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Important New USERRA Case in Fifth Circuit[1]

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1.1.1.7—USERRA applies to state and local governments
1.2—USERRA forbids discrimination
1.3.1.1—Left job for service and gave prior notice
1.3.1.3—Timely application for reemployment
1.4—USERRA enforcement
1.8—Relationship between USERRA and other laws/policies

***Bradberry v. Jefferson County,* 2013 WL 5658838 (5th Cir. Oct. 17, 2013).**

Joel Bradberry worked as a corrections officer for the Jefferson County (Texas) Sheriff's Department from February 2007 until December 2008, when the Sheriff fired him. Bradberry is an enlisted member of the
Army Reserve and was a member during his brief Jefferson County employment.

Bradberry sued Jefferson County in the United States District Court for the Eastern District of Texas, claiming that the firing violated section 4311 of the Uniformed Services Employment and Reemployment Rights Act (USERRA).[2] Bradberry moved for partial summary judgment[3] on collateral estoppel grounds. The District Judge denied the plaintiff's motion for summary judgment but granted the plaintiff's request to certify its order for interlocutory appeal

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[1] The 5th Circuit is the federal appellate court that sits in New Orleans and hears appeals from district courts in Louisiana, Mississippi, and Texas. This decision has been submitted for official publication in *Federal Reporter, Third Series* (F.3d). When this case is published in F.3d we will add that citation to this article.

[2] As I explained in Law Review 104 and other articles, Congress enacted USERRA in 1994 as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA). USERRA is codified in title 38, United States Code, sections 4301-4335 (38 U.S.C. 4301-4335). The VRRA was originally enacted in 1940, as part of the Selective Training and Service Act (STSA), the law that led to the drafting of millions of young men (including my late father) for World War II. I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 967 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 145 so far in 2013.

[3] Under Rule 56 of the Federal Rules of Civil Procedure (FRCP), after discovery in a civil case has been completed either party (or both) may move for summary judgment or partial summary judgment. The court will grant the motion for summary judgment if the moving party demonstrates to the court's satisfaction that there is *no material issue of fact* and that the moving party is entitled to judgment as a matter of law. The moving party must demonstrate that there is no evidence in the record that would enable a reasonable jury to find for the non-moving party.

pursuant to 28 U.S.C. 1292(b). The 5th Circuit agreed to take the interlocutory appeal and affirmed the district court.

Ordinarily, a party is not permitted to appeal a District Court's decision to the Court of Appeals until the District Court has reached a dispositive conclusion, ruling for the plaintiff or the defendant. In limited circumstances, an appeal on an important but non-dispositive ruling is permitted—this is called an interlocutory appeal. *Bradberry* is one of those rare cases where an interlocutory appeal was heard and decided. Now that the 5th Circuit has ruled, the case is back in District Court for a trial on the merits, unless the parties settle.

As is required by the Federal Rules of Appellate Procedure, this case was assigned to a three-judge panel of the 5th Circuit. The three judges are Emilio M. Garza, Leslie H. Southwick, and Catharina Hayes. Judge Garza is a senior judge of the 5th Circuit and was appointed to the court by President George H.W. Bush. Judge Southwick and Judge Haynes are active judges of the 5th Circuit and were appointed by President George W. Bush. Judge Southwick wrote the opinion and was joined by Judge Garza. Judge Haynes concurred in the judgment only but did not write a separate opinion.

Jefferson County was not entitled to demand that Bradberry provide documentation of his 16-day military service.

Bradberry was ordered to report to his annual Army Reserve training from September 1 through September 12, 2008. He gave his employer prior notice and provided the employer a copy of his military orders. He was scheduled to report back to his civilian job on September 13.

According to Bradberry, as a result of the imminent landfall of Hurricane Ike on September 13 Army Captain Dwayne Rose orally extended Bradberry's orders and required him to go to Abilene, Texas and remain there until released. Bradberry contacted the Sheriff's Office on September 12 to report that he would not be back at work the next day because of the new military orders. As a result of the military extension, Bradberry missed scheduled civilian work shifts on September 13 and 14.

The Army released Bradberry, in Abilene, at 7 am on September 15. He traveled back to Beaumont, the county seat of Jefferson County. According to MapQuest, it is 461.28 miles from the county courthouse of Taylor County, in Abilene, to the county courthouse in Jefferson County, and the trip takes almost eight hours by automobile. Bradberry returned to work the evening of September 16, in time for his next regularly scheduled shift, which began at midnight that evening.

