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Enforcing USERRA against the State of Missouri

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***Clegg v. Arkansas Department of Correction,* 496 F.3d 922 (8th Cir. 2007).[1]**

Facts of the *Clegg* case

Lori Clegg is an African-American woman[2] and a Soldier in the Army National Guard. She began working for the Arkansas Department of Correction (ADOC) in 1997. In 2003, she was working at ADOC's Tucker maximum security facility as a Substance Abuse Treatment Program (SATP) coordinator when she was activated by the Army and deployed to Iraq in February 2003. She served honorably and was released from active duty in July 2004, and she returned to work at the Tucker facility on September 7, 2004.

It is undisputed that Ms. Clegg met the eligibility criteria for reemployment under USERRA. She left her job for the purpose of performing service in the uniformed services and gave the employer prior oral or written notice. She did not exceed the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to her employment relationship with ADOC. Since she was called to active duty involuntarily, her 18 months of service in 2003-

[1] The citation means that you can find this case in Volume 496 of *Federal Reporter, Third Series,* starting on page 922. This is a decision of the United States Court of Appeals for the Eighth Circuit, the appellate court that sits in St. Louis and hears appeals from district courts in Arkansas, Iowa, Minnesota, Nebraska, North Dakota, and South Dakota. As is typical in federal appellate cases, this case was decided by a panel of three Eighth Circuit judges: Steven M. Colloton, Raymond W. Gruender, and David R. Hansen. Judge Hansen wrote the decision, and the other two judges joined. This case is now final.

[2] In addition to her claim that her rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) were violated, she also alleged that she was discriminated against on the basis of her race and sex, in violation of Title VII of the Civil Rights Act of 1964. Her Title VII claims are not discussed in detail in this article.

04 do not count toward her five-year limit. 38 U.S.C. 4312(c)(4)(A).[3] Ms. Clegg served honorably and was released from active duty without a disqualifying bad discharge enumerated in 38 U.S.C. 4304. After release from the period of service, she made a timely application for reemployment with ADOC.[4]

Because Ms. Clegg met the USERRA conditions, ADOC was required to reemploy her "in the position of employment in which the person [Ms. Clegg] would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform." 38 U.S.C. 4313(a)(2)(A). The position that the returning veteran *would have attained if continuously employed* is not necessarily the position that the individual held just before he or she was called to the colors. But in this case it seems clear that if Ms. Clegg had not been on active duty in 2003-04 she would have remained in the same SATP position at the Tucker facility.

In July 2004, after Ms. Clegg had been released from active duty but before she had applied for reemployment, Roger Cameron (administrator of the SATP program) telephoned Ms. Clegg at her home and informed her of two pieces of information. The first was that state certification requirements had changed while Ms. Clegg was on active duty and that in order to remain qualified for her job and to remain employed by ADOC she needed to obtain a Certified Criminal Justice Professional credential. Mr. Cameron also told Ms. Clegg that they were considering assigning her to the Therapeutic Community (TC) counseling unit at Tucker, instead of the SATP unit, upon her return to work.

Ms. Clegg was entitled to retraining to help her qualify for the new certification requirement.

If there was a *bona fide* change in the qualifications required of a person holding the SATP position during the time that Ms. Clegg was away from work for service, the employer (ADOC) was required to make reasonable efforts to help Ms. Clegg qualify. 38 U.S.C. 4313(a)(4).

Section 4331 of USERRA (38 U.S.C. 4331) gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA. The Secretary utilized that authority and published the final USERRA Regulations in the *Federal Register* on Dec. 19, 2005. The Regulations are now published in title 20 of the Code of Federal Regulations (C.F.R.), Part 1002 (20 C.F.R. Part 1002). The pertinent section is as follows:

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[3] The citation refers to section 4312(c)(4)(A) of title 38 of the United States Code. Section 4312 sets forth the five-year limit and the exemptions from the limit. Please see Law Review 201 (August 2005) for a definitive discussion of what counts and what does not count toward exhausting the limit. I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 994 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 169 new articles in 2013.

