LAW REVIEW 13131
October 2013

DOJ Files USERRA Lawsuit against Delaware Employer

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Facts

On August 14, 2013, the United States Department of Justice (DOJ) filed suit against Regal Contractors LLC in the United States District Court for the District of Delaware, on behalf of Senior Airman (E-4) Lon Fluman, USAFR. The suit alleges that the company violated the Uniformed Services Employment and Reemployment Rights Act (USERRA) when it fired Fluman on account of his Air Force Reserve service and his absences from his civilian job necessitated by that service.

Fluman performed a short period of Air Force Reserve service that was originally scheduled to begin on September 3, 2012 (Labor Day) and then was rescheduled to start a day later. Fluman next missed work at Regal during a weekend in early December 2012. Regal claimed that Fluman provided insufficient notice for this drill weekend and fired him shortly thereafter.

Eligibility for Reemployment

Fluman was entitled to reinstatement in his job at Regal, upon returning from his drill weekend in early December 2012, if he met the five USERRA eligibility criteria.

As I explained in Law Review 1281[1] (August 2012) and other articles, an individual must meet five conditions to have the right to reemployment under USERRA:

a. Must have left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services.

[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 953 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform. You will also find 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 another 131 so far in 2013.

b. Must have given the employer prior oral or written *notice.*
c. Must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed 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 bad discharge enumerated in section 4304 of USERRA, 38 U.S.C. 4304.
e. Must have been timely in reporting for work or applying for reemployment, after release from the period of service.

It seems clear beyond any question that Fluman left his Regal job for the purpose of performing "service in the uniformed services." That term is defined in section 4303(13) of USERRA, and inactive duty training (drill weekends) clearly fall within the definition.

It seems clear that Fluman has not exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service relating to his employer relationship with Regal. Periods of inactive duty training do not count toward the five-year limit. *See* 38 U.S.C. 4312(c)(3).[2]

It is clear beyond any question that Fluman was not disqualified from reemployment by virtue of having received one of the disqualifying bad discharges enumerated in section 4304, 38 U.S.C. 4304. Indeed, Fluman has not been discharged at all. He is still serving in the Air Force Reserve.

After a period of service of less than 31 days (like the drill weekend at issue in this case), Fluman was required to report for work "not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the of the person from the place of that service to the person's residence." 38 U.S.C. 4312(e)(1)(A)(i).[3]

For example, let us assume that Fluman was released from his drill weekend at 4:30 pm Sunday afternoon and that it took him one hour to drive home. Let us further assume that the next day (Monday) is a scheduled workday for Fluman, and his workday starts at 8 am. In that case, Fluman should be at work at 8 am Monday, but if the drive home from the drill weekend reasonably takes nine hours Fluman is permitted to wait until 8 am Tuesday morning to report for work.

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[2] Please see Law Review 201 (August 2005) for a definitive discussion of what counts and what does not count toward the five-year limit.

[3] If Fluman's return from his drill weekend was unavoidably delayed, he was required to report for work "as soon as possible after the expiration of the eight-hour period referred to in clause (i), if reporting within the period referred to in such clause is impossible or unreasonable through no fault of such person." 38 U.S.C. 4312(e)(1)(A)(ii).

It seems reasonably clear that Fluman met four of the five conditions for reemployment under USERRA. Fluman left his job for the purpose of service. Fluman was released from the period of service without having exceeded the cumulative five-year limit and without having received a disqualifying bad discharge. After release from the period of service, Fluman reported back to work in a timely manner.

It appears that Regal is challenging Fluman's right to reemployment solely based on its claim that Fluman did not give proper and sufficient notice to the employer of his expected absence from work for the drill weekend in question. I think that this is a losing argument for the employer.

As is explained in Law Review 104 and other articles, Congress enacted USERRA[4] in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA). The STSA is the law that led to the drafting of millions of young men (including my late father) for World War II.

In connection with the enactment of USERRA in 1993-94, the House Committee on Veterans' Affairs, chaired by the venerable Representative G.V. "Sonny" Montgomery[5] of Mississippi, held extensive hearings and wrote a thorough report (House Report No. 103-65). Most of that report is reprinted in the 1994 edition of *United States Code Congressional & Administrative News (USCCAN),* at pages 2449 through 2515.

USERRA's legislative history, showing the intent of Congress, shows that the individual service member should not be penalized if he or she had little advance notice from the military, but if the member had advance notice and intentionally withheld it from your employer, this will be "viewed unfavorably," especially if the lateness of the notice causes a severe disruption of the employer's operations. *See* H.R. Rep. 103-65, 103d Cong., 1st Sess., page 26 (April 28, 1993), 1994 *USCCAN* at 2458-59. *See also Burkart vs. Post-Browning, Inc*., 859 F.2d 1245 (6th Cir. 1988). (VRRA case upholding the firing of a National Guard member who withheld notice until the last moment).

It seems clear that Fluman met the USERRA conditions and was entitled to reemployment. Regal's refusal to reemploy him violated section 4312 of USERRA.

