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Be Always Ready[1] To Sue and Don't Sleep on your Rights

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***Baldwin v. City of Greensboro,* 2013 U.S. App. LEXIS 9201 (4th Cir. May 6, 2013).[2]**

Oakley Dean Baldwin is a Warrant Officer in the Coast Guard Reserve.[3] The City of Greensboro (North Carolina) hired Baldwin as its Solid Waste Division Manager on February 15, 2001. He was supervised by Mitchell Johnson (the City Manager) and Jeryl W. Covington (another high level official of the city government). He had an amicable working relationship and had received outstanding performance evaluations until August 2002, when he informed Covington that he would in the near future be mobilized by the Coast Guard. After receiving that notice, Covington began harassing Baldwin on a regular basis.

Baldwin reported the harassment to Johnson, and shortly thereafter (December 20, 2002) the city informed him that he would be subject to a reduction in force (RIF) to be effective on the date he reported to active duty in the Coast Guard. Baldwin reported to active duty on January 25, 2003 and left active duty on June 30, 2003.

On January 23, 2003, just prior to entering active duty, Baldwin and Johnson signed an agreement, apparently drafted by the city attorney. Under the agreement, Baldwin received one-half pay for two weeks, starting on January 25, along with four weeks of severance pay and payment for his accumulated leave balance with the city. The agreement provided that he would receive this meager pay "in lieu of continued employment with the City of Greensboro following active duty military service." The agreement further provided: "Mr. Baldwin agrees that this arrangement was made at his request and waives his right to any claims against the City of Greensboro."

If Mr. Baldwin had contacted me at the time, I certainly would have counseled him not to sign this agreement, which essentially amounts to a release of any claims that he might have had against the city. The court could have dismissed his claims based on the release, but instead the court chose to dismiss on statute of limitations grounds.

As I explained in Law Review 104[4] and other articles, Congress enacted the Uniformed Services Employment and Reemployment Rights Act[5] (USERRA) in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act

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[1] The official motto of the Coast Guard is "semper paratus" and that is Latin for "always ready."
[2] This is a decision of the United States Court of Appeals for the Fourth Circuit, the federal appellate court that sits in Richmond, Virginia and hears appeals from district courts in Maryland, Virginia, West Virginia, North Carolina, and South Carolina.
[3] He is not a member of ROA, but we are working on that.
[4] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 886 articles about 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. We added 122 new articles in 2012, and we have added another 64 so far in 2013.
[5] Public Law 103-353.

(VRRA), which was originally enacted as part of the Selective Training and Service Act (STSA) of 1940.[6] The VRRA never had a statute of limitations[7] and after 1974 the VRRA contained a provision that specifically disclaimed the application of state statutes of limitations. That provision was carried over into USERRA, without change, in 1994.

In 1990, Congress enacted section 1658(a) of title 28 of the United States Code, which provides: "Except as provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section [December 1, 1990] may not be commenced later than 4 years after the cause of action accrues." 28 U.S.C. 1658(a).
Section 1658(a) effectively establishes a four-year default statute of limitations for causes of action arising under federal law, if the underlying statute that creates the cause of action does not contain a statute of limitations.

On July 13, 2006, Baldwin filed a written complaint against the City of Greensboro with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), alleging that city officials had harassed him after he notified them of his likely impending mobilization in the Coast Guard Reserve. It is unclear why he waited almost four years to file this complaint. Perhaps he was unaware that he had rights under USERRA.

Baldwin obtained private counsel (Gregory M. Kash, Esq. of Raleigh, NC) and filed this lawsuit on September 29, 2009, in the United States District Court for the Middle District of North Carolina.[8] The problem is that the four-year statute of limitations had expired prior to the filing of this lawsuit. The District Court and the Court of Appeals determined that the cause of action accrued in January 2003, when the city informed Baldwin that his job had been eliminated in a RIF.

In accordance with section 206 of the Servicemembers Civil Relief Act (SCRA),[9] the court correctly tolled (suspended) the statute of limitations during the periods after January 2003 when Baldwin was on active duty. The court also tolled the statute of limitations during the periods when DOL-VETS was processing Baldwin's complaint.[10] Even with these tolling periods, the four-year statute of limitations expired on March 24, 2008, according to the District Court and the Court of Appeals.

On October 10, 2008, President Bush signed into law the Veterans' Benefits Improvements Act (VBIA)[11], and that law made several amendments to USERRA. The relevant amendment was to create a new section 4327. Section 4327(b) provides: "If any person seeks to file a complaint or claim with the Secretary [of Labor], the Merit Systems Protection Board, or a Federal or State court under this chapter alleging a violation of this chapter, there shall be *no limit on the period for filing the complaint or claim."* 38 U.S.C. 4327(b) (emphasis supplied).

Section 4327(b) overrides the four-year default statute of limitations under 28 U.S.C. 1658(a), *but only as to causes of action that accrued on or after October 10, 2008.* In Law Review 925 (June 2009), I argued that section 4327(b) should be applied retroactively, to claims that accrued prior to October 10, 2008. In Law Review 948 (October 2009), I acknowledged that the United States Court of Appeals for the Seventh Circuit[12] had rejected my arguments about retroactivity. *Middleton v. City of Chicago,* 578 F.3d 655, 662-65 (7th Cir. 2009).

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[6] The STSA is the law that led to the drafting of millions of young men, including my late father, for World War II.
[7] A statute of limitations is a law that establishes a deadline to file suit on a claim. A suit that is filed even one day after the statute of limitations has expired is routinely dismissed based on the statute of limitations, without consideration of the merits.
[8] Because the defendant is a political subdivision of the State of North Carolina, and not the state itself, the 11th Amendment of the United States Constitution was not an impediment to filing and maintaining this suit in federal court.
[9] 50 U.S.C. App. 526(a).
[10] That tolling was not so clearly required by statute.
[11] Public Law 110-389.
[12] The 7th Circuit is the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.

In this case, the 4th Circuit followed the 7th Circuit and held that section 4327(b) only applies to causes of action accruing on or after October 10, 2008, the date of enactment of the VBIA. A more difficult question, not presented by *Baldwin,* is how section 4327(b) applies to causes of action that accrued within four years prior to October 10, 2008—causes of action that had not already gone stale before the VBIA was enacted. That issue is left for another day in another case in another court.

Causes of action accruing after October 10, 2008 are not subject to any statute of limitations, but that certainly does not mean that it is a good idea to sleep on your rights. If you sleep on your rights, you are likely to find that you have no enforceable rights when you awaken. There is no statute of limitations, but there is the equitable doctrine of laches. If you file suit years after your claim accrues, and if the defendant can show the court that your inexcusable delay has prejudiced the defendant in its defense of the case (memories have dimmed, records have been lost, witnesses have died), the court can dismiss your case on that basis. Moreover, the longer you wait the more difficult it is to prove your case, and as the plaintiff you generally have the burden of proof.

It is most unfortunate that Warrant Officer Baldwin did not have access to legal advice in 2003, when he really needed it. We did not establish the Service Members Law Center until more than six years later, in June 2009. Today's reservists and National Guard members have an advantage that Baldwin did not have in 2003. I am here answering telephone calls and e-mails during regular business hours and until 10 pm Eastern Time on Mondays and Thursdays.[13] In April 2013, I received and responded to 885 inquiries, and almost half of them were about USERRA.

[13] The point of the evening availability is to encourage Reserve and Guard personnel to call me from the privacy of their own homes, outside their civilian work hours.