[4] Because her period of service was in excess of 180 days, she had 90 days (starting on the day of release) to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

§ 1002.198 What efforts must the employer make to help the employee become qualified for the reemployment position?

The employee must be qualified for the reemployment position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position. The employer is not required to reemploy the employee on his or her return from service if he or she cannot, after reasonable efforts by the employer, qualify for the appropriate reemployment position.
(a)
(1) "Qualified" means that the employee has the ability to perform the essential tasks of the position. The employee's inability to perform one or more non-essential tasks of a position does not make him or her unqualified.
(2) Whether a task is essential depends on several factors, and these factors include but are not limited to:
(i) The employer's judgment as to which functions are essential;
(ii) Written job descriptions developed before the hiring process begins;
(iii) The amount of time on the job spent performing the function;
(iv) The consequences of not requiring the individual to perform the function;
(v) The terms of a collective bargaining agreement;
(vi) The work experience of past incumbents in the job; and/or
(vii) The current work experience of incumbents in similar jobs.
(b) Only after the employer makes reasonable efforts, as defined in § 1002.5(i), may it determine that the employee is not qualified for the reemployment position. These reasonable efforts must be made at no cost to the employee.

20 C.F.R. 1002.198 (bold question in original).

Thus, under USERRA ADOC was required to reemploy Ms. Clegg and to make reasonable efforts to help her qualify under the new, higher qualification standard that was put into effect while she was away from work for military service. At a minimum, ADOC was required to give Ms. Clegg the training that she would have received at her civilian job if she had remained continuously employed during the 18 months that she was on active duty in Iraq.

Ms. Clegg was entitled to reemployment in the position that she would have attained if continuously employed or in another position of like seniority, *status,* and rate of pay.

Because Ms. Clegg's period of uniformed service lasted more than 90 days, the employer (ADOC) had some flexibility. In lieu of reemploying her in the position that she would have attained if continuously employed (likely the SATP position that she left), the employer had the option to reemploy her in another position, for which she was qualified, that was of like seniority, *status,* and rate of pay. 38 U.S.C. 4313(a)(2)(A). Mr. Cameron tentatively suggested that Ms. Clegg would be reemployed in the TC counseling unit, instead of the SATP unit, upon returning to work. Let us assume that the TC position was of like seniority and pay and that Ms.

Clegg was qualified for the position. The question remains as to whether the TC position was of like *status.*

As I explained in Law Review 104 and other articles, President Clinton signed Public Law 103-353 (USERRA) on October 13, 1994. USERRA was 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.

I explained in Law Review 120 that the VRRA did not give rulemaking authority to the Department of Labor (DOL), but DOL did publish a *VRR Handbook*. While employed as a DOL attorney, I co-edited the 1988 edition of that handbook, which replaced the 1970 edition. Several courts, including the Supreme Court, have accorded a "measure of weight" to the interpretations expressed in the *VRR Handbook*. *See Monroe v. Standard Oil Co.,* 452 U.S. 549, 563 n. 14 (1981); *Leonard v. United Air Lines, Inc*., 972 F.2d 155, 159 (7th Cir. 1992); *Dyer v. Hinky-Dinky, Inc*., 710 F.2d 1348, 1352 (8th Cir. 1983); *Smith v. Industrial Employers and Distributors Asso*ciation, 546 F.2d 314, 319 (9th Cir. 1976), *cert. denied*, 431 U.S. 965 (1977); *Helton v. Mercury Freight Lines, Inc*., 444 F.2d 365, 368 n. 4 (5th Cir. 1971).

The 1988 *VRR Handbook* has this to say about the concept of status: "The statutory concept of 'status' is broad enough to include both pay and seniority, as well as other attributes of the position, such as working conditions, opportunities for advancement, job location, shift assignment, rank or responsibility, etc. Where such matters are not controlled by seniority or where no established seniority system exists, they can be viewed as matters of 'status.' In a determination of whether an alternative position offered is of 'like seniority, status, and pay,' all of the features that make up its 'status' must be considered in addition to the seniority and rate of pay that are involved." (*VRR Handbook*, pages 11-1 through 11-2.)

