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Not All USERRA Plaintiffs Are Successful

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***Sutton v. City of Chesapeake*, 713 F. Supp. 2d 547 (E.D. Va. 2010).¹**

This case was brought by the United States Department of Justice (DOJ), after the plaintiff (Paul F. Sutton)² made a formal, written complaint to the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), alleging that his rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) had been violated by his former employer, the City of Chesapeake. Although DOJ represented Mr. Sutton at no charge, the named plaintiff was Mr. Sutton, not the Secretary of Labor or the United States.³

A person who claims that a private employer or a state or local government has violated his or her USERRA rights is authorized to file a formal, written complaint with DOL-VETS. 38 U.S.C. 4322(a). Mr. Sutton filed such a complaint, and DOL-VETS investigated it, in accordance with 38 U.S.C. 4322(d). DOL-VETS apparently found that the case had merit and advised Mr. Sutton of the results of its investigation, in accordance with 38 U.S.C. 4322(e). The DOL-VETS investigation did not result in resolution of the case, and DOL-VETS so advised Mr. Sutton.

Mr. Sutton requested that DOL-VETS refer the case to DOJ, in accordance with 38 U.S.C. 4323(a)(1), and the case was referred. DOJ found the case to have merit and brought suit, on behalf of Mr. Sutton, in the United States District Court for the Eastern District of Virginia, Norfolk Division.

It is most interesting that DOJ brought this case, because I have seen much stronger USERRA cases that DOJ has declined to bring. ROA's President-elect (Brigadier General Michael J. Silva, USAR) filed a complaint with DOL-VETS, which that agency found to have merit. DOL-VETS referred General Silva's case to DOJ with a recommendation that DOJ file suit on General Silva's behalf against the employer that he left in 2006, when he was

¹ This citation means that you can find the *Sutton* case in Volume 713 of *Federal Supplement, Second Series*, starting on page 547. This is a decision of Judge Raymond A. Jackson of the United States District Court for the Eastern District of Virginia. Mr. Sutton did not appeal to the United States Court of Appeals for the Fourth Circuit, and the time for doing so has long since passed. This case is final.

² Mr. Sutton is a retired CWO3 of the Coast Guard Reserve and a life member of ROA.

³ In this case, the defendant was the City of Chesapeake, a political subdivision of the Commonwealth of Virginia, and not the Commonwealth itself. If the Commonwealth of Virginia had been the defendant, the case would have been brought in the name of the United States, as plaintiff. See 38 U.S.C. 4323(a)(1) (final sentence). For purposes of section 4323 (USERRA enforcement), a political subdivision of a state is treated as a private employer. See 38 U.S.C. 4323(i).

called to active duty and deployed to Iraq. For reasons that were never made clear⁴ DOJ turned down the Silva case. General Silva later retained private counsel (Thomas J. Jarrard, Esq.)⁵ and prevailed.

Judge Jackson ruled (I believe correctly) that Mr. Sutton did not have the right to reemployment when he left Coast Guard active duty and applied to the City of Chesapeake for reemployment in November 2007. Judge Jackson granted the City's summary judgment motion on two separate grounds, either of which would have been adequate to support summary judgment for the City.

Mr. Sutton did not have the right to reemployment because he exceeded USERRA's five-year limit.

As I explained in Law Review 1281⁶ and other articles, an individual must meet five conditions to have the right to reemployment under USERRA:

- a. Must have left the job for the purpose of performing voluntary or involuntary service in the uniformed services.
- b. Must have given the employer prior oral or written notice.⁷
- c. Must not have exceeded the cumulative five-year limit on the duration of the period or periods of service, relating to the employer relationship for which the individual seeks reemployment.
- d. Must have been released from the period of service without having received a disqualifying 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.⁸

An individual must meet all five of these conditions to have the right to reemployment. The person claiming reemployment rights has the burden of proof to demonstrate that he or she meets each of these conditions.

Mr. Sutton worked for the Police Department of the City of Chesapeake from February 16, 1974 until December 2000, when he began the period of active duty that gives rise to this case. During that period of more than 26 years, he was away from his Police Department job many times for voluntary and involuntary service and training in the Coast Guard.⁹ Because the five-year limit is cumulative with respect to the employer relationship for which

⁴ In accordance with standard DOJ policy, DOJ adamantly refused to explain the rationale for declination when it declined General Silva's request for representation.

⁵ Thomas Jarrard is a Marine Corps Reserve officer and a life member of ROA.

⁶ I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 876 articles about USERRA and other laws that are especially relevant 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. We added 122 new articles in 2012.

⁷ Mr. Sutton gave the City of Chesapeake notice when he was called to involuntary active duty in December 2000, but he did not notify the City when he voluntarily extended that active duty. Judge Jackson held that he was not required to do so.

⁸ After a period of service of more than 180 days (as in this case), the returning veteran must apply for reemployment with the pre-service employer within 90 days after release from the period of service. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service. Judge Jackson held that Mr. Sutton's application for reemployment was sufficient.

⁹ Although the Coast Guard is not part of the Department of Defense (DOD), it is an armed force as defined by 10 U.S.C. 101(a)(4). The Coast Guard is our nation's oldest *continuously operating* maritime service, in continuous operation since 1790, while the United States Navy actually ceased to exist for a period of time in the 1790s. The service was known as the Revenue Cutter Service from 1790 until 1915, when the name Coast Guard was adopted. The service was part of the Department of the Treasury from 1790 until 1967, when it became part of the newly created Department of Transportation. In 2003, the Coast Guard became part of the newly created Department of Homeland Security.

the person seeks reemployment, we must look to the entire period back to February 16, 1974 in determining whether Mr. Sutton has exceeded his five-year limit.

