Law Review 12108

November 2012

DOJ Sues NC School District on Behalf of Army Reservist

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In late October 2012, the United States Department of Justice (DOJ) filed suit against the Warren County School District (WCSD) in the United States District Court for the Eastern District of North Carolina, on behalf of Sergeant First Class (SFC) Dwayne Coffer, USAR. DOJ alleges that the WCSD violated the Uniformed Services Employment and Reemployment Rights act (USERRA) when it decided not to renew Coffer's contract at the end of the 2007-08 school year.

SFC Coffer was not required to limit his military service to summer vacation periods.

Coffer was the acting principal of a school in the WCSD when he left his job for a one-month military assignment in March 2008. Ray Spain, the WCSD Superintendent, was annoyed with Coffer for performing military duty during the school year. When Coffer's contract expired at the end of the school year, Spain recommended that the Board not renew the employment contract, and the Board followed the Superintendent's recommendation. Coffer has reported that Spain told him that the contract was not being renewed because, in Spain's view, "Coffer had a choice as to whether to take military leave during the school year."

Contrary to the Superintendent's position, Coffer was not required to limit his Army Reserve service to summer vacation periods. It is not possible to win our nation's wars if almost half of the nation's service members are only available three months out of the year.

The seven Reserve Components (RC) are the Army Reserve, the Army National Guard of the United States, the Air Force Reserve, the Air National Guard of the United States, the Navy Reserve, the Marine Corps Reserve, and the Coast Guard Reserve. Almost as many men and women serve in these seven components as serve in the armed forces as regulars. Thus, the RC makes up almost half of our nation's military manpower base.

The RC is now an integral part of the national military establishment, not just for the "total war" scenario (which is most unlikely to occur) but also for intermediate military engagements like Iraq and Afghanistan. As Iraq has come to a close and Afghanistan is winding down, the next decade will likely see some falloff in the demands on the RC, but I confidently predict that as a nation we will never return to the "weekend warrior" RC—the days when RC service was generally limited to one weekend per month and two weeks of "summer camp."

Here at ROA headquarters, the treasured Minuteman Memorial Building, we have the Minuteman Statue—donated to ROA by Brigadier General and Mrs. Roger L. Zeller as a memorial to Lieutenant Edwin F. Dietzel. The statue sits on a marble pedestal. On the pedestal, these words are inscribed: "Each citizen of a free government owes his services to defend it." Those words are attributed to General George Washington in 1783.

For most of our nation's history, we had a tiny standing Army of professional career soldiers, and a Navy that was only slightly larger. When conflict arose, the standing Army was quickly supplemented by calling up state militia forces, the citizen soldiers of that era. For a major military conflict, our nation established a draft and conscripted young men into service. This pattern held for the Civil War, World War I, World War II, the Korean War, the Vietnam War, and the first 28 years (1945-73) of the Cold War competition with the Soviet Union.

All of that changed in 1973, when Congress abolished the draft. Today, the United States military, Active Component and Reserve Component, is the best motivated, best trained, best led, best equipped, and most effective military in the world, and perhaps in the history of the world. Few in today's military would contemplate returning to the draft. The vast majority of our population is not asked to participate in the defense of the nation, beyond the payment of taxes.

Today's military establishment, including the National Guard and Reserve, amounts to less than ¾ of 1% of the U.S. population. Somewhat a tradition for some, it is largely the same families who serve, from one generation to the next. In the 11 years since the September 11 terrorist attacks, service academy alumnae publications are full of photographs of inter-generational family reunions in Iraq and Afghanistan.

In a speech to the House of Commons on August 20, 1940, Prime Minister Winston Churchill said:

> The gratitude of every home in our Island, in our Empire, and indeed throughout the world, except in the abodes of the guilty, goes out to the British airmen who, undaunted by odds, unwearied in their constant challenge of mortal danger, are turning the tide of world war by their prowess and their devotion. Never in the field of human conflict was so much owed by so many to so few.

Prime Minister Churchill's paean to the Royal Air Force in the Battle of Britain applies equally to the United States military in the Global War on Terrorism. It is these few, these hardy few, who have prevented a recurrence of the horrors of September 11, by their prowess and their devotion.

According to the Department of Defense, 860,919 RC personnel have been called to the colors since September 11, 2001, our generation's "date which will live in infamy." Some have been called five or more times, and their civilian employers are tired of the "burden" and seek to shed the burden by flouting the Uniformed Services Employment and Reemployment Rights Act (USERRA).

