

**Number 149—UPDATE, December 2004:**

## **USERRA Victory in Dallas Federal Court Case**

BY COL JOHN S. ODOM JR., USAFR\*

A Marine Corps Reserve lieutenant colonel has won a victory in a USERRA case in federal court in Dallas, Texas, that is of potential significance to thousands of Reserve and Guard members. LtCol Michael T. Garrett, USMCR, had sued his former employer, Circuit City Stores, Inc., complaining that the employer had violated his rights under the Uniformed Services Employment and Reemployment Act (USERRA), 42 U.S.C. 4301, by terminating him. In response to the lawsuit, the employer claimed that a program adopted after Garrett's employment requiring mandatory arbitration for any employee-employer disputes applied to him and that he could not sue in federal court to enforce a violation of his rights under USERRA. (This case was described in *The Officer*, November 2004, page 42.)

Colonel Garrett's civilian counsel contacted ROA with a request for assistance in the form of filing an *amicus curiae*, "friend of the court," brief. Fortunately, ROA enjoys the services of one of its Life Members, CAPT Samuel F. Wright, who just happens to be one of two attorneys who essentially wrote the statute that became USERRA when he was an attorney with the Department of Labor in the mid-1990s. Captain Wright wrote an authoritative *amicus* brief, which was filed with the court.

Somewhat surprisingly, the court then asked for oral argument on the issue (whether mandatory arbitration clauses trumped USERRA's right to a trial in federal court). Because I live in Shreveport, La., Sam asked me to go to Dallas and argue the case on behalf of the ROA. I was pleased to do so. The federal district judge, the Hon. Barbara M. G. Lynn, gave the parties more time than I have ever seen spent on motion arguments in federal court to argue the pros and cons of the employer's motion to require mandatory arbitration of Colonel Garrett's USERRA claim.

In a Memorandum Opinion and Order entered on October 19, 2004, Judge Lynn ruled in favor of Colonel Garrett and held that "USERRA's text and legislative history evidence Congress's clear intent to treat the right to a jury trial as a right not subject to waiver in favor of arbitration. Furthermore, the court is cognizant that USERRA and its predecessor statutes have been liberally interpreted, 'for the benefit of those who left private life to service their country in its hour of great need.' [Alabama Power Co. v. Davis, 431 U.S. 581, 584 (1977) citing *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).]"

The court ruled that the pertinent section of USERRA, 38 U.S.C. 4302(b), superseded the arbitration agreement between the parties. The court also noted that no court costs or other fees could be charged a USERRA plaintiff who goes to federal court, and the clerk

of court subsequently refunded the filing fee Colonel Garrett's civilian counsel had paid to file the suit initially [citing Section 4323(h)(1) of USERRA].

The court went on to order that the parties commence and conclude non-binding arbitration within 60 days (unless Colonel Garrett was precluded by military service from doing so). If the employer decided not to proceed with non-binding arbitration, it was to notify the court and no such proceeding would be required. The difference between binding and non-binding arbitration is huge. Why would either side ever want to engage in non-binding arbitration? Why go to the time, trouble and expense of full-blown arbitration if the result is not binding on either side?

As it turns out, neither side wanted to engage in non-binding arbitration and the parties have so informed the court. Circuit City has filed notice of its intent to appeal the judge's ruling to the U.S. Fifth Circuit Court of Appeals. In the meantime, Colonel Garrett has been notified of his impending recall to active duty and the parties are in the process now of deciding whether or not to stay the appeal during his period of active duty with the Marine Corps. We will continue to follow *Garrett v. Circuit City Stores, Inc.*, (Civil Action No. 3:04-CV-556-M, U.S. District Court for the Northern District of Texas, Dallas Division) and will keep ROA and the readers of The Officer advised of the outcome. The district court's Memorandum Opinion and Order are posted on the ROA Law Review Web site.

\* \*Military title shown for purposes of identification only. The views expressed in these articles are the personal views of the authors, and not necessarily the views of the United States Air Force, the Department of the Navy, the Department of Defense, or the U.S. government.

Captain Wright has a B.A. in political science, a J.D., and an LLM in labor law. He was employed as an attorney for DOL for 10 years. With one other DOL attorney (Susan M. Webman), he largely drafted USERRA. If you have questions of Captain Wright, after reading the published Law Review articles, you may contact him by e-mail at [samwright50@yahoo.com](mailto:samwright50@yahoo.com).