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Missouri TAG Settles Case Alleging USERRA Violation

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1.1.1.7—USERRA applies to state and local governments
1.1.3.3—USERRA applies to National Guard service
1.2—USERRA forbids discrimination
1.3.2.10—Furlough or leave of absence clause
1.4—USERRA enforcement
1.8—Relationship between USERRA and other laws/policies
2.0—Paid leave for government employees who are Reserve Component members

On March 12, 2015, Major General Stephen L. Danner (Adjutant General of Missouri), the Missouri National Guard, and the State of Missouri settled the lawsuit brought by the United States Department of Justice (DOJ) against them on behalf of Kinata C. Holt and other Missouri National Guard Technicians (MNGTs), alleging that their rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) had been violated. I have discussed this case previously in Law Review 14029 (March 2014) and Law Review 14076 (July 2014).

Under the settlement, 138 MNGTs (including Holt) will receive leave credits (under the federal statute that provides paid military leave for federal employees and National Guard technicians) that they were unlawfully denied when they were forced to "resign" their technician positions as a condition precedent to being "allowed" to leave these civilian jobs for active duty in the Active Guard and Reserve (AGR) Program.

Of course, a settlement is not an admission of fault or liability, but in this case Judge Nanette K. Laughrey[3] of the United States District Court for the Western District of Missouri held the defendants' practices to be unlawful on June 9, 2014. *United States of America v. State of Missouri,* 2014 WL 2574487 (W.D. Mo. June 9, 2014). This case is one of those unusual cases that we call a "pure question of law" case—there was no real dispute about the facts. The dispute was about how the law (USERRA) applied to essentially undisputed facts. Judge Laughrey resolved the legal questions in favor of Holt and DOJ nine months ago.

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[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1,300 "Law Review" 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. The Reserve Officers Association (ROA) initiated this column in 1997, and we add new articles each week.

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[3] Judge Laughrey was nominated to the court by President Bill Clinton. She was confirmed by the Senate and took office in August 1996. In August 2011, she took senior status, but she continues to serve actively and hear cases regularly.

DOJ filed suit on February 24, 2014 in the United States District Court for the Western District of Missouri, against the State of Missouri, the Missouri National Guard, and Major General Stephen L. Danner, the Adjutant General (TAG) of Missouri. In the lawsuit, DOJ contended that these defendants violated USERRA in their treatment of Kinata C. Holt and other MNGTs who have left their MNGT civilian jobs for AGR tours.

The defendants filed a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure (FRCP), contending that even if all of the plaintiff's factual assertions are correct the plaintiff is not entitled to relief that the court can award. In a scholarly seven-page decision, Judge Laughrey denied the defendants' motion to dismiss on June 9, 2014.

First, it should be noted that the Missouri TAG is the *civilian employer* of MNGTs and is bound by USERRA, just like any other civilian employer (federal, state, local, or private sector). Section 4303 of USERRA (38 U.S.C. 4303) defines 16 terms used in this law, including the term "employer." That definition includes the following: "In the case of a National Guard technician employed under section 709 of title 32, the term 'employer' means the adjutant general of the State in which the technician is employed." 38 U.S.C. 4303(4)(B).

Congress enacted USERRA in 1994, to replace the Veterans' Reemployment Rights Act (VRRA), which goes back to 1940. USERRA's legislative history explains the rationale for defining the TAG as the civilian employer of NGTs, as follows: "Section 4303(4)(B) would provide that the employer of a National Guard technician shall be the Adjutant General of the State where the technician is employed. Because of the mix of State and Federal attributes of National Guard technicians, these persons have had difficulty enforcing their rights under the existing reemployment statute [VRRA]. The purpose of this provision is to clarify that National Guard technicians are to be considered to be State employees for purposes of chapter 43 of title 38 [USERRA], but not necessarily for any other purpose, except as otherwise provided by law." House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News (USCCAN)* 2449, 2454-55.

NGTs have a unique hybrid status—partly state and partly federal, and partly civilian and partly military.[4] But for purposes of USERRA they are considered to be civilian employees of the state, and the TAG (a state official) is considered to be their civilian employer. Thus, the enforcement mechanism for National Guard technicians claiming USERRA rights is through the appropriate federal district court, not through the Merit Systems Protection Board (MSPB). This case was properly filed in Federal District Court.