To our nation's employers—I say that your burden, while not inconsiderable, pale in comparison to the burden, and sometimes the ultimate sacrifice, borne by those in uniform. Because our country abolished the draft 39 years ago, we are not calling you to involuntary military service, and we are not calling your sons or daughters. That entire burden is borne by that tiny sliver of the population that volunteered to serve, in the Active Component or the Reserve Component. Employers—do not complain about the burden on you—honor and celebrate the much greater burden voluntarily undertaken by those who serve.

The reemployment statute is not new—it is 72 years old. It was originally enacted in 1940, as part of the Selective Training and Service Act, the law that led to the drafting of millions of young men, including my late father, for World War II. A year later, as part of the Service Extension Act of 1941, Congress expanded the reemployment provision to make it apply to voluntary enlistees as well as draftees. Congress strengthened the law when it enacted USERRA in 1994, but you should think of this law as 72 years old, not 18. This law is an integral part of the fabric of our society.

The individual Reservist's right to time off from his or her civilian job is not limited by what the employer or even a court might consider "reasonable." For many years, there was a dispute about whether a "rule of reason" limited the duration of Reserve component training, but that dispute was resolved by the Supreme Court, favorably to Reservists and National Guard members, even before USERRA was enacted in 1994.

Under the VRR law, there was a four-year limit on "active duty" with respect to any one employer, but there was no express limit on the duration of active duty for training (ADT) and inactive duty training (either of a particular period or cumulatively with that employer). For almost 20 years, there was an intense dispute and conflicting court

decisions about whether there was an implied limit or a "rule of reason." The Supreme Court finally put an end to that argument in 1991, when it held that there is no limit on the duration of ADT. See King v. St. Vincent's Hospital, 502 U.S. 215 (1991).

USERRA eliminated the sometimes-confusing distinctions among categories of military training or service found in the VRR law. All categories (active duty, ADT, inactive duty training, initial active duty training, funeral honors duty, etc.) now fit within USERRA's broad definition of "service in the uniformed services." [38 U.S.C. 4303(13)] Under USERRA, the cumulative limit on service, with respect to a particular employer, is generally five years, but most Reserve component training and several other categories of service are exempt from the five-year limit.[1] To the extent that there was any lingering doubt about the continuing existence of a "rule of reason," Congress drove a stake in it when it enacted 38 U.S.C. 4312(h):

"In any determination of a person's entitlement to protection under this chapter, the timing, frequency, and duration of the person's training or service, or the nature of such training or service (including voluntary service) in the uniformed services, shall not be a basis for denying protection of this chapter if the service does not exceed the limitations set forth in subsection (c) [the five-year limit] and the notice requirements established in subsection (a)(1) and the notification requirements established in subsection (e) are met."

This section could hardly be clearer, but the intent of Congress is further buttressed by USERRA's legislative history. In its report (House Report No. 103-65, 1994 United States Code Congressional and Administrative News, at page 2463), the House Committee on Veterans' Affairs wrote:

"Section 4312(h) is a codification and amplification of *King v. St. Vincent's Hospital*. This new section makes clear the Committee's intent that no "reasonableness" test be applied to determine re-employment rights and that this section prohibits consideration of timing, frequency or duration of service so long as it does not exceed the cumulative limitations under section 4312(c) and the service member has complied with the requirements under sections 4312(a) and (e).

The Committee believes, however, that instances of blatant abuse of military orders should be brought to the attention of appropriate military authorities [see *Hilliard v. New Jersey Army National Guard*, 527 F. Supp. 405, 411-412 (D. N.J. 1981)], and that voluntary efforts to work out acceptable alternatives could be attempted. However, there is no obligation on the part of the service member to rearrange or postpone already-scheduled military service nor is there any obligation to accede to an employer's desire that such service be planned for the employer's convenience. Good employer-employee relations dictate, however, that voluntary accommodations be attempted by both parties when appropriate."

Section 4331 of USERRA (38 U.S.C. 4331) gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. The Department of Labor (DOL) published proposed USERRA regulations, for notice and comment, in September 2004. After considering the comments received and making a few adjustments, DOL published the final USERRA rules in the *Federal Register* on December 19, 2005. Shortly thereafter, the USERRA regulations were published in the Code of Federal Regulations (C.F.R.), at 20 C.F.R. Part 1002. The DOL USERRA regulations contain a definitive statement on this "rule of reason" issue:

"Is the employee required to accommodate his or her employer's needs as to the timing, frequency or duration of service?

No. The employee is not required to accommodate his or her employer's interests or concerns regarding the timing, frequency, or duration of uniformed service. The employer cannot refuse to reemploy the employee because it believes that the timing, frequency or duration of the service is unreasonable. However, the employer is permitted to bring its concerns over the timing, frequency, or duration of the employee's service to the attention of the appropriate military authority. Regulations issued by the Department of Defense at 32 CFR 104.4 direct military authorities to provide assistance to an employer in addressing these types of employment issues. The military authorities are required to consider requests from employers of National Guard and Reserve members to adjust scheduled absences from civilian employment to perform service."

