 and other articles, Colonel Duncan (or any service member) must meet five eligibility criteria to have the right to reemployment under USERRA:

a. Must have left a position of civilian employment for the purpose of performing voluntary or involuntary service in the uniformed services.
b. Must have given the employer prior oral or written notice.
c. Cumulative period or periods of uniformed service, relating to the employer relationship for which the individual seeks reemployment, must not have exceeded five years. Colonel Duncan's current active duty is involuntary and

does not count toward his five-year limit. See Law Review 201.
d. Must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge.
e. Must have made a timely application for reemployment after release from the period of service.

Colonel Duncan does not have a *ripe* claim for reemployment under USERRA because he does not meet the five eligibility criteria. He almost certainly meets the first two, but he has not been released from the period of service and he has not applied for reemployment. Many things might happen that would mean that he would not have the right to reemployment as District Attorney.

But Duncan has it in his power to meet these five criteria. I am confident that he will leave active duty (probably sometime this spring) without having exceeded the five-year limit and without having received a disqualifying bad discharge. If he applies for reemployment, he will have the right to reemployment as District Attorney as a matter of federal law and federal law trumps conflicting state law.

I am optimistic that the State of Oklahoma will not "make a federal case out of this", but if they do they will lose. If the Governor appoints a new District Attorney, the Governor should make it clear to that person that he or she must resign when Colonel Duncan returns from Afghanistan.

In his opinion, Attorney General Pruitt cited *Wimberly v. Deacon,* 144 P.2d 447 (Okla. 1944). This is an Oklahoma Supreme Court case decided during World War II, involving a member of the University of Oklahoma Board of Regents who was called to active duty for the war. I respectfully submit that this ancient case is irrelevant. It should be noted that the federal reemployment statute has applied to the Federal Government and to private employers since 1940, but it did not apply to state and local governments until amended in 1974.

The *Tulsa World* reported on the Duncan situation in an article published on September 28, 2011. On the newspaper's website, there are many comments following the article, including the following by a person who calls himself (herself) "SocProf":

"Folks, the Constitution is there for a reason, and Pruitt is simply following what was established by Oklahomans before us. We can argue all day about this being a 'political' move, but the bottom line is we are bound by the Constitution. Pruitt acknowledged that he struggled with the opinion, but the law is the law. If we don't like it...then we can put it to a vote of the people, but we can't simply ignore it because Duncan is 'a good ol' American Oklahoma boy.' We don't get to apply the law to some cases while ignoring it with others."

This learned professor needs to understand that the *Oklahoma Constitution* is not the final word on this subject. I invite the professor's attention to the Supremacy Clause of the *United States Constitution:*

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

United States Constitution, Article VI, Clause 2. Yes, it is capitalized just that way, in the style of the late 18th Century.

As a federal statute, USERRA overrides conflicting state constitutions and statutes. If and when Colonel Duncan meets the USERRA eligibility criteria, after he returns from Afghanistan, he will have the right to reemployment as District Attorney and Governor Fallin's appointee will have to leave office to make room for him.

UPDATE- February 15, 2013: The State of Oklahoma did not back down from its legally untenable position that the Oklahoma Constitution overrides a federal statute, the Uniformed Services Employment and Reemployment Rights Act (USERRA). Colonel Duncan sued, and on February 14, 2013 Oklahoma County Special District Judge Donald Easter ruled in his favor, awarding him more than $7,000 in leave-of-absence pay and ordering the State of Oklahoma to give Duncan state employee retirement credit for the period of time that he was away from the District Attorney position for military service.

It is unclear whether the State of Oklahoma will appeal. We will keep the readers informed of any additional developments in this important and interesting case.