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Once You File with DOL-Vets, You Are Stuck with Them for Awhile

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1.1.1.7—USERRA applies to state and local governments

1.4—USERRA enforcement

Walker v. City of New York, 2011 U.S. Dist. LEXIS 107384 (S.D.N.Y. Sept. 20, 2011).

Alton Walker enlisted in the Marine Corps in 1988 and served for a time (probably about four years) on active duty. He went to work for the New York Police Department (NYPD) as a police officer in 1997. In 2004, he affiliated with the Marine Corps Reserve as a drilling reservist. He took several leaves of absence from his NYPD job for inactive duty training (drills), active duty for training, and other military duty. He alleged that several NYPD supervisors criticized his absences from work for military duty and transferred him to an unfavorable NYPD duty assignment, with unfavorable hours, as a reprisal against him for having taken time off from work for military duty, as permitted by the Uniformed Services Employment and Reemployment Rights Act (USERRA).

On August 4, 2010, Walker filed a written USERRA complaint against the NYPD with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). Just two days later, he filed this civil action against the NYPD in the United States District Court for the Southern District of New York. Judge P. Kevin Castel dismissed the action. Walker did not appeal the dismissal to the United States Court of Appeals for the Second Circuit, and the time for doing so has expired. This case is final.

Section 4323(a)(3) provides 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 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).

Under section 4323(a)(3)(A), Walker could have filed his suit directly in federal district court *if he had not first filed a complaint with DOL-VETS*. Since Walker *did file* with DOL-VETS, he needed to wait for DOL-VETS to complete its investigation *before filing suit in federal district court*. Because he failed to wait, Judge Castel dismissed Walker's case against the NYPD, properly in my view.

If Walker had given DOL-VETS time to investigate his USERRA complaint, the agency would have investigated and would have advised him of the results of its investigation, in accordance with section 4322(e), 38 U.S.C. 4322(e). The agency also would have notified him of his right to request that the case file be referred to the United States Department of Justice (DOJ). At that point, Walker could have chosen to file suit in federal district court, in lieu of requesting referral to DOJ.

If Walker had requested DOL-VETS to refer the case file to DOJ, the agency would have done so promptly. If DOJ had found the case to have merit, DOJ could have filed suit (on behalf of Walker and in his name) in accordance with section 4323(a)(1). If DOJ had decided not to represent Walker, for whatever reason, it would have notified

him of the decision, in accordance with section 4323(a)(2), 38 U.S.C. 4323(a)(2). Upon receiving DOJ notice of its declination of his case, Walker would have had one more opportunity to bring the suit himself, in accordance with section 4323(a)(3)(C).

Having filed with DOL-VETS, could Walker have withdrawn his DOL-VETS complaint for the purpose of filing suit in federal district court? The answer to that question is “probably yes” but Judge Castel properly avoided commenting on that question. In our system of jurisprudence, the judge is expected to answer only those legal questions that are necessary to decide the case. Since Walker made no effort to withdraw his DOL-VETS complaint before filing suit, there was no occasion for Judge Castel to decide if it would have been possible for him to do so.

It appears that Walker and his attorney were confused about USERRA’s enforcement mechanism, but the language of sections 4322 and 4323 is clear and straightforward. Walker also alleged that the NYPD had taken unfavorable personnel actions against him on account of his race (African American), in violation of Title VII of the Civil Rights Act of 1964. He filed Title VII complaints and tried to merge his USERRA issues into those complaints, and that was a mistake.

If you are complaining about an unfavorable personnel action (firing, refusal to hire, denial of promotion, involuntary transfer, etc.), you may have more than one legal theory about why the unfavorable action was unlawful, and more than one federal or state statute may be relevant in your case. You need to be aware that each statute has its own enforcement mechanism and its own conditions precedent to filing suit. Meeting the conditions under one statute does not mean that you have met those conditions under a separate statute. You need competent legal counsel to help you sort these things out.