LAW REVIEW 1233

March 2012

Federal Arbitration Act Severely Limits Review of Arbitrator's Erroneous Ruling

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

1.2—USERRA Forbids Discrimination

1.4—USERRA Enforcement

1.5—USERRA Arbitration

1.8—Relationship between USERRA and other Laws/Policies

Q: I went to work for a major corporation in 2007. Before I was hired, I was required to sign, as a condition of hiring, a printed agreement stating that if I ever had a dispute with my employer about anything related to my employment I agreed to submit the dispute to arbitration and that I agreed not to sue in court or to file a complaint against the employer with any federal or state agency. When I objected to the agreement, I was told that I would not be hired if I did not sign. My signing was certainly not voluntary. I signed because I needed the job and because other prospective employers in the same industry imposed identical arbitration requirements.

I am a Major in the Marine Corps Reserve and a member of ROA. I have read with great interest your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

While I worked for this company, I got a very hard time from my direct supervisor about my Marine Corps Reserve drill weekends and annual training. The supervisor went to general quarters when I was called to active duty for seven months in 2008-09. I returned to work after the mobilization, but not in the appropriate position and not without a great deal of grief from the supervisor.

In January 2010, my Marine Corps Reserve Commanding Officer (CO) informed me (and other unit members) that we would likely be called to active duty again in the summer of 2010, and the CO directed all of us to inform our civilian employers. As directed, I informed my supervisor the following Monday, when I returned to work after the drill weekend. When I informed him, he expressed a great deal of irritation about my Marine Corps responsibilities, using four-letter words.

The employer fired me three weeks after I gave this informal notice of my likely mobilization later in 2010. Through the personnel office, the company denied that my Marine Corps Reserve service had anything to do with the firing, but the company refused to explain the rationale for the firing. The personnel office insisted that I was an "employee at will" and that the company was not required to explain and would not explain the rationale.

I hired a lawyer and sued the company in federal court. The company responded by filing a "motion to compel arbitration." Over the strenuous objections of my lawyer, the judge ordered me to submit my claims to an arbitrator, under the terms of the arbitration agreement that I involuntarily signed when I was hired.

I was called to active duty from July 2010 to February 2011. After I was released from active duty, I applied for reemployment with the company, as my lawyer advised me to do. The company refused to reemploy me, contending that I had been lawfully fired in February 2010, five months before I was called to active duty.

My lawyer pursued the matter with the arbitrator, concerning the February 2010 firing and the February 2011 refusal to reemploy. The arbitrator held a hearing, and then months went by with no action. At the hearing, the company pointed to several incidents where they claimed that my work was substandard, and the company claimed that I was fired because of substandard work, not because of my Marine Corps obligations. I acknowledge that I was a less-than-perfect employee, but I strenuously deny having done anything that would justify firing me. I think that the company exaggerated certain incidents and took them out of context, and I think that the company's proffered reasons for my firing were pretextual. I think that the real reason, or at least one of the reasons, was that I had already been called to active duty once and had told them that I was likely to be called up again.

Months went by after the arbitrator's hearing, and he just recently came out with a written decision, ruling against me. In his memorandum, he stated that to prevail under section 4311 of USERRA I was required to prove that the firing was motivated *solely* by my Marine Corps service, and that I had not proved that. In his memorandum, the arbitrator cited *Sawyer v. Swift & Co.,* 836 F.2d 1257, 1261 (10th Cir. 1988).

In several of your published articles, you have written that "solely motivated" is not the test and that I am only required to prove that my Marine Corps Reserve service was *one of the reasons* for the firing. Was the arbitrator's decision wrong as a matter of law? What, if anything, can I do about it?

A: The arbitrator's decision is clearly wrong, but unfortunately there is nothing you can do about it. If this were a decision of a district court, the court of appeals would have no difficulty reversing it. But since this is an arbitrator's decision it is unreviewable.

Congress enacted USERRA in 1994, to replace the Veterans' Reemployment Rights Act (VRRA), which goes back to 1940. The text and legislative history of USERRA make clear that you are only required to prove that your uniformed service was "a motivating factor" in the employer's decision to fire you. 38 U.S.C. 4311(c)(1). If you prove that, you win:

> …unless the employer can *prove* that the action [firing] would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service.
>
> *Id.* (emphasis supplied).

USERRA's legislative history specifically mentions *Sawyer* with disapproval. *See* House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2457. *Sawyer* was wrongly decided under the VRRA, and it is certainly not good law under USERRA.

The Federal Arbitration Act (FAA) is codified in title 9 of the United States Code, at sections 1 and following (9 U.S.C. 1 *et seq.).* Under section 10, an arbitrator's award can be set aside by a federal district court only under very limited circumstances:

> **(a)**In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> **(1)**where the award was procured by corruption, fraud, or undue means;
>
> **(2)**where there was evident partiality or corruption in the arbitrators, or either of them;
>
> **(3)**where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> **(4)**where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> 9 U.S.C. 10(a).

Under the FAA, there is no provision for a federal or state court to reverse the arbitrator's decision based on the arbitrator's misunderstanding and misapplication of the underlying statute and its case law. The arbitrator's ruling against you was egregiously wrong but will not be overturned.

I believe, and I have argued in *amicus curiae* briefs, that section 4302(b) of USERRA overrides an agreement (like the agreement you signed when you were hired) to submit future USERRA disputes to binding arbitration. 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 receipt of any such benefit.*
>
> 38 U.S.C. 4302(b) (emphasis supplied).

Unfortunately, the 5th Circuit[1] and the 6th Circuit[2] have specifically rejected this argument. *See Garrett v. Circuit City Stores, Inc.,* 449 F.3d 672 (5th Cir. 2006) and *Landis v. Pinnacle Eye Care LLC,* 537 F.3d 559 (6th Cir. 2008). The other circuits have not addressed this specific question under USERRA. Thus, it is not surprising that in your case the district court rejected your lawyer's objection to the motion to compel arbitration, and it

is unlikely that there will be a conflict among the circuits, so that we can get this issue to the Supreme Court.

If there is to be a solution to this problem, it will probably have to come from Congress, as a statutory amendment. This could be an amendment to USERRA specifically, or it could be part of broader legislation on arbitration of employment and consumer cases generally. This issue is discussed in detail in Law Review 1191 (October 2011).[3]

---

[1] The 5th Circuit is the federal appellate court that sits in New Orleans and hears appeals from district courts in Louisiana, Mississippi, and Texas.

[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.

[3] Please see www.servicemembers-lawcenter.org. You will find 732 articles about USERRA and other laws that are particularly pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.