LAW REVIEW 15097[1]
November 2015

As an Employer, New York City Mistreats Marine Corps Reserve Officer

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***Lapaix v. City of New York,* 2014 WL 3950905, 2014 U.S. Dist. LEXIS 112265 (S.D.N.Y. August 12, 2014).**

This is an informally published decision by Judge Lorna G. Schofield of the United States District Court for the Southern District of New York. She was appointed by President Obama and confirmed by the Senate in 2012.

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[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find almost 1,400 "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.

[2] Captain Wright is the author or co-author of more than 1,200 of the more than 1,400 "Law Review" articles available at www.servicemembers-lawcenter.org. He has been dealing with the federal reemployment statute for 33 years and has made it the focus of his legal career. He developed the interest and expertise in this law during the decade (1982-92) that he worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), he largely drafted the interagency task force work product that President George H.W. Bush presented to Congress (as his proposal) in February 1991. On October 13, 1994, President Bill Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA), Public Law 103-353. The version that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. Wright has also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), and as an attorney in private practice, at Tully Rinckey PLLC. For the last six years (June 2009 through May 2015), he was the Director of ROA's Service Members Law Center (SMLC), as a full-time employee of ROA. In June 2015, he returned to Tully Rinckey PLLC, this time in an "of counsel" relationship. To schedule a consultation with Samuel F. Wright or another Tully Rinckey PLLC attorney concerning USERRA or other legal issues, please call Mr. Zachary Merriman of the firm's Client Relations Department at (518) 640-3538. Please mention Captain Wright when you call.

The plaintiff is Mario Lapaix, a black man of Haitian national origin. He served on active duty in the Marine Corps from 1977 to 1984 and in the Marine Corps Reserve from 1985 to 2012, when he retired. He is not a member of the Reserve Officers Association (ROA), but he is certainly eligible, and we are trying to recruit him. The facts in this article are as alleged by Lapaix in his lawsuit against New York City (NYC)[3] and four named supervisors who (Lapaix claims) mistreated him and violated his rights.[4]

In this lawsuit, Lapaix alleged race and national origin discrimination and retaliation claims under New York State and NYC Human Rights Laws and sections 1981 and 1983 of title 42 of the United States Code (42 U.S.C. 1981, 1983)[5] as well as discrimination against service members under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and section 242 of the New York Military Law and section 88 of the NYC Service Law.[6]

Lapaix began his career with NYC in 1985, shortly after he left active duty. Between 1985 and 2001, he moved up in the NYC ranks smartly and was promoted seven times. After the terrorist attacks of September 11, 2001 (the "date which will live in infamy" for our time), Lapaix was called to the colors by the Marine Corps several times and his NYC supervisors had an animus against him because of his absences from work for military service.[7]

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[3] NYC is a political subdivision of the State of New York. The final subsection of section 4323 of the Uniformed Services Employment and Reemployment Rights Act (USERRA) provides: "In this section [pertaining to USERRA enforcement], the term 'private employer' includes a political subdivision of a State." 38 U.S.C. 4323(i). This means that you can sue a political subdivision for violating USERRA in federal court, in your own name and with your own lawyer. Political subdivisions do not share in the 11th Amendment immunity of arms of the state. *See Weaver v. Madison City Board of Education,* 771 F.3d 748 (11th Cir. 2014). I discuss *Weaver* in detail in Law Review 15011.

[4] Section 4303 of the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4303, defines 16 terms used in this law, including the term "employer." The definition of "employer" includes "a *person,* institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities." 38 U.S.C. 4303(4)(A)(i) (emphasis supplied). To the extent that an individual supervisor or official of the employer has violated USERRA, that person can be sued individually and could be held individually liable.

[5] In a case like this, the plaintiff is well served by having private counsel, rather than relying upon the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS) and the Department of Justice (DOJ). Private counsel can consider and bring claims under various statutes and legal theories, while DOL-VETS and DOJ are limited to USERRA.

[6] Section 4302(a) of USERRA provides: "Nothing in this chapter [USERRA] 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." 38 U.S.C. 4302(b) (emphasis supplied). When you have a federal court lawsuit under a federal statute like USERRA and you have closely related state law claims that arise out of essentially the same facts, you can bring your state law claims, along with your federal claims, in the federal court under the supplemental jurisdiction of the federal court. *See* 28 U.S.C. 1367(a). I discuss this issue in detail in Law Review 1173.

[7] After September 11, 2001, the "strategic reserve" (available only for World War III, which thankfully never happened) was transformed into the "operational reserve" (routinely called to duty for intermediate situations like Iraq and Afghanistan). According to the Department of Defense (DOD), more than 910,000 Reserve Component (RC) personnel have been called to the colors since 9/11/2001.