Jefferson County ordered Bradberry to provide documentation about the extension of his military orders to include September 13-16. Bradberry provided memoranda from his commanding officers, but the county was not satisfied with the documentation that he

provided. The county initiated an internal affairs investigation into Bradberry's conduct and then fired him in December 2008.

Section 4312(e) of the Uniformed Services Employment and Reemployment Rights Act (USERRA) states the manner and deadline for a person returning from a period of service in the uniformed services to report for work or apply for reemployment. The deadline and the manner depend upon the duration of the period of service from which the individual is returning. Section 4312(e) is as follows:

"(1) Subject to paragraph (2), a person referred to in subsection (a) shall, upon the completion of a period of service in the uniformed services, notify the employer referred to in such subsection of the person's intent to return to a position of employment with such employer as follows:
(A) In the case of a person whose period of service in the uniformed services was less than 31 days, by reporting to the employer—
(i) 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 person from the place of that service to the person's residence; or
(ii) 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 the person.
(B) In the case of a person who is absent from a position of employment for a period of any length for the purposes of an examination to determine the person's fitness to perform service in the uniformed services, by reporting in the manner and time referred to in subparagraph (A).
(C) In the case of a person whose period of service in the uniformed services was for more than 30 days but less than 181 days, by submitting an application for reemployment with the employer not later than 14 days after the completion of the period of service or if submitting such application within such period is impossible or unreasonable through no fault of the person, the next first full calendar day when submission of such application becomes possible.
(D) In the case of a person whose period of service in the uniformed services was for more than 180 days, by submitting an application for reemployment with the employer not later than 90 days after the completion of the period of service.
(2)
(A) A person who is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service in the uniformed services shall, at the end of the period that is necessary for the person to recover from such illness or injury, report to the person's employer (in the case of a person described in subparagraph (A) or (B) of paragraph (1)) or submit an application for reemployment with such employer (in the case of a person described in subparagraph (C) or (D) of such paragraph). Except as provided in subparagraph (B), such period of recovery may not exceed two years.
(B) Such two-year period shall be extended by the minimum time required to accommodate the circumstances beyond such person's control which make reporting within the period specified in subparagraph (A) impossible or unreasonable.

(3) A person who fails to report or apply for employment or reemployment within the appropriate period specified in this subsection shall not automatically forfeit such person's entitlement to the rights and benefits referred to in subsection (a) but shall be subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work."

38 U.S.C. 4312(e).

Under section 4312(f), the employer is permitted to demand, as a condition precedent to reinstatement, that the returning service member provide certain documentation, *but the documentation requirement only applies to persons applying for reemployment after 31 days or more of continuous uniformed service.* Even with the three-day extension necessitated by Hurricane Ike, Bradberry's period of service was well short of this 31-day threshold. Accordingly, Jefferson County had no right to demand that Bradberry provide any such documentation. Section 4312(f) is as follows:

"(1) A person who *submits an application for reemployment in accordance with subparagraph (C) or (D) of subsection (e)(1) or subsection (e)(2)* shall provide to the person's employer (upon the request of such employer) documentation to establish that—
(A) the person's application is timely;
(B) the person has not exceeded the service limitations set forth in subsection (a)(2) (except as permitted under subsection (c)); and
(C) the person's entitlement to the benefits under this chapter has not been terminated pursuant to section 4304.
(2) Documentation of any matter referred to in paragraph (1) that satisfies regulations prescribed by the Secretary shall satisfy the documentation requirements in such paragraph.
(3)
(A) Except as provided in subparagraph (B), the failure of a person to provide documentation that satisfies regulations prescribed pursuant to paragraph (2) shall not be a basis for denying reemployment in accordance with the provisions of this chapter if the failure occurs because such documentation does not exist or is not readily available at the time of the request of the employer. If, after such reemployment, documentation becomes available that establishes that such person does not meet one or more of the requirements referred to in subparagraphs (A), (B), and (C) of paragraph (1), the employer of such person may terminate the employment of the person and the provision of any rights or benefits afforded the person under this chapter.
(B) An employer who reemploys a person absent from a position of employment for more than 90 days may require that the person provide the employer with the documentation referred to in subparagraph (A) before beginning to treat the person as not having incurred a break in service for pension purposes under section 4318(a)(2)(A).
(4) *An employer may not delay or attempt to defeat a reemployment obligation by demanding documentation that does not then exist or is not then readily available.*"

38 U.S.C. 4312(f) (emphasis supplied).

This is a good case for the invocation of the legal doctrine of *expressio unius est exclusio alterius* (expression of one thing is the exclusion of another). By imposing a duty to provide documentation on service members returning from periods of service of 31 days or more, Congress demonstrated that service members returning from shorter periods of service (like annual training periods and drill weekends) are not required to provide any such documentation.