Kinata C. Holt was an MNGT when she applied for and was accepted by the Army's AGR Program. She served a three-year AGR active duty orders, from November 2011 to November

[4] An MNGT is required (as a condition of employment) to maintain membership in one of the Missouri National Guard units that the MNGT supports. During drill weekends and annual training tours, the MNGT participates in unit activities in his or her military capacity. During the work week, the MNGT is a civilian employee, although he or she normally wears a military uniform and observes military courtesies (saluting, etc.).

2014. The Missouri National Guard forced Holt to resign from her technician position before she reported to active duty.

In paragraph 11 of its complaint, DOJ alleged: "Pursuant to Missouri National Guard policy and practice, before allowing Holt to go on active duty with the Army's Guard and Reserve Program, the Missouri National Guard required her to sign a document in which she agreed to be separated (i.e., terminated) from her civilian position rather than allowing her to remain a Missouri National Guard employee and placing her on furlough or leave of absence ('LOA') as required by USERRA, 38 U.S.C. 4316(b)(1)(A)."

Why, you may ask, would the Missouri National Guard seek to force Holt and other similarly situated technicians to resign from their civilian positions? Paragraph 12 of the DOJ complaint states: "By forcing dual technicians to separate from their employment with the Missouri National Guard before performing active duty military service with the Army's Guard and Reserve Program, defendants are effectively denying Missouri National Guard dual technicians the benefit of 15 days [per year] paid military leave to which they are otherwise entitled under 5 U.S.C. 6323."

Paragraph 11 of the DOJ complaint asserts that the Missouri National Guard policy violates section 4316(b)(1)(A) of USERRA. That subsection provides: "Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be—deemed to be on furlough or leave of absence while performing such service." 38 U.S.C. 4316(b)(1)(A).

USERRA's 1994 legislative history expounds upon this provision as follows: "Section 4315(b) [later renumbered 4316(b)] would reaffirm that a departing serviceperson is to be placed on a statutorily-mandated military leave of absence while away from work, regardless of the employer's policy. Thus, terminating a departing serviceperson, or forcing him or her to resign, even with the promise of reemployment, is of no effect. *See Green v. Oktibbeha County Hospital,* 526 F. Supp. 49, 54 (N.D. Miss. 1981); *Winders v. People Express Airlines, Inc.,* 595 F. Supp. 1512, 1518 (D.N.J. 1984), *affirmed,* 770 F.2d 1078 (3rd Cir. 1985)." 1994 *USCCAN* at 2466.

MNGTs are considered to be state employees for USERRA purposes, but they are treated as if they were federal employees for purposes of the right to *paid* military leave under section 6323 of title 5 of the United States Code, which provides as follows:

§ 6323. Military leave; Reserves and National Guardsmen

(a)
(1) Subject to paragraph (2) of this subsection, an employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, is entitled to leave without loss in pay, time, or performance or efficiency rating for active duty, inactive-duty training (as defined in section 101 of title 37), funeral honors duty (as described in section 12503 of title 10 and section 115 of title 32), or engaging in

field or coast defense training under sections 502-505 of title 32 as a Reserve of the armed forces or member of the National Guard. Leave under this subsection accrues for an employee or individual at the rate of 15 days per fiscal year and, to the extent that it is not used in a fiscal year, accumulates for use in the succeeding fiscal year until it totals 15 days at the beginning of a fiscal year.
(2) In the case of an employee or individual employed on a part-time career employment basis (as defined in section 3401(2) of this title), the rate at which leave accrues under this subsection shall be a percentage of the rate prescribed under paragraph (1) which is determined by dividing 40 into the number of hours in the regularly scheduled workweek of that employee or individual during that fiscal year.
(3) The minimum charge for leave under this subsection is one hour, and additional charges are in multiples thereof.

