

Law Review 13021

January 2013

Sergeant Major Erickson's Struggle against the United States Postal Service Continues

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1.1.1.8—USERRA applies to Federal Government as employer

1.2—USERRA forbids discrimination

1.4—USERRA enforcement

Captain Samuel F. Wright, JAGC, USN (Ret.), the Director of ROA's Service Members Law Center, first addressed the "Erickson Saga" in Law Review 0937, which was published in October 2009. Along with Michael Macomber (an attorney at the law firm that I founded), I followed up with Law Review 1128, published in May 2011. This is an especially important case, so I am writing this new article now to bring the readers up to date.

It is most unfortunate that this case has taken so long, but of course delays in legal proceedings are not new. One of Charles Dickens' greatest novels is *Bleak House*, about multi-decade litigation over an estate. That novel was published in 1853.

On December 14, 2012 an Administrative Judge ("AJ") of the Merit Systems Protection Board ("the Board") ordered significant and long-awaited relief to Sergeant Major (SGM) Richard Erickson in his lengthy legal battle with the U.S. Postal Service (USPS) to obtain relief from a violation of his rights under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). In his decision the AJ ordered the USPS to reinstate SGM Erickson retroactively and to compensate him for lost wages and benefits. Notably, the AJ also ordered Interim Relief until this decision becomes final following any appeal by the USPS.

The latest decision in this saga is still subject to review by the Board and/or the U.S. Court of Appeals for the Federal Circuit ("the Federal Circuit"), but is nevertheless a substantial victory for SGM Erickson. This article will review the background of this matter, its protracted litigation history, and the recent Initial Decision on Remedy made by the AJ.

Background

SGM Erickson began working at the USPS in 1988 and held the position of Distribution Clerk before being removed by the Agency on April 7, 2000. Prior to removal, in his approximately nine-year tenure with the USPS, SGM Erickson was also a National Guard member, taking military leave at times throughout his employment. In fact, SGM Erickson has become one of the highest ranking National Guard noncommissioned officers in the Army's Special Forces.

While on active duty in January 2000, the USPS tried to communicate with SGM Erickson seeking to determine his intention regarding his employment. After SGM Erickson communicated with the Agency on this matter they proposed his removal on February 16, 2000, charging him with excessive use of military leave. On April 7, 2000, the Agency effected the removal. SGM Erickson remained on military duty until December 31, 2005. Upon his return from duty he filed an appeal with the Board alleging that his rights under USERRA were violated when he was removed.

Litigation History

SGM Erickson's initial appeal, filed with the Board in September 2006, alleged a violation of his USERRA rights under 38 U.S.C. § 4311 for discrimination by the Agency in removing him from his position due to his military service and use of military leave. A claim for a violation under 38 U.S.C. § 4312 for the Agency's failure to reemploy him in his position upon his return from duty was later added to the appeal. From the initial filing this matter has taken many twists and turns in arriving at the remedy stage.

In the Administrative Judge's 2007 decision on the initial appeal, he determined that SGM Erickson was not entitled to relief under USERRA. Even though the Judge found that the USPS discriminated against SGM Erickson for removing him based on taking military leave, it also held that he had waived his USERRA rights by abandoning his civilian career for a career with the military. Therefore, since USERRA only applies to non-career military service members, he was denied relief.

SGM Erickson subsequently filed a Petition for Review with the Board. A decision on the Petition for Review was made in 2008. This decision affirmed the previous ruling which denied relief under USERRA. In this decision the Board affirmed, but on the grounds that SGM Erickson failed to prove discrimination by the Agency and that there was no evidence that he reapplied for employment within 90 days of his completed military service. The Board did not address the issue of whether SGM Erickson waived his USERRA rights by abandoning his civilian career.

SGM Erickson then filed a Petition for Review with the United States Court of Appeals for the Federal Circuit. The Federal Circuit affirmed the Board's holding that his reemployment rights under 38 U.S.C. § 4312 were not violated by the Agency, but reversed the Board's holding regarding SGM Erickson's discrimination claim, holding that the USPS had discriminated against SGM Erickson by terminating him for his absence for military service and use of military leave. The Federal Circuit remanded to the Board for a determination on whether he waived his USERRA rights by abandoning his civilian career.

On remand from the Federal Circuit, the Board again denied SGM Erickson's request for relief under USERRA based on discrimination in his removal. The Board determined that he abandoned his civilian career and thereby waived his USERRA rights. The Board cited various factors, including that SGM Erickson had expressed a preference for military service and failed to respond to the Notice of Removal.

The case then went back to the Federal Circuit for the Court to determine whether or not the decision by the Board that SGM Erickson had abandoned his civilian career was supported by substantial evidence. The Federal Circuit held that substantial evidence did not support the Board's finding on this issue.

The Court's interpretation of the five-year service timeframe outlined in USERRA (See Law Review 1128) makes it reasonable to presume that service less than five years should not be considered abandonment absent clear evidence to the contrary. The Court remanded the case back to the Board for further proceedings on the appropriate remedy in light of the two holdings concerning the discrimination claim and the reemployment claim. See Law Review 0937.

The Board's further proceedings taken on the discrimination claim bring this case to its current stage with the recent December 14, 2012 initial decision on remedy.

Decision on Remedy – Relief Provided under 38 U.S.C. § 4324(c)(2)

With the issue of discrimination by the USPS under section 4311 settled at the Federal Circuit and Board level, the AJ's December 14, 2012 decision addresses the remedy to be provided to SGM Erickson. The AJ determined that when section 4311(a) is violated the issue of remedy is guided by section 4324(c)(2). Section 4324(c)(2) provides:

If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter

relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.

The AJ's decision therefore ordered that the USPS cancel SGM Erickson's removal, reinstate him retroactive to the date of removal, and compensate him for lost wages or benefits suffered, no later than 60 calendar days after the decision becomes final. What's more, the AJ provided SGM Erickson with interim relief meaning that if a petition for review is filed he will still be entitled to reinstatement, pay, and benefits during the course of any appeal proceedings and until the decision becomes final.

While the Board and Federal Circuit found that the USPS did not violate section 4312, dealing with reemployment of an employee upon return from military service, the AJ ordered that he be reinstated in his position retroactive to the date of removal as a remedy for the wrongful termination which occurred prior to SGM Erickson's return from military service. The remedy of reinstatement was vigorously objected to by the Agency, which argued that there was no independent right to reinstatement provided by a violation of the discrimination provision of section 4311. The Agency further argued that since SGM Erickson had not prevailed on his claim under section 4312 and did not apply for reemployment (see Law Review 0937) that he did not have a right to be reinstated. The AJ's decision does not directly address these arguments, but they were presumably not found to be compelling.

The legal authority for the Interim Relief ordered by the AJ is described in 5 U.S.C. § 7701(b)(2)(A), which provides:

If an employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review under subsection (e), ...

The AJ could have determined that interim relief was not appropriate in this case under section 7701(b)(2)(A)(i) but found it appropriate in these circumstances.

The USPS is required to reinstate and compensate SGM Erickson no later than 60 calendar days after this decision became final on January 18, 2013. It appears that SGM Erickson is finally in a position to be compensated for the Agency's violation of his USERRA rights, but he may expect that the USPS will appeal this decision and drag the matter out even further beyond the over 12-year period that has elapsed since this dispute first began.

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