The classic example of *expressio unius est exclusio alterius* comes in the early Supreme Court case, *Marbury v. Madison,* 5 U.S. 137 (1803). Article III, Section 2, Clause 2 of the United States Constitution establishes the *original* (as opposed to appellate) jurisdiction of the Supreme Court-cases affecting ambassadors and other public ministers and disputes between states. The statute at issue in *Marbury* expanded the original jurisdiction of the Supreme Court to include cases in which a *writ of mandamus* is sought against a federal official. The Supreme Court held that since the Constitution expressly states the classes of cases for which the Supreme Court has original jurisdiction, a federal statute that adds additional classes of cases to the original jurisdiction of the Supreme Court is unconstitutional.

The United States Court of Appeals for the Sixth Circuit[4] applied this doctrine to the construction of section 4304 of USERRA, which provides that a person who has received a punitive discharge (by court martial) from the armed forces or an other-than-honorable administrative discharge or who has been dismissed or dropped from the rolls of a service shall not have the right to reemployment in his or her civilian job, even if he or she otherwise meets the USERRA eligibility criteria. This means that a person who resigned his commission "for the good of the service" in lieu of trial by court martial and who received a "general discharge under honorable conditions" is entitled to reemployment, even though the person was certainly not "Soldier of the Year" material. By setting forth the specific kinds of unfavorable discharges that disqualify a person from reemployment, Congress established that other less than fully satisfactory discharges do not disqualify a person from the right to return to his or her pre-service civilian job. *See Petty v. Metropolitan Government of Nashville-Davidson County,* 538 F.3d 431 (6th Cir. 2008), *cert. denied,* 556 U.S. 1165 (2009) (*Petty I). See also Petty v. Metropolitan Government of Nashville,* 687 F.3d 710 (6th Cir. 2012) (*Petty II).*

Applying this same rule of statutory construction to section 4312(f), it is clear that Jefferson County had no right to demand that Bradberry produce documentation. If the county had reason to doubt Bradberry's claim that his commanding officer (CO) had extended his orders by three days and had ordered him to travel all the way to Abilene, the county could have contacted the CO or other military authorities to verify Bradberry's assertions.

Bradberry was required to provide, and did provide, prior notice to Jefferson County before the start of his September 2008 period of uniformed service. Section 4312 of USERRA sets forth the conditions that an individual must meet to have the right to reemployment under USERRA.

[4] The 6th Circuit is the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee.

One of the conditions is that "the person (*or an appropriate officer of the uniformed service in which such service is to be performed*) has given advance written or verbal notice of such service to such person's employer." 38 U.S.C. 4312(a)(1) (emphasis supplied). [5]

You are not required to provide any documentation when you give notice to your employer of an upcoming period of service, but I strongly recommend that you share with the employer whatever paperwork you have. Your annual training orders are not a military secret, and you should not be reluctant to provide a copy to your employer.

It is true that some civilian employers have an inflated idea of the kind of paperwork that Reserve Component (RC) members typically receive from the military. You can probably get your unit's commanding officer (CO) to provide you the unit drill schedule and annual training schedule on unit stationery, and you can provide that schedule to your employer. That will probably satisfy the employer. If not, you could request that your CO contact your employer, or invite the employer to contact your CO, if your civilian employer doubts your claim that you were performing uniformed service during the period that you were away from work.

Based on my own experience in the Navy Reserve, I do not find it difficult to believe that Bradberry's unit CO orally extended the annual training of Bradberry and other unit members and directed them to travel all the way to Abilene, because of the imminent landfall of a hurricane. In memoranda prepared for Jefferson County after the fact, the unit CO readily acknowledged having done this, but the county wanted "official" Army orders, in writing, extending Bradberry's annual training period. In an unlawful effort to rid itself of the inconvenience of employing an RC member, the county demanded the production of something that did not exist and had never existed. This seems to me to be a clear and egregious USERRA violation.