20 C.F.R. 2001.104 (bold question in original).

In summary, applying the text of USERRA, the legislative history, the Supreme Court case law under USERRA and the prior reemployment statute, and the DOL USERRA regulations, it is clear that SFC Coffer was not required to accommodate the preferences of his civilian employer in scheduling his military duty for the summer break time, even if such a scheduling accommodation were feasible.

SFC Coffer was entitled to reinstatement as acting principal when he returned from one month of military duty in April 2008.

When Coffer left his civilian job for one month of military service, in early March 2008, he was the acting principal of a WCSD school, while the principal was away from work because of illness. When Coffer was called to the colors, another administrator was made the acting principal, and that other individual became the principal after the WCSD Board declined to renew Coffer's employment contract.

As I explained in Law Review 1281 and other articles, an individual must meet five conditions to have the right to reemployment under USERRA:

1. Must have left a position of employment for the purpose of performing voluntary or involuntary service in the uniformed services.
2. Must have given the employer prior oral or written notice.
3. Cumulative period or periods of uniformed service, relating to the employer relationship for which the individual seeks reemployment, must not have exceeded five years. All involuntary service and some voluntary service are exempted from the computation of the individual's five-year limit.
4. Must have been released from the period of service without having received the sort of bad discharge that disqualifies the individual under 38 U.S.C. 4304.
5. Must have made a timely application for reemployment after release from the period of service.

It seems clear that Coffer met these five conditions in late March or early April of 2008, when he returned from one month of military duty. Accordingly, Coffer was entitled to be promptly reemployed in the position of employment that he would have attained if he had not been called to the colors. 38 U.S.C. 4313(a)(1)(A).

The principal did not recover from his illness during the month that Coffer was away from work for service. There is every reason to believe that if Coffer had not been called to the colors he would have continued to be the acting principal at least through the end of the 2007-08 school term. Accordingly, the WCSD had a duty to reemploy Coffer as the acting principal, even if that meant displacing the other administrator who had served in that capacity in Coffer's absence.

Allowing the hiring of another employee to defeat the reemployment rights of the returning veteran would render the reemployment statute largely meaningless, and it is clear that the lack of a current vacancy does not defeat the right of the veteran to return to his or her rightful position. "The department [Department of Veterans Affairs, employer in the case] first argues that, in this case, Nichols' [Nichols was the returning veteran and the plaintiff.] former position was 'unavailable' because it was occupied by another, and thus it was within the department's discretion to place Nichols in an equivalent position. This is incorrect. Nichols' former position is not unavailable because it still exists, even if occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. … Although occupied by Walsh, Nichols' former position is not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him." *Nichols v. Department of Veterans Affairs,* 11 F.3d 160, 163 (Fed. Cir. 1993).

The WCSD's decision not to renew Coffer's contract violated section 4311 of USERRA.

Section 4311 of USERRA provides as follows:

"(a)A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, *retention in employment*, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

(b)An employer may not discriminate in employment against or take any adverse employment action against any person because such person

(1) has taken an action to enforce a protection afforded any person under this chapter,

(2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter,

(3) has assisted or otherwise participated in an investigation under this chapter, or

(4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c)An employer shall be considered to have engaged in actions prohibited—

(1)under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

(2)under subsection (b), if the person's

(A) action to enforce a protection afforded any person under this chapter,

(B) testimony or making of a statement in or in connection with any proceeding under this chapter,

(C) assistance or other participation in an investigation under this chapter, or

(D) exercise of a right provided for in this chapter, is *a motivating factor in the employer's action*, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d)The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title."

38 U.S.C. 4311 (emphasis supplied).

The WCSD violated section 4311 when it decided not to renew Coffer's contract at the end of the 2007-08 school year—it denied him retention in employment on the basis of his membership in the Army Reserve, his performance of uniformed service, and/or his obligation to perform future service. To prove a violation of section 4311, DOJ need not prove that the non-renewal was based solely on Coffer's membership, service, or obligation to perform service. It is sufficient to prove that these protected factors constituted *a motivating factor* in the employer's decision. If DOJ proves that, Coffer wins, unless the WCSD can *prove* (not just say) that it would not have renewed Coffer's contract even if he had not been a member of the Army Reserve.

Superintendent Spain's statement to the effect that Coffer could have chosen to perform his Army duty during the vacation period seems fully adequate to prove motivating factor. Even without the statement, the proximity in time

between Coffer's military service (March 2008) and the non-renewal of his contract (June 2008) may be sufficient to prove motivating factor.