USERRA's legislative history also addresses the issue of "status," as follows: "Although not the subject of frequent court decisions, courts have construed status to include 'opportunities for advancement, general working conditions, job location, shift assignment, [and] rank and responsibility.' [*Monday v. Adams Packing Association, Inc*., 85 LRRM 2341, 2343 (M.D. Fla. 1973).] See *Hackett v. State of Minnesota*, 120 Labor Cases (CCH) Par. 11,050 (D. Minn. 1991). A reinstatement offer in another city is particularly violative of status. [*See Armstrong v. Cleaner Services, Inc.,* 79 LRRM 2921, 2923 (M.D. Tenn. 1972)], as would reinstatement in a position which does not allow for the use of specialized skills in a unique situation." [House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2464.]

The DOL USERRA Regulations provide as follows concerning the status of the returning veteran: "In particular, the employee's status in the reemployment position could include opportunities for advancement, general working conditions, job location, shift assignment, rank, responsibility, and geographical location." 20 C.F.R. 1002.193(a).

It is unclear whether the TC position was of like status to the SATP position that Ms. Clegg left and probably would have retained but for her call to the colors. The dispute about the

equivalency of the positions was rendered moot when ADOC agreed to reemploy Ms. Clegg in the SATP position after she protested the proposed transfer.

Ms. Clegg did not agree with the tentative decision to transfer her to the TC position, and she complained to a judge advocate of the Missouri Army National Guard and to the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). The judge advocate sent a letter to ADOC shortly thereafter, and it appears that ADOC paid attention to the letter, because ADOC notified Ms. Clegg that she would be placed in her original SATP position upon her return to work. Ms. Clegg returned to work in the SATP position on September 7, 2004. On September 28, 2004, DOL-VETS closed its investigation and sent a closing letter to ADOC.

The problem of enforcing USERRA against a state agency

As is explained in Law Reviews 89 (Sept. 2003), 0848 (Oct. 2008), 1011 (Jan 2010), 1140 (June 2011), 1144 (June 2011), 1148 (July 2011), 1158 (Aug. 2011), 1195 (Dec. 2011), 1224 (Feb. 2012), 1232 (Mar. 2012), 12115 (Nov. 2012), 12120 (Dec. 2012), 13027 (Feb. 2013), 13028 (Feb. 2013), 13066 (May 2013), 13073 (May 2013), and 13156 (Nov. 2013), the 11th Amendment of the United States Constitution presents enormous complications to the enforcement of USERRA against state government employers.

The 11th Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State."[5] Although the 11th Amendment speaks to a suit against a state by a citizen of another state, or a foreign state, the Supreme Court has held that 11th Amendment immunity also precludes a suit against a state by a citizen of that same state. *Hans v. Louisiana*, 134 U.S. 1 (1890).[6]

As originally enacted in 1994, USERRA authorized an individual (like Ms. Clegg) to sue a state government employer (just like a private employer) in federal court. In 1998, the United States Court of Appeals for the Seventh Circuit[7] held that USERRA is unconstitutional insofar as it permits an individual to sue a state in federal court. *Velasquez v. Frapwell,* 160 F.3d 389 (7th Cir. 1998), *citing Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996).

Seminole Tribe dealt with a federal statute (enacted pursuant to Article I, Section 8, Clause 3) that permitted an Indian tribe (like the Seminole Tribe of Florida) to sue a state in federal court. The Supreme Court held that statute to be unconstitutional under the 11th Amendment. A federal statute enacted pursuant to Article I, Section 8, Clause 3 (ratified along with the rest of the Constitution in 1789) cannot override the 11th Amendment, which was ratified in 1795.

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[5] Yes, it is capitalized just that way, in the style of the late 18th Century.

[6] The citation means that you can find the *Hans* case in Volume 134 of *United States Reports,* starting on page 1.

[7] The 7th Circuit is the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.