I believe that the Army Reserve and the other Reserve Components should utilize the authority granted by section 4312(a)(1) and should notify civilian employers of expected absences from civilian work of RC members, before the fact and when necessary (as in this case) after the fact. If the Jefferson County Sheriff had received official notice in writing, from the Army Reserve, that Bradberry's annual training period had been extended by three days, perhaps all of this difficulty between Bradberry and his employer might have been avoided.

I recognize that the Chief of Army Reserve (a Lieutenant General) cannot personally undertake to notify the civilian employer of each Army Reserve member each time such member will be away from work for uniformed service, because there are more than 200,000 Soldiers in the Army Reserve. The responsibility for notifying civilian employers and receiving and responding

[5] Section 4312(b) provides: "No notice is required under subsection (a)(1) if the giving of prior notice is precluded by military necessity or, under all the relevant circumstances, the giving of such notice is impossible or unreasonable. A determination of military necessity for the purposes of this subsection shall be made pursuant to regulations prescribed by the Secretary of Defense and shall not be subject to judicial review." 38 U.S.C. 4312(b).

to complaints and questions from civilian employers will need to be delegated, but it should be delegated to a level of command that is above the unit CO.

In most cases, the unit CO will be a part-timer, just like the individual RC member. The unit CO will have enough problems with his or her own civilian employer. It just will not do to have multiple civilian employers contacting the unit CO at his or her own job, and thereby endangering the unit CO's civilian job. The responsibility for liaising with civilian employers needs to be assigned to a full-timer, perhaps the CO of the Reserve Center or a senior officer at the Reserve Component headquarters.

USERRA and collateral estoppel

The Texas Legislature has established the Texas Commission on Law Enforcement Officers Standards and Education (TCLEOSE). When an individual law enforcement officer[6] leaves the employ of any Texas law enforcement office (including the Sheriff of Jefferson County), the law enforcement office is required to file an F-5 Report with TCLEOSE, categorizing the officer's law enforcement service as "honorable," "general," or "dishonorable." If the former officer seeks employment with any other law enforcement agency, that agency is required to review employment termination reports (on file at TCLEOSE) before hiring the individual.

As required, the Jefferson County Sheriff filed an F-5 Report on the termination of Bradberry's employment and characterized his discharge as "dishonorable." An explanation of the separation, attached to the F-5 Report, stated that Bradberry was insubordinate and absent without leave and that he had failed to answer questions truthfully or provide documentation and relevant statements to the Sheriff or any supervisor in the departmental investigation

Section 1701.4525(a) of the Texas Occupational Code provides that a law enforcement officer who receives an unfavorable F-5 Report "may contest information contained in the report" by filing a petition with TCLEOSE, and Bradberry filed such a petition. In accordance with Texas law, an Administrative Law Judge (ALJ) of TCLEOSE conducted a hearing and found that the Sheriff had not established by a preponderance of the evidence that Bradberry had committed the alleged misconduct. The ALJ ordered Jefferson County to amend the F-5 Report to show that Bradberry was terminated "at will" and that the explanation of the firing "should read he was terminated over a disagreement over military leave."

In his USERRA lawsuit, Bradberry claimed that under the collateral estoppel doctrine the TCLEOSE ALJ's determination that Bradberry had not committed the misconduct alleged by the Sheriff should be given preclusive effect and that the court should grant summary judgment for the plaintiff (Bradberry) on his USERRA claim. The District Court denied the motion for summary judgment, holding that the questions decided by the TCLEOSE ALJ were sufficiently different from the USERRA questions that collateral estoppel was not appropriate in this case.

[6] A corrections officer like Bradberry is considered to be a law enforcement officer for this purpose.

This interlocutory appeal followed, and in a lengthy and scholarly opinion Judge Southwick (joined by Judge Garza) affirmed the District Court on this point.

I think that Judge Southwick's opinion about collateral estoppel is correct, and I would not want determinations like the TCLEOSE ALJ's determination to be given preclusive effect in USERRA lawsuits. In this case, the ALJ found for Bradberry, but what if it had been the other way around? If the ALJ had found that Bradberry was "insubordinate" because he obeyed his Army Reserve CO instead of the Sheriff, I would not want a court to give preclusive effect to such a determination.

