LAW REVIEW 14005
January 2014

Abandonment Doctrine Rests on Slender Reed

By Captain Samuel F. Wright, JAGC, USN (Ret.)

1.1.1.7—USERRA applies to state and local governments
1.1.1.8—USERRA applies to Federal Government
1.3.1.1—Left job for service and gave prior notice
1.3.1.2—Character and duration of service
1.8—Relationship between USERRA and other laws/policies

***Paisley v. City of Minneapolis,* 79 F.3d 722 (8th Cir.), *cert. denied,* 519 U.S. 929 (1996).[1]**

As Lieutenant Colonel Mathew B. Tully and I described in detail in Law Review 14004,[2] the United States Court of Appeals for the Federal Circuit[3] has cited and relied upon this 1996 Eighth Circuit decision in adopting the "abandonment doctrine" under the Uniformed Services Employment and Reemployment Rights Act (USERRA). I believe that the abandonment doctrine is wrong and that *Paisley* is an extraordinarily weak reed to rely upon in support of this wrong-headed doctrine.

As I described in Law Review 104 (December 2003) 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enacted USERRA[4] in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act, the law that led to the drafting of millions of young men (including my late father) for World War II. As originally enacted in 1940, the VRRA only applied to persons who left civilian jobs when they

---

[1] The citation means that you can find this case in Volume 79 of *Federal Reporter, Third Series,* starting on page 722. This is a decision of the United States Court of Appeals for the 8th Circuit, the federal appellate court that sits in St. Louis and hears appeals from district courts in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota. As is required in federal appellate courts, this case was decided by a panel of three judges: James B. Loken, Pasco Bowman II, and Charles R. Wolle. At the time of this decision, Judge Wolle was the Chief Judge of the United States District Court for the Southern District of Iowa, and he was sitting by designation. Judge Loken and Judge Bowman were sitting judges of the 8th Circuit. Judge Loken is still a sitting judge, while Judge Bowman has since taken senior status. After this decision, the 8th Circuit denied rehearing *en banc* and the Supreme Court denied *certiorari* (discretionary review). The denial of *certiorari* does not make this case a Supreme Court precedent.

[2] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 996 articles about 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.

[3] The Federal Circuit is the specialized federal appellate court that sits here in our nation's capital and has nationwide jurisdiction, but only as to certain kinds of cases, including review of final decisions of the Merit Systems Protection Board (MSPB).

[4] Public Law 103-353. USERRA has been amended several times since 1994 and is codified at sections 4301 through 4335 of title 38 of the United States Code, 38 U.S.C. 4301-4335.

were drafted into our nation's armed forces. In 1941, as part of the Service Extension Act, Congress expanded the VRRA to make it apply to those who voluntarily enlisted as well as those who were drafted.

The federal reemployment statute has applied to the Federal Government and to private employers since 1940. In 1974, as part of the Vietnam Era Veterans Readjustment Assistance Act (VEVRA), Congress amended the VRRA to make it apply to state and local governments as well. The VRRA was codified in title 50 of the United States Code[5] until 1974, when VEVRA moved it to title 38. At the time of the facts giving rise to *Paisley,* the VRRA was codified at 38 U.S.C. 2021-2027.

The VRRA made confusing and cumbersome distinctions among categories of military training or service, and different rules applied to "active duty" and "active duty for training." A person who left a job for voluntary or involuntary active duty had reemployment rights in the pre-service civilian job if he or she left the job for the purpose of performing active duty[6] and that the period of active duty, relating to that particular employer relationship, had not exceeded four years.[7] The individual had to be released from active duty under honorable conditions and had to apply for reemployment within 90 days after release from active duty.[8] A person who met these conditions was entitled to be reemployed in the position of employment that he or she would have attained if continuously employed or (at the employer's option) in another position of like seniority, status, and pay.[9]

Section 4324(a) of the VRRA[10] dealt with active duty for training and inactive duty training.[11] The Reservist or National Guard member was required to "request a leave of absence" from his

---

[5] The United States Code has 49 titles (broad subject areas) numbered 1 through 50. Title 10 deals with the armed forces, title 38 deals with veterans' benefits, and title 50 deals with war and national defense. Title 34 dealt with the Navy and Marine Corps until 1947, when Congress consolidated the Cabinet-level Department of the Navy with the Department of War to form the new Department of Defense. The title 34 provisions governing the Navy and Marine Corps were moved to title 10, which until that point dealt only with the Army and the Air Force, which was part of the Army until Congress created the Air Force as a separate service in 1947. Congress repealed title 34 in 1947, but the number has not been reutilized.