Article I, Section 8 has 18 separate clauses enumerating the broad but not unlimited powers of Congress. In the years, following *Seminole Tribe,* a common interpretation of the Court's holding was that any federal statute based on any of the 18 clauses of Article I, Section 8 cannot override the 11th Amendment and permit lawsuits in federal court against the states, because all of those clauses predate the 11th Amendment by six years. A more recent Supreme Court case seems to indicate that this is too broad a reading of *Seminole Tribe,* focusing solely on the 1789 ratification of the Constitution and the 1795 ratification of the 11th Amendment.

I invite the reader's attention to *Central Virginia Community College v. Katz,* 546 U.S. 356 (2006). The Supreme Court held that a federal statute enacted pursuant to Article I, Section 8, Clause 4 (the bankruptcy clause) could abrogate the 11th Amendment immunity of states and permit lawsuits against states in federal court.

Applying *Seminole Tribe* (and without the benefit of *Katz* which was not decided until eight years later), the United States Court of Appeals for the Seventh Circuit held USERRA to be unconstitutional insofar as it permitted an individual to sue a state in federal court. *Velasquez*. Later in 1998, Congress amended USERRA to address the *Velasquez* problem.

As amended in 1998, USERRA provides for two ways to enforce USERRA against a state government employer. The first way is to file a formal complaint with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). That agency will investigate the complaint and (if it is not resolved) will refer the case file to the United States Department of Justice (DOJ). If DOJ agrees that the case has merit, it may file suit against the state government employer in the appropriate federal district court *in the name of the United States as plaintiff.* Filing suit in the name of the United States solves the 11th Amendment problem because that amendment does not preclude a suit against a state by the United States.

The alternative way to enforce USERRA against a state government employer is provided by section 4323(b)(2) of USERRA, which provides: "In the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State*."* 38 U.S.C. 4323(b)(2).

Ms. Clegg brought this suit in her own name and with retained private counsel in the United States District Court for the Eastern District of Arkansas. ADOC is the first named defendant, and ADOC is clearly an arm of the State of Arkansas. Section 4323 of USERRA did not authorize Ms. Clegg to bring this suit in federal court. Accordingly, the District Court should have dismissed Ms. Clegg's lawsuit for want of jurisdiction. Because the District Court granted ADOC's motion for summary judgment on the merits, and because the 8th Circuit affirmed the summary judgment, the District Court's error constitutes harmless error.

ADOC's motion for summary judgment

Under Rule 56 of the Federal Rules of Civil Procedure, a party (usually the defendant) can make a motion for summary judgment after the discovery process has been completed. If the court finds that there is no material issue of fact and that there is no evidence that would support a **reasonable** jury verdict for the non-moving party, the court should grant the motion for summary judgment. In this case, the District Court granted the defendant's motion for summary judgment and the Eighth Circuit affirmed the summary judgment on appeal. This case is over.

The Court of Appeals ruled (I believe correctly) that there was no material issue of fact because Ms. Clegg apparently had no evidence that any unfavorable personnel action had been taken against her in retaliation for her having exercised her USERRA rights or having complained to DOL-VETS and to a National Guard judge advocate. In the absence of evidence of an unfavorable action, the court simply need not reach the question of whether the employer had improper motivations.

Is employer harassment of National Guard and Reserve members a cognizable issue under USERRA?

As I explained in Law Review 1211 (Jan. 2012), Congress amended USERRA in 2011 to make clear that harassment that creates a hostile work environment is a violation of section 4311 of USERRA. The *Clegg* case arose seven years before that statutory amendment, but the Court of Appeals apparently assumed that serious harassment would constitute a violation, and the court concluded that there was no evidence of the kind of "systematic bad treatment adversely affecting [Ms. Clegg's] employment situation" that would rise to the level of a violation. *Clegg,* 496 F.3d at 928.

I think that the court got this right. Ms. Clegg was disappointed that her colleagues and supervisors failed to welcome her back to work after her active duty in Iraq and initially considered reemploying her in a different part of the correctional facility, but it is simply not warranted to "make a federal case" out of petty slights and lack of civility.

Summary

This case should not have been brought and was correctly dismissed, although not on the correct basis. Nonetheless, the case does raise some interesting issues about how USERRA applies to real-life employment situations.