(b) Except as provided by section 5519 of this title, an employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, who--
(1) is a member of a Reserve component of the Armed Forces, as described in section 10101 of title 10, or the National Guard, as described in section 101 of title 32; and
(2) (A) performs, for the purpose of providing military aid to enforce the law or for the purpose of providing assistance to civil authorities in the protection or saving of life or property or the prevention of injury--
(i) Federal service under section 331, 332, 333, or 12406 of title 10, or other provision of law, as applicable, or
(ii) full-time military service for his State, the District of Columbia, the Commonwealth of Puerto Rico, or a territory of the United States; or
(B) performs full-time military service as a result of a call or order to active duty in support of a contingency operation as defined in section 101(a)(13) of title 10;

is entitled, during and because of such service, to leave without loss of, or reduction in, pay, leave to which he otherwise is entitled, credit for time or service, or performance or efficiency rating. Leave granted by this subsection shall not exceed 22 workdays in a calendar year. Upon the request of an employee, the period for which an employee is absent to perform service described in paragraph (2) may be charged to the employee's accrued annual leave or to compensatory time available to the employee instead of being charged as leave to which the employee is entitled under this subsection. The period of absence may not be charged to sick leave.

(c) An employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, who is a member of the National Guard of the District of Columbia, is entitled to leave without loss in pay or time for each day of a parade or encampment ordered or authorized under title 39, District of Columbia Code. This subsection covers each day of service the National Guard, or a portion thereof, is ordered to perform by the commanding general.

(d) (1) A military reserve technician described in section 8401(30) is entitled at such person's request to leave without loss of, or reduction in, pay, leave to which such person is otherwise entitled, credit for time or service, or performance or efficiency rating for each day, not to exceed 44 workdays in a calendar year, in which such person is on active duty without pay, as authorized pursuant to section 12315 of title 10, under section 12301(b) or 12301(d) of title 10 for participation in operations outside the United States, its territories and possessions.
(2) An employee who requests annual leave or compensatory time to which the employee is otherwise entitled, for a period during which the employee would have been entitled upon request to leave under this subsection, may be granted such annual leave or compensatory time without regard to this section or section 5519.

5 U.S.C. 6323.

Just like a DOJ employee who is away from his or her civilian job for voluntary or involuntary military training or service in the National Guard or Reserve, Holt was entitled to paid military leave under section 6323 while on her three-year (November 2011 to November 2014) active duty period. This is a valuable benefit, especially since only federal work days (not weekends or federal holidays) are to be charged against her paid military leave entitlement.[5] This advantage is a benefit of employment, as defined by section 4303(2) of USERRA, 38 U.S.C. 4303(2). The Missouri National Guard deprived her of this benefit of employment on the basis of her performance of uniformed service, in violation of section 4311(a) of USERRA, 38 U.S.C. 4311(a).

On page 3 of her opinion, Judge Laughrey cites *Paisley v. City of Minneapolis,* 79 F.3d 722, 724 (8th Cir.), *cert. denied,* 519 U.S. 929 (1996) for the proposition that: "An employee may waive USERRA rights by voluntarily resigning from a civilian position and pursuing a career in military service." I discuss *Paisley* in detail, and criticize it, in Law Review 14005 (January 2014). I think that the concept of the individual "waiving" his or her reemployment rights by an implied or even an expressed intent not to return to the civilian job is fundamentally inconsistent with the intent of Congress to preserve the individual's opportunity to return to his or her pre-service job, upon completion of the period of service and compliance with the five USERRA conditions, as an "unburned bridge."

USERRA's 1994 legislative history contains a very instructive paragraph on this issue: "The Committee [House Committee on Veterans' Affairs] wishes to stress that rights under chapter 43 belong to the claimant, and he or she may waive those rights, either explicitly or impliedly, through conduct. Because of the remedial purposes of chapter 43, any waiver must, however, be clear, convincing, specific, unequivocal, and not under duress. Moreover, only known rights *which are already in existence* may be waived. *See Leonard v. United Airlines, Inc.,* 972 F.2d 155, 159 (7th Cir. 1992). An express waiver of future statutory rights, such as one that an employer might wish to require as a condition of employment, would be contrary to the public policy embodied in the Committee bill and would be void." House Rep. No. 103-65, 1994 *USCCAN* 2449, 2453 (emphasis supplied).