Bradberry was not successful in his motion for summary judgment, and the 5th Circuit did not overturn the District Court's denial of the motion for summary judgment, on this interlocutory appeal, but Bradberry can still win this case, and I believe that it is most likely that he will. It seems to me that there is ample evidence to establish that Bradberry's uniformed service and his obligation to perform future uniformed service were, at a minimum, a motivating factor in the Sheriff's decision to terminate his employment. Thus, Bradberry wins, unless the employer can *prove* (not just say) that it would have fired Bradberry anyway, for a lawful reason unrelated to his Army Reserve service, even if Bradberry had not been a member of the Army Reserve.

Bradberry's cause of action is under section 4311 of USERRA, which reads 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."

38 U.S.C. 4311.

USERRA Enforcement—Role of USDOL and USDOJ

In accordance with section 4322(a) of USERRA, Bradberry filed a complaint with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), alleging that the Jefferson County Sheriff violated USERRA by firing him in December 2008. DOL-VETS has a "Director-Veterans' Employment and Training" (DVET) in each state. The larger states have one or more "Assistant Directors-Veterans' Employment and Training" (ADVETs). Responsibility for investigating Bradberry's USERRA complaint was assigned to one of the Texas ADVETs.

The ADVET determined, after investigation, that the Sheriff had violated USERRA by firing Bradberry and so advised the Sheriff. The ADVET tried to persuade the Sheriff to come in compliance with USERRA by reinstating Bradberry and compensating him for the pay he lost because of the unlawful firing, but the Sheriff refused. In accordance with section 4323(a)(1), DOL-VETS referred the Bradberry case file to the Attorney General, recommending that the Attorney General file suit on behalf of Bradberry. For reasons that were never made clear, the Attorney General declined the request to represent Bradberry in a lawsuit against the Sheriff and so advised Bradberry.[7]

In accordance with section 4323(a)(3)(C) of USERRA, Bradberry retained private counsel and sued Jefferson County in the United States District Court for the Eastern District of Texas. In this lawsuit, Bradberry is ably represented by attorney Melissa Ann Moore of the Houston law firm known as Moore & Associates.

Under section 4323(a), an individual claiming USERRA rights with respect to a private employer or a local government is permitted to retain private counsel and sue the employer in the appropriate federal district court if the individual has not filed a USERRA complaint with DOL-VETS, or if the individual has not requested that DOL-VETS refer the case file to DOJ, or if DOJ has declined the individual's request for representation, as in this case. Under section

[7] In accordance with the standard practice of the Department of Justice (DOJ), no one explained to Bradberry the rationale for declining his request for representation.

4323(h)(1), the court may award attorney fees (in addition to other relief) to the USERRA plaintiff who proceeds through private counsel and prevails.

USERRA is a floor and not a ceiling on reemployment rights.

In accordance with section 4302(a) of USERRA, this federal law does not supersede or override a state law (among other things) that establishes *greater or additional rights* for the individual who is serving or has served in the uniformed services. Under section 4302(b), USERRA supersedes and overrides state laws (among other things) that purport to limit USERRA rights or that impose additional prerequisites on the exercise of USERRA rights. Section 4302 reads as follows:

"(a) Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.
(b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit."

38 U.S.C. 4302.

Chapter 613 of the Texas Government Code provides for the reemployment of state and local government public employees who are returning from military service. Section 613.021 provides: "If a public official [in Texas] fails to comply with a provision of [Chapter 613], a [Texas] district court in the district in which the individual is a public official may require the public official to comply with the provision on the filing of a motion, petition, or other appropriate pleading by an individual entitled to a benefit under the provision." Texas Government Code, section 613.021.

When you bring a claim in federal court, under a federal law like USERRA, you can simultaneously bring *closely related* state law claims, under the *supplemental jurisdiction* (formerly called pendent jurisdiction) of the federal court. *See* 28 U.S.C. 1367(a). In his federal court lawsuit, Bradberry asserted that Jefferson County violated Chapter 613 of the Texas Government Code, as well as USERRA. Jefferson County objected, on the grounds that section 613.021 of the Texas Government Code provides that a suit to compel compliance with Chapter 613 is to be brought in Texas District Court, not the United States District Court. In the final paragraph of the court's decision, the 5th Circuit panel firmly rejected this Jefferson County argument:

"Our question is far simpler: does a statute that identifies which state court is to hear a certain case prevent a federal district court—which of course is not the identified state court—from exercising supplemental jurisdiction over the claim? There is nothing extraordinary about a

state statute limiting which court can hear a claim. Whatever section 613.021 means for state court lawsuits, it is no barrier to the exercise of supplemental jurisdiction in federal court."

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