[6] Under the VRRA, there was no requirement to give the civilian employer notice that one was leaving the job for the purpose of active duty, although giving such notice was certainly encouraged. It was necessary to prove that one had left the civilian job for the purpose of service, and this purpose could be established by timing—that one had begun the period of active duty shortly after one's last day at the civilian job.

[7] If the individual served up to one additional year "at the request and for the convenience of the Federal Government" the individual would still have the right to reemployment, and "any period of additional service imposed pursuant to law" (i.e., an involuntary extension of the individual's active duty because of a war or national emergency) would not cause the individual to exceed the four-year limit. 38 U.S.C. 2024(a) (1988 edition of the United States Code).

[8] 38 U.S.C. 2021(a) (1988 edition of the United States Code). If the person was hospitalized at the time of release from active duty the 90-day deadline to apply for reemployment could be extended by up to one year. *Id.*

[9] *Id.*

[10] 38 U.S.C. 4324(d) (1988 edition of the United States Code).

[11] Inactive duty training refers to the regular training (usually but not always conducted on weekends) that is performed by Reservists and National Guard members on a monthly basis.

or her civilian employer in order to perform such duty, but the employer did not have the option to decline the request. Time spent on active duty for training or inactive duty training did not count toward the individual's four-year limit on the duration of active duty, relating to a specific employer relationship, and section 4324(a) did not specify any limit on the duration of a specific period or any cumulative limit on the amount of time that the Reservist or National Guard member could be away from his or her job for such service.

Inactive duty training normally lasts about two days (usually Saturday and Sunday) per month. Active duty for training normally lasts two or three weeks and is conducted once per year, usually in the summer. After Congress abolished the draft and established the All-Volunteer Military in 1973, the Department of Defense (DOD) established the "Total Force Policy" (TFP) and increased our nation's reliance on the National Guard and Reserve. Under the TFP, DOD asked some Reservists and National Guard members to perform military training that was far beyond the "one weekend per month and two weeks in the summer" that had been the norm.

Many civilian employers (federal, state, local, and private sector) objected when Reservists and National Guard members demanded the right to be away from their jobs for frequent and/or lengthy tours of military training, and this set off a two-decade argument in the courts as to whether there was an implied limit or a "rule of reason" limiting the permissible frequency and duration of military-related absences from civilian employment. The Supreme Court ended that argument in December 1991 when it unanimously held that there is no "rule of reason" limiting the frequency or duration of permissible military absences from work for National Guard and Reserve personnel.[12]

Section 2024(f) of the VRRA[13] provided as follows: "For purposes of subsections (c) and (d) of this section, full-time training *or other full-time duty* performed by a member of the National Guard under section 316, *502,* 503, 504, or 505 of title 32[14] *is considered active duty for training."* (Emphasis supplied.) A member of the Army National Guard or Air National Guard on full-time duty at the state headquarters of the National Guard of a particular state typically receives orders that cite 32 U.S.C. 502(f) as their authority. Such duty could last for many years, even a full 20-year career in some cases, but for purposes of the VRRA such duty qualified as active duty for training and was not subject to the VRRA's four-year limit on active duty.

Duane D. Paisley joined the Minnesota Army National Guard in 1965 as a traditional National Guard Soldier. From 1965 until 1979, his National Guard service was generally limited to one weekend of inactive duty training per month and 15 days of active duty for training per year. In 1973, he was hired as a police officer for the City of Minneapolis. In late 1979, he requested and was granted a two-year leave of absence by the City, for the purpose of full-time military duty. In 1981, he requested and was granted a two-year extension, and in 1983 he was granted a

---

[12] *King v. St. Vincent's Hospital,* 502 U.S. 215 (1991). Please see Law Review 0929 (July 2009) for a detailed discussion of *King* and its implications.