[5] *See Butterbaugh v. Department of Justice,* 336 F.3d 1332 (Fed. Cir. 2003).

As I explained in Law Review 1281 and other articles, an individual must meet five conditions to have the right to reemployment under USERRA:

a. Must have left a civilian position of employment (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services.
b. Must have given the employer prior oral or written notice.
c. Cumulative period or periods of uniformed service, relating to the employer relationship for which the individual seeks reemployment, must not have exceeded five years.[6]
d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.
e. After release from the period of service, has made a timely application for reemployment.

In November 2011, Kinata C. Holt left her MNGT position when she applied for and was selected for a three-year AGR tour. In my view, it matters not one whit what Ms. Holt intended (regarding remaining on AGR duty beyond the three-year orders) at the time she left her civilian job, in November 2011. Regardless of what her plans were at the time, plans can change, or her hope to remain on full-time duty long-term could be dashed by injury, illness, or the discontinuation of the opportunity to remain, for any number of reasons.

My view on this point is strongly supported by section 1002.88 of the DOL USERRA Regulation, which provides as follows:

§ 1002.88 **Is the employee required to tell his or her civilian employer that he or she intends to seek reemployment after completing uniformed service before the employee leaves to perform service in the uniformed services?**

No. When the employee leaves the employment position to begin a period of service, he or she is not required to tell the civilian employer that he or she intends to seek reemployment after completing uniformed service. Even if the employee tells the employer before entering or completing uniformed service that he or she does not intend to seek reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment after completing service. The employee is not required to decide in advance of leaving the civilian employment position whether he or she will seek reemployment after completing uniformed service.

20 C.F.R. 1002.88 (bold question in original).

I believe that *Paisley* was wrongly decided, but Judge Laughrey was required to apply it, because Missouri is in the 8th Circuit.[7] But even if *Paisley* is good law and is binding, that does

[6] As I explain in detail in Law Review 201 (August 2005), there are nine exemptions to the five-year limit—kinds of service that do not count toward exhausting the individual's limit with that employer.

not mean that the defendants win or that the motion to dismiss should be granted. Even under the *Paisley* test, waiver is a fact-intensive inquiry—it is an affirmative defense for which the defendants bear a heavy burden of proof. It is simply not possible, at the motion to dismiss stage (before discovery), to state that DOJ cannot prevail and that the suit should be dismissed on the pleadings.

The court found that, in contrast with Defendants' argument that section 4316(b)(1) does not apply because the Complaint alleges that Holt voluntarily enlisted in a career program, thus agreeing to be separated from her civilian position and waiving her rights under USERRA, the Complaint did plausibly allege a violation of USERRA by Defendants. The court found the Complaint to allege that Holt was accepted into the AGR program "for a three year tour of duty," and that there was no indication of whether or not Holt desired to return to her civilian position after this tour. The court, citing *Freitas v. Wells Fargo Home Mortgage, Inc.*, 703 F.3d 436, 441 (8th Cir. 2013), accepted all of the factual allegations in the Complaint as true and drew all reasonable inferences in favor of Plaintiff. This led the court to the finding that the Complaint plausibly alleged that Defendants had violated USERRA.

The court found the primary dispute of the motion to dismiss to be whether Holt had intended to pursue a career in military service when she joined the AGR program. Defendants argued that, in spite of the general rule that an employee's intent to resign from civilian employment in favor of career military service is a fact-intensive inquiry, positions in the AGR program are, by definition, career positions. Defendants cited to Army Regulation 135-18 ¶ 1-6(a), which states that AGR provides for:

> "[a] career program offering opportunities that encourages retention through promotion, professional development, and assignments or attachments to positions of increased responsibility."

