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Scrivener's Error Won't Preclude you from Collecting Attorney Fees

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1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

Q: I am an attorney in private practice and I undertook to represent and have represented a National Guard member who was fired by her civilian employer shortly after she notified the employer that she would likely be called to active duty about six months later. I filed suit in federal district court, claiming that the firing violated the Uniformed Services Employment and Reemployment Rights Act (USERRA).

The trial has been held, and we won. The court awarded her back pay and liquidated damages (having found that the employer violated the law willfully) and ordered the employer to reinstate her. I have applied for a court order directing the employer to pay reasonable attorney fees for my efforts on behalf of this client. I cited section 4323(h)(2) of USERRA, which provides: "In any action or proceeding to enforce a provision of this chapter by a person *under subsection (a)(2)* who obtained private the court *may* award any such person who prevails in such action or proceeding reasonable attorney fees." 38 U.S.C. 4323(h)(2) (emphasis supplied).

The employer's attorney has objected, pointing out that subsection (a)(2) of USERRA provides as follows:

"(2) Not later than 60 days after the date the Attorney General receives a referral under paragraph (1), the Attorney General shall—

(A) make a decision whether to appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted; and

(B) notify such person in writing of such decision."

38 U.S.C. 4323(a)(2).

The employer's attorney has pointed out to the court that subsection (h)(2) refers to subsection (a)(2), which refers to USERRA lawsuits brought by the Attorney General of the United States. This seems to make no sense. What is going on here? Am I going to be able to collect attorney fees for this client?

A: What we have here is an obvious "scrivener's error." I am confident that this error will not prevent you from collecting attorney fees. Subsection (h)(2) refers to subsection (a)(2), but it is clear that the intended reference is to subsection (a)(3), which reads as follows:

"(3) A person may commence an action for relief with respect to a complaint against a State (as an employer) or a private employer if the person—

(A) has chosen not to apply to the Secretary [of Labor] for assistance under section 4322(a) of this title;

(B) has chosen not to request that the Secretary refer the complaint to the Attorney General under paragraph (1); or

(C) has been refused representation by the Attorney General with respect to the complaint under such paragraph." 38 U.S.C. 4323(a)(3).

As I explained in Law Review 104¹ and other articles, President Clinton signed USERRA into law on October 13, 1994.² As enacted in 1994, what is now subsection 4323(a)(3) was subsection 4323(a)(2) and immediately followed subsection 4323(a)(1). There have been several amendments to USERRA since it was enacted in 1994. The relevant amendment came in 2008.³

Section 311(e)(2) of VBIA-2008⁴ added subsection (a)(2) to section 4323 and renumbered what had been subsection (a)(2) as subsection (a)(3). VBIA-2008 made several amendments to USERRA, and it included several “clerical amendments” to account for added and renumbered sections and subsections. There should have been a clerical amendment to subsection (h)(2), but those who drafted VBIA-2008 missed this need for a clerical amendment. Nobody is perfect. This is not a big deal.

The new authoritative hornbook on statutory interpretation is *Reading Law: The Interpretation of Legal Texts*, by Supreme Court Justice Antonin Scalia and law professor Bryan A. Garner, published in 2012 by Thomson/West Publishing Company. On page 234 of this 567-page book, Justice Scalia and Professor Garner write: “No one would contend that the mistake cannot be corrected if it is of the sort sometimes described as a ‘scrivener’s error.’ Suppose, for example, that a passage misspells *third party* as ‘third partly’ or inexplicably repeats the word (‘third party party’). No one would suggest that the entire provision containing such an error must be disregarded because it makes no sense: The meaning is clear. Such readily identifiable ‘scrivener’s errors’ present no realistic interpretive problem.”

The next time Congress amends USERRA we will try to get this error fixed, simply as a clean-up matter, but there is no hurry. There is, however, a substantive change that I would like to make to subsection 4323(h)(2). As currently written, the subsection provides that the court *may* award reasonable attorney fees to the USERRA plaintiff who proceeded with private counsel and prevailed. I would like to change “may” to “shall.”

If USERRA is to be more than an empty promise, there must be diligent and effective private counsel to represent veterans and Reserve Component personnel whose USERRA rights have been flouted. If a private attorney is to take one of these cases on the contingency of sticking the employer for the fee after prevailing, the attorney needs a reasonable certainty that if he or she wins the case he or she will be able to collect attorney fees. Changing “may” to “shall” will make it more likely that those whose USERRA rights have been violated will be able to find the representation that they need.

¹ I invite the reader’s attention to www.servicemembers-lawcenter.org. You will find 889 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. We added 122 new articles in 2012.

² Public Law 103-353, 108 Stat. 3149 (Oct. 13, 1994). This means that USERRA was the 353rd Public Law enacted during the 103rd Congress (1993-94), and you can find this Public Law in Volume 108 of *Statutes at Large*, starting on page 3149.

³ Veterans’ Benefits Improvement Act of 2008 (VBIA-2008), Public Law 110-389, 122 Stat. 4145 (Oct. 10, 2008).

⁴ 122 Stat. 4163.