[13] 38 U.S.C. 2024(f) (1988 edition of the United States Code).

[14] Title 32 of the United States Code deals with the National Guard, including both the Army National Guard and the Air National Guard.

second two-year extension. Thus, he was away from his civilian job for six years of full-time military duty under these three two-year military leave periods.

In 1985, Paisley requested still another extension of his military leave, this time for three years, and the City declined to grant still another extension. By letter dated December 15, 1985, Paisley resigned from the Minneapolis Police Department.[15]

In May 1994 (before Congress enacted USERRA on October 13, 1994), Paisley retired from the Army National Guard, left full-time military service, and applied for reemployment with the City of Minneapolis. He claimed that he was entitled to prompt reemployment as a police officer and to be treated (for seniority and pension purposes) as if he had been continuously employed by the Minneapolis Police Department during the entire time (late 1979 until September 1994) that he had been serving full-time in the Army National Guard.

I believe that Paisley was most likely not entitled to reemployment in 1994 because he was well beyond the VRRA's four-year limit. The only way that he would have been entitled to reemployment would be if he could show that most of his 1979-94 full-time duty qualified as "active duty for training" and thus was exempt from the VRRA's four-year limit on active duty. While that is not impossible, I think that it is most unlikely.

Instead of defending on the merits, by showing that Paisley was not entitled to reemployment because he was beyond the four-year limit, the City of Minneapolis chose to rely on a "waiver" argument. The City argued that Paisley had waived his right to reemployment by repeatedly volunteering for new periods of full-time military duty and by his 1985 resignation letter. This waiver argument is directly contrary to the USERRA and VRRA case law, legislative history, and regulations to the effect that only known rights that are *already in existence* can be waived and that any waiver must be clear, specific, unequivocal, and not under duress.[16]

I believe that the District of Minnesota and the 8th Circuit could have and should have decided *Paisley* on the merits, and not on this cockamamie waiver theory. Accordingly, I believe that *Paisley* is a very weak reed for the Federal Circuit to rely on in promulgating its ill-considered "abandonment doctrine."

On October 13, 1994, President Bill Clinton signed into law Public Law 103-353, USERRA. Most USERRA provisions went into effect 60 days later, on December 12, 1994. USERRA applies to "reemployments initiated" on or after December 12, 1994. The USERRA transition rules preserve vested VRRA rights based on reemployments initiated prior to December 12, 1994. Because Paisley was released from full-time military service and applied for reemployment with

---

[15] I believe that a "resignation" does not defeat the returning veteran's claim for reemployment so long as the individual made clear that he or she was resigning *for the purpose of performing military service.* Please see Law Review 63 (January 2003).

[16] In Law Review 14004 Lieutenant Colonel Tully and I argue in detail against the "abandonment doctrine" that the Federal Circuit has adopted, relying in part on *Paisley.*

the City of Minneapolis some months prior to December 12, 1994, the *Paisley* case is governed by the VRRA, not by USERRA.

USERRA eliminated the VRRA's confusing and cumbersome distinctions among categories of military training or service. Under USERRA, active duty, active duty for training, inactive duty training, initial active duty training, full-time National Guard duty, funeral honors duty, etc. all qualify as "service in the uniformed services."[17] Under USERRA, the rules depend upon the *duration* of the period of uniformed service, rather than the category.[18]

Under section 4312(c) of USERRA, the durational limit is five years, rather than four years under the VRRA. Section 4312(c) also provides nine exemptions—kinds of service that do not count toward the individual's five-year limit.[19] Because of the exemptions, there are Reservists and National Guard members who have been away from their civilian jobs for substantially more than five years without having exhausted the five-year limit, but it seems impossible that a person could be on full-time military duty for 14.5 years (like Paisley) without having exceeded the five-year limit.

[17] *See* 38 U.S.C. 4303(13).

[18] For example, if the period of service was 181 days or more, the returning service member has 90 days to apply for reemployment with the pre-service employer. If the period of service was 31-180 days, the service member has 14 days to apply for reemployment. If the period of service was less than 31 days, the service member must report for work the next day after the completion of the period of service, the time reasonably required for safe travel from the place of service to the person's residence, plus eight hours for rest. *See* 38 U.S.C. 4312(e).

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