The court looks further into this regulation to where it states that the AGR program also provides for "[e]ntry into the program of soldiers who may desire to serve only initial or occasional AGR tours, as well as soldiers who serve in a career status." Army Reg. 135-18 ¶ 1-6(d) The court acknowledged that Army Reg. 135-18 ¶ 2-6(b) provided that the "indefinite" period of duty, following the initial three-year tour, be subject to the soldier's voluntary reenlistment. Holt had also completed a checklist form prior to entering the AGR program that specifically acknowledged that she would have reemployment rights under USERRA if she left the program prior to serving five years. On this basis, the court determined that an individual participating in the AGR program may choose whether to make it a career or only the initial three-year tour, or occasional tours. This led to the finding that there was little basis for concluding, as a matter of law, that participation in AGR results in a categorical loss of USERRA protections. The court looked to a Supreme Court case in which an analogous situation arose and the analogous provisions of the Veterans' Reemployment Rights Act, the predecessor to USERRA "cover[ed] AGR participants." *King v St Vincent's Hosp.*, 502 U.S. 215, 217, n.5 (1991).

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[7] The 8th Circuit is 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.

The court also cited to a series of lower court cases that applied USERRA to AGR participants.[3] The court found that to not apply USERRA to individuals who volunteer to serve in the AGR program for a limited time, with no intent to make it a career, would be inconsistent with the stated purpose of USERRA to encourage "noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service" § 4301(a)(1).

Defendants further argue that Soldiers who enter the AGR program indicate their intent to accept a career military position when they sign paperwork to separate from their civilian employment. The court rejects this argument, stating that this requirement (imposed by the Missouri National Guard) is at the very heart of Plaintiff's Complaint. The court also rejects this argument on the basis of the allegation that the Missouri National Guard forced Holt to separate from her civilian employment rather than be placed on furlough or leave of absence. This was sufficient evidence for the court to find the inference that the Missouri National Guard refuses requests for leaves of absence to be plausible. This action by the Missouri National Guard would circumvent the USERRA rights of individuals who *do not* enter the AGR program with the intent of turning it into a career.

The court's final rationale for denying Defendants' motion to dismiss lay in the fact that 38 U.S.C. § 4316(b)(2)(B) placed "the burden of proving that a person knowingly provided clear written notice of intent not to return to a position of employment after service in the uniformed service and, in doing so, was aware of the specific rights and benefits to be lost" on the Defendants. The materials provided by Defendant did not show that Holt had knowledge that she could request a leave of absence in lieu of separation, given her possible intent to not make a career out of AGR. Absent proof that a soldier does not intend to return to civilian employment, the existence of a waiver defense is not apparent and dismissal upon this ground would be inappropriate.

My principal concern with this situation is with the "optics"—to use "Inside the Beltway" lingo. The appearance is terrible. USERRA's very first section expresses the "sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter." 38 U.S.C. 4301(b). As a civilian employer, the National Guard must strive to be a model among models. It should not be necessary for DOJ to sue a state's National Guard to get that organization to comply with USERRA.

The appearance that the Missouri National Guard does not comply (with respect to its own civilian employees) with the law that protects Guard members generally inevitably undermines the National Guard's moral standing to advocate for National Guard Soldiers and Airmen, with respect to their civilian employers. "Do as I say and not as I do" has always been a losing argument. How will the National Guard leadership tell the gas station owner in Missouri that he must comply with USERRA with respect to his employees when the National Guard has been sued for violating the USERRA rights of its own employees?

I want to congratulate DOJ and the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS) for having brought this lawsuit and for having obtained this excellent settlement. In January 2013, Kinata C. Holt filed with DOL-VETS a formal written complaint alleging that the Missouri National Guard had violated her USERRA rights, in accordance with section 4322(a) of USERRA, 38 U.S.C. 4322(a). DOL-VETS investigated the complaint in accordance with section 4322(d) and found it to have merit. In accordance with section 4322(e), DOL-VETS advised Ms. Holt of the results of its investigation and of her right to request referral to DOJ. Ms. Holt requested referral to DOJ, and the case file was referred. DOJ agreed with DOL-VETS that the case had merit, and DOJ filed this lawsuit on February 24, 2014 and obtained this excellent settlement 13 months later.

Regular readers of this column will recall that I have been very critical of DOL-VETS with respect to its efforts to enforce USERRA. I find that all too often DOL-VETS simply accepts the employer's assertions of fact and law and closes the case as "without merit" even when the case does have merit. In this case, however, I have nothing but praise for DOL-VETS and DOJ. They found the case to have merit and have resolved the matter favorably within 27 months after Ms. Holt filed her complaint with DOL-VETS.