As is described in detail in Law Review 104, Law Review 201, and other articles, Congress enacted USERRA (Public Law 103-353) and President Clinton signed it into law on October 13, 1994. USERRA is a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which dates back to 1940. Under the USERRA transition rules, when an individual has military service relating to the same civilian employer relationship both before and after the 1994 enactment of USERRA, the individual does not get a fresh five-year limit with the enactment of USERRA in 1994. Military service performed before the enactment of USERRA, but relating to the same employer relationship, counts toward USERRA's five-year limit if it counted toward the four-year limit under the VRRA.

Mr. Sutton was called to involuntary active duty under 10 U.S.C. 12302 in December 2000. Duty performed under section 12302 is specifically exempted from USERRA's five-year limit.¹⁰ It is not contested that this involuntary active duty does not count toward the five-year limit. The problem is that Mr. Sutton voluntarily remained on active duty, under 10 U.S.C. 12301(d), after the involuntary call-up ended. The issue in this case relates to Mr. Sutton's voluntary active duty from July 1, 2006 to December 18, 2007 (17 months and 17 days). If that period counts, Mr. Sutton is at six years and 17 days of countable military service relating to his City of Chesapeake employment, and thus he is beyond the five-year limit and does not have the right to reemployment. If this period does not count, he is at four years and seven months and is within the five-year limit.

Mr. Sutton's Coast Guard orders for the final 17-month period refer to 10 U.S.C. 12301(d), and that subsection is not among the subsections that are specifically exempted from the five-year limit by 38 U.S.C. 4312(c)(4)(A). Mr. Sutton's 2006-07 active duty can be exempted from the five-year limit under 38 U.S.C. 4312(c)(4)(B) if the "Secretary concerned"¹¹ determines that the service (although voluntary) was "because of a war or national emergency declared by the President or Congress." In Mr. Sutton's case, there is no indication that the Secretary of Homeland Security made the required determination and certification, so this 2006-07 active duty period is not exempted from his five-year limit.

Mr. Sutton produced a Coast Guard official e-mail dated August 15, 2003, concerning procedures for Coast Guard Reservists to remain on active duty voluntarily after completion of an involuntary call-up. The e-mail states that reservists who voluntarily stay on active duty under mobilization orders "are entitled to the same pay, allowances, compensation, rights, privileges, and protections that they had while in involuntary recall status." Judge Jackson held that this e-mail is not sufficient to make the 17-month active duty period exempt from the five-year limit because there is no indication that the Secretary concerned made this determination or that those who drafted this e-mail were even aware of USERRA. Because Mr. Sutton exceeded the five-year limit by more than a year, he did not have the right to reemployment under USERRA.

Mr. Sutton did not have the right to reemployment in 2007 because he retired from the Police Department in 2000, before he began this final active duty period.

When Mr. Sutton received notice of recall from the Coast Guard in November 2000, he put in his papers to retire from the Police Department, and his application for retirement was approved by the City and the Virginia Retirement System (VRS). In accordance with his request, he started drawing monthly pension checks from VRS on January 1, 2001. He also cashed out all of his vacation and sick leave with the City of Chesapeake, he participated in his own Police Department retirement ceremony, and he attended annual retiree banquets.

¹⁰ See 38 U.S.C. 4312(c)(4)(A).

¹¹ The "Secretary concerned" is the service secretary, like the Secretary of the Navy or the Secretary of the Army. In at least two places in his opinion, Judge Jackson incorrectly refers to the "Secretary of the Coast Guard" (a position that does not exist). These references should be to the Secretary of the Department of Homeland Security.

Judge Jackson correctly pointed out that a *resignation* at the time of departure from a job for voluntary or involuntary military service does not defeat the individual's right to reemployment upon leaving service, provided of course that the person meets the five USERRA eligibility conditions.¹² But a *retirement* is different.

If Mr. Sutton wanted to retain the right to reemployment after leaving active duty, he should have held off on applying for retirement. Upon leaving active duty and meeting the five conditions (including the five-year limit), he could have returned to the civilian job for one day and then claimed civilian pension credit for the time that he was away from work for service, thus perhaps adding to his monthly pension check. Of course, in this scenario he would not have been receiving monthly pension checks from VRS while on Coast Guard duty. In this particular situation, it was probably to Mr. Sutton's net advantage to retire from the Police Department, as he did, prior to entering active duty, since he already had more than 27 years of Police Department service.

Reservists need detailed information and advice about USERRA and other laws.

I have been dealing with the VRRRA and USERRA for more than 30 years. In September 1982, I left active duty (in the Navy Judge Advocate General's Corps) and went to work for DOL as an attorney. I remained there for ten years, until September 1992. During that time, I had a key role in the drafting of USERRA, enacted in 1994. I have also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), and as an attorney in private practice.

In June 2009, I retired from private practice and joined ROA's full-time staff as the first Director of the Service Members Law Center (SMLC). In 2012, I received and responded to 8,103 inquiries (675 per month on average) from service members, military family members, attorneys, employers, ESGR volunteers, DOL investigators, congressional staffers, reporters, and others, on military-legal topics. Almost half of the inquiries were about USERRA.

I am here at ROA headquarters answering telephone calls and e-mails during regular business hours and until 2200 Eastern Time on Mondays and Thursdays. The point of the evening availability is to make it possible for Reserve Component personnel to call me from the privacy of their own homes, outside their civilian work hours.

I regret that I did not have the opportunity to speak to CWO3 Sutton, but his need for this information arose well before we established the SMLC in June 2009. For today's reservists and National Guard members, this service is available. Let me hear from you at 800-809-9448, extension 730, or by e-mail at SWright@roa.org. Monday or Thursday evening is an excellent time to call.

¹² Please see Law Review 63.