USERRA Forbids Discrimination

[4] Public Law 103-353, now codified at 38 U.S.C. 4301-4335.

[5] Representative Montgomery was a World War II Army veteran and participated in the D-Day invasion on June 6, 1944. After the war, he remained active in the Army National Guard and rose to the rank of Major General, serving as the Adjutant General of Mississippi. He was elected to the U.S. House of Representatives in 1966 and served through 1996. For more than a decade, culminating in 1994, he chaired the House Committee on Veterans' Affairs and was the "father" of many important laws for veterans. USERRA was the last one and perhaps the most important. Representative Montgomery was also a life member of ROA for many years and until he passed away in 2006.

From the various media reports on this case, it is unclear whether Regal refused to reinstate Fluman when he returned from his drill weekend, or whether the company reinstated him and then fired him shortly thereafter. If the former applies, this case is governed by section 4312 of USERRA, 38 U.S.C. 4312. If the latter, this case is governed by section 4311, which makes it unlawful to deny a person *retention in employment* on the basis of the person's membership in a uniformed service, application to join a service, performance of uniformed service, or application or obligation to perform service. Section 4311 of USERRA provides as follows:

"(a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.
(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person
(1) has taken an action to enforce a protection afforded any person under this chapter,
(2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter,
(3) has assisted or otherwise participated in an investigation under this chapter, or
(4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.
(c) An employer shall be considered to have engaged in actions prohibited—
(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or
(2) under subsection (b), if the person's
(A) action to enforce a protection afforded any person under this chapter,
(B) testimony or making of a statement in or in connection with any proceeding under this chapter,
(C) assistance or other participation in an investigation under this chapter, or
(D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.
(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.

The everyday business of courts in this country is determining the meaning and intent of statutes enacted by Congress and the state legislatures—a process known as "statutory construction." In this process, a court looks first to the *text* of the statute (the actual words enacted by the legislative body) and then to the *legislative history*. The legislative history

consists of committee reports, floor statements, and other contemporaneous materials that shed light on what the legislative body had in mind and was seeking to achieve when it considered and enacted the statute in question. As I have explained in numerous past Law Review articles, there is a large body of legislative history accompanying the 1994 enactment of USERRA, and there is some legislative history for the USERRA amendments enacted by Congress in 1996, 1998, 2000, and 2004.

With regard to the meaning of section 4311, and particularly section 4311(c), I offer a long quotation from a 1993 report of the House Committee on Veterans' Affairs:

"Section 4311(b) [later renumbered 4311(c)] would reaffirm that the standard of proof in a discrimination or retaliation case is the so-called 'but for' test and that the burden of proof is on the employer, once a ***prima facie*** case is established. This provision is simply a reaffirmation of the original intent of Congress when it enacted current section 2021(b)(3), in 1968. See Hearings on H.R. 11509 before Subcommittee No. 3 of the House Committee on Armed Services, 89th Cong., 1st Sess. at 5320 (Feb. 23, 1966). In 1986, when Congress amended section 2021(b)(3) to prohibit initial hiring discrimination against Reserve and National Guard members, Congressman G.V. Montgomery (sponsor of the legislation and chairman of the House Committee on Veterans Affairs) explained that, in accordance with the 1968 legislative intent cited above, the courts in these discrimination cases should use the burden of proof analysis adopted by the National Labor Relations Board and approved by the Supreme Court under the National Labor Relations Act. See 132 Cong. Rec. 29226 (Oct. 7, 1986) (statement of Cong. Montgomery) citing *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

"This standard and burden of proof is applicable to all cases brought under this section regardless of the date of accrual of the cause of action. To the extent that the courts have relied on *dicta* from the Supreme Court's decision in *Monroe v. Standard Oil Co.*, 452 U.S. 549, 559 (1981), that a violation of this section can occur only if the military obligation is the sole factor (*see Sawyer v. Swift & Co.*, 836 F.2d 1257, 1261 (10th Cir. 1988)), those decisions have misinterpreted the original legislative intent and history of 38 U.S.C. 2021(b)(3) and are rejected on that basis" (House Report No. 103-353, 1994 *United States Code Congressional & Administrative News* 2449, 2457).

The appellate courts that have addressed the burden of proof issue under section 4311 since Congress enacted USERRA in 1994 have been unanimous in putting the burden of proof on the employer (defendant) to show lack of pretext, rather than putting the burden of proof on the employee (plaintiff) to show that the employer's proffered reason for taking an employment action was a pretext for unlawful discrimination. See *Velasquez-Garcia v. Horizon Lines of Puerto Rico, Inc.*, 2007 U.S. App. LEXIS 114, at page 3 (1st Cir. 2007); *Coffman v. Chugach Support Services Inc.*, 411 F.3d 1231, 1238-39 (11th Cir. 2005); *Gagnon v. Sprint Corp.*, 284 F.3d 839, 853-54 (8th Cir. 2002); *Leisek v. Brightwood Corp*., 278 F.3d 895, 898-99 (9th Cir. 2002); ***Hill** v. Michelin North America Inc.*, 252 F.3d 307, 312 (4th Cir. 2001); *Sheehan v. Department of the Nav***y**, 240 F.3d 1009, 1014 (Fed. Cir. 2001); *Gummo v. Village of Depew, New York***,** 75 F.3d 98, 106 (2nd Cir. 1996).