Remedies available to Coffer if a violation is proved.

Section 4323 of USERRA (38 U.S.C. 4323) provides for enforcement of USERRA against a state or local government or private employer, through litigation (initiated by DOJ or by private counsel) in the appropriate federal district court. Section 4323(d)(1) addresses the relief that the court may award upon finding a USERRA violation:

"In any action under this section, the court may award relief as follows:

(A) The court may require the employer to comply with the provisions of this chapter.

(B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.

(C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful."

38 U.S.C. 4323(d)(1).

If the court finds that the WCSD violated USERRA by failing to renew Coffer's contract in June 2008, the court will order the district to reinstate Coffer as an employee. Moreover, the court will order the district to compensate Coffer for all the pay and benefits that he lost from the date he lost his job until the date that he returns to work under the court order.

It appears that 52 months have elapsed from the end of Coffer's prior employment contract until the filing of this lawsuit. Let us assume that it takes another 36 months, from the date of filing, for this case to go to trial, and then DOJ wins. At that point, it will be necessary to compute, on a pay period by pay period basis, the pay and benefits that Coffer lost because of the USERRA violation, over the entire 88-month period. First, we must determine what Coffer *would have earned* from the school district if he had been continuously employed. From that figure, for each particular pay period, we then subtract what Coffer earned from any mitigating employment that he was able to find. If Coffer earned more from the mitigating employment in a particular pay period than he would have earned from the WCSD, he receives no back pay for that pay period, but the excess is not applied to earlier or later pay periods.[2]

If the court finds that the school district violated USERRA willfully, the court will award Coffer liquidated damages equal to the actual damages, as computed above, and in addition to those damages. This amounts to double damages for a willful violation.

Why did it take 52 months for DOJ to file this lawsuit?

In this case, the principal violation (non-renewal of Coffer's contract) occurred in June 2008. It appears that Coffer complained to DOL shortly thereafter, but this lawsuit was not filed until October 2012, 52 months later. Why?

In October 2008, Congress amended sections 4322 and 4323 of USERRA, putting specific timelines on DOL and DOJ actions in USERRA cases. If those timelines had been followed, this case would have been filed in the Eastern District of North Carolina by sometime in early 2009. Where has this case been? What accounts for the delay?

In retrospect, Coffer would have been better off to have retained private counsel and to have filed this case on his own. He could have done so at any point. USERRA has no "exhaustion of remedies" requirement, and one does

not need a "right to sue" letter as a condition precedent to filing suit. If Coffer had filed with private counsel in 2009, this case would be over by now. As it is, Coffer's case is just entering the substantial queue in the crowded docket of the United States District Court for the Eastern District of North Carolina.

As I explained in Law Review 89 (September 2003) and other articles, it is not possible for an individual USERRA plaintiff to sue a state government employer in federal court, because of the 11th Amendment to the United States Constitution. USERRA lawsuits against states need to be brought by DOJ, in the name of the United States, as plaintiff.

The 11th Amendment is not a problem in this case because the defendant employer is a political subdivision of the State of North Carolina, not the state itself. The United States Supreme Court has held that political subdivisions do not have 11th Amendment immunity. *See Hopkins v. Clemson College,* 221 U.S. 636, 645 (1911).

The final subsection of section 4323 provides: "*In this section,* the term 'private employer' includes a political subdivision of a State." 38 U.S.C. 4323(j) (emphasis supplied). Thus, this case could have been brought by private counsel in Coffer's own name.

Update:

On November 1, 2013, the Department of Justice and the Warren County Board of Education resolved this lawsuit by entering into a consent decree. Dwayne Coffer will be reemployed as a Lead Teacher/Site Supervisor at the salary he would have received if he had remained continuously employed by the county, and he will receive $10,000 in back pay. The county also is contributing $13,702.63 to Coffer's retirement account, to make up for pension payments lost because of the county's delay in complying with USERRA.

Jocelyn Samuels, the Acting Assistant Attorney General for the Civil Rights Division, said: "USERRA affords military members who leave their civilian careers behind for significant periods of time to serve our country certain protections against unjust terminations. It is important that veterans have the opportunity to serve their country free from worry about termination without cause."

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[1] I invite the reader's attention to Law Review 201 for a definitive summary of what counts and what does not count in exhausting an individual's five-year limit with respect to a particular civilian employer. Please go to www.servicemembers-lawcenter.org. You will find 808 articles about USERRA and other laws that are especially 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. I initiated this column in 1997, and we add new articles each week.

[2] Please see Law Review 206 for a definitive discussion of the relief that is available under USERRA.