The two-pronged burden-shifting analysis under USERRA and the National Labor Relations Act [*National Labor Relations Board v. Transportation Management Corp*., 462 U.S. 393 (1983)] is markedly different from and much more pro-employee than the three-pronged analysis under Title VII of the Civil Rights Act of 1964. (Title VII makes it unlawful for an employer to discriminate in employment on the basis of race, color, sex, religion, or national origin.) In Title VII cases, the employee (plaintiff) must first prove that one of the Title VII factors (race, sex, etc.) was the reason, or at least a reason, for the employer's action, then the burden of going forward with the evidence (but not the burden of proof) shifts to the employer, to offer a legitimate, non-discriminatory reason for the action. The burden of proof then shifts back to the plaintiff, to show that the employer's proffered reason for the action is a pretext for discrimination. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

In Law Reviews 61, 0642, 0701, and 0707, I explained the distinction between section 4311 cases (discrimination) and section 4312 cases (reemployment). Section 4312 cases are much easier to prove, because in such a case you don't need to get inside the head of the employer-defendant. In a reemployment case under section 4312, you only need to prove that you meet five objective eligibility criteria, as discussed in Law Review 77 (left job for service, gave employer prior notice, have not exceeded the cumulative five-year limit, released from the period of service without a punitive or other-than-honorable discharge, and made a timely application for reemployment). If you meet these criteria, you are entitled to reemployment, regardless of the reason the employer does not want you back, and even if reemploying you means laying off the person who was hired to take your place when you left the job for service.

Section 4311 cases are more difficult, because in a section 4311 case you must prove that one of the protected factors mentioned in section 4311 (membership in a uniformed service, obligation to perform service, etc.) was *a motivating factor* in the employer's decision. The degree of difficulty of section 4311 cases should not be overstated, however. You are not required to prove that your military service was *the* reason you were fired-it is sufficient to prove that your service was *a motivating factor* in the employer's decision. There need not be a "smoking gun" or employer admission, and the "motivating factor" can be proved by circumstantial as well as direct evidence. The courts often look to the *proximity in time* between the protected activity and the adverse employment action. I invite your attention to Law Review 0707 (employee fired immediately after returning from two-week National Guard training) and Law Review 35 (employee fired immediately after giving the employer notice of impending mobilization).

Whether this case is governed by section 4312 (reinstatement) or section 4311 (discrimination), it seems clear that Fluman has a strong case.

USERRA Enforcement

There are two ways to enforce USERRA, with or without the assistance of the United States Department of Labor (DOL) and Department of Justice (DOJ). A person who claims that his or

her USERRA rights have been violated by a private employer or a state or local government[6] may file a written complaint with DOL's Veterans' Employment and Training Service (DOL-VETS). 38 U.S.C. 4322(a) and (b). That agency shall then investigate the complaint. If DOL-VETS determines the complaint to have merit, it shall "make reasonable efforts to ensure that the person or entity named in the complaint complies with the provisions of this chapter." 38 U.S.C. 4322(d).

If the DOL-VETS efforts do not resolve the complaint, the agency is required to notify the complainant of the results of the investigation and of the complainant's right to request referral to DOJ. 38 U.S.C. 4322(e). If DOJ agrees that the complaint has merit, it may file suit against the employer on behalf of and in the name of the individual complainant. 38 U.S.C. 4323(a)(1).[7]

If DOJ turns down the individual's request for representation, or if the individual chooses not to request DOL-VETS referral to DOJ, or if the individual never files a complaint with DOL-VETS in the first place, the individual may file suit in the appropriate federal district court in his or her own name and with his or her own attorney.[8] If the individual proceeds with private counsel and prevails, the court may order the defendant-employer to pay the plaintiff's reasonable attorney fees. 38 U.S.C. 4323(h)(2).

Most successful USERRA cases are filed and litigated by private counsel, but this was not such a case. Fluman filed a complaint with DOL-VETS, and that agency investigated and found his case to have merit. Fluman requested that DOL-VETS refer his case file to DOJ, and it was referred. DOJ found Fluman's case to have merit and filed suit on his behalf. This is how the system was intended to work.

We will keep the readers informed of developments in this important case.

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[6] There is a separate enforcement mechanism with respect to alleged USERRA violations by federal agencies as employers.

[7] If the defendant-employer is a state government agency, DOJ shall file suit in the name of the United States, as plaintiff. 38 U.S.C. 4323(a)(1) (final sentence). A political subdivision of a state (county, city, school district, etc.) shall be deemed to be a private employer for purposes of USERRA enforcement. 38 U.S.C. 4323(i).

[8] It is also possible for the individual to file the suit *pro se*—with the individual acting as his or her own attorney. I do not recommend that course of action. Abraham Lincoln said, "A man who represents himself has a fool for a client." And the law is so much more complicated today than it was in Lincoln's lifetime.