By 2001, Lapaix rose to the position of Assistant Commissioner and Senior Executive for Transportation Services of the NYC Department of Citywide Administrative Services (DCAS). The Marine Corps chose Lapaix to attend the Naval War College (NWC) as a full-time residential student for one year, from July 2001 to July 2002. Lapaix gave notice to NYC before leaving and timely sought reemployment within DCAS, but it was denied.[8]

As I have explained in Law Review 1281 and many other articles, an individual has the right to reemployment under USERRA if he or she meets five simple conditions:

a. Left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services.
b. Gave the employer prior oral or written *notice.* The individual does not need the employer's permission, and the employer does not get a veto.
c. Has not exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which the individual seeks reemployment.[9]

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[8] As is explained in Law Review 15067, Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. Neither the VRRA nor USERRA have ever had a statute of limitations (SOL), and both laws specifically precluded the application of state SOLs. However, the four-year default SOL under 28 U.S.C. 1658(a) probably applied to USERRA cases. On October 10, 2008, President Bush signed into law the Veterans' Benefits Improvement Act of 2008. Section 311(f) of that law enacted a new section of USERRA—section 4327, or 38 U.S.C. 4327. Section 4327(b) of USERRA now provides as follows: "If any person seeks to file a complaint or claim with the Secretary [of Labor], the Merit Systems Protection Board, or a Federal or State court under this chapter [USERRA] alleging a violation of this chapter, *there shall be no limit on the period for filing the complaint or claim."* 38 U.S.C. 4327(b) (emphasis supplied). With the enactment of section 4327(b), it is now clear that there is no statute of limitations for USERRA causes of action that accrued on or after October 10, 2008. How does section 4327(b) apply (if at all) to causes of action that accrued *before* October 10, 2008? The United States Court of Appeals for the Seventh Circuit has held that the enactment of section 4327(b) in 2008 did not "resurrect" USERRA claims that were already "dead" on October 10, 2008. *Middleton v. City of Chicago,* 578 F.3d 655, 662-65 (7th Cir. 2009). Thus, there is no SOL for claims accruing after October 10, 2004. Lapaix returned from his one-year NWC tour in July 2002, so his claim for improper reemployment in 2002 is time-barred. The 2002 USERRA violation is discussed in the case and in this article only because it provides context and helps to establish the willfulness of later violations that are not time-barred.

[9] As is explained in Law Review 201 and other articles, there are nine exemptions from the five-year limit (kinds of service that do not count toward exhausting the limit) under section 4312(c) of USERRA, 38 U.S.C. 4312(c). Lapaix's one year of service to attend the NWC was exempt from the five-year limit under 38 U.S.C. 4312(c)(3).

d. Served honorably and did not receive from the military one of the disqualifying bad discharges enumerated in section 4304 of USERRA, 38 U.S.C. 4304.
e. Made a timely application for reemployment after release from the period of service.[10]

Lapaix has alleged that he met these five conditions after he completed his one-year NWC tour in July 2002, and it seems very likely that he did. If Lapaix met the conditions, the employer (NYC) had a duty to reemploy him "in the position of employment in which the person *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."[11]

If Lapaix's NYC job had not been interrupted by military service from July 2001 to July 2002, it seems very likely that he would have remained employed in the position of Assistant Commissioner and Senior Executive for Transportation Services in DCAS, or perhaps he would have been promoted into an even higher position.[12] Lapaix was not entitled to insist on returning to the specific position that he had held prior to July 2001, but he was entitled to insist on being reinstated into a position that was equal in seniority, status, and pay to the position that he had left and almost certainly would have continued to hold.

When Lapaix completed his one year of service and applied for reemployment in July 2002, a DCAS supervisor told him that there were no vacancies for him in DCAS and that it was Lapaix's responsibility to find another job in the city government. It seems likely that the supervisor said this because he had an animus against Lapaix because of his military service and perhaps also because of his race (black) and national origin (Haitian).

In fact, it was the responsibility of the employer (NYC) to reemploy Lapaix in the position that he would have attained if he had been continuously employed or another position of like seniority, status, and pay. Moreover, even if it were true that there were no vacancies in DCAS, that would not have been a defense to the city's obligation to reemploy Lapaix in an appropriate position.

Allowing the hiring of another employee to defeat the reemployment rights of the returning veteran would render the reemployment statute largely meaningless, and it is clear that the lack of a current vacancy does not defeat the right of the veteran to return to his or her rightful position. This is established in the 1993 case styled *Nichols v. Department of Veterans Affairs:*

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[10] After a period of service of 181 days or more, the individual has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.
[11] 38 U.S.C. 4313(a)(2)(A) (emphasis supplied).
[12] Lapaix had performed quite admirably and had been promoted seven times in his 16 years of NYC employment between 1985 and 2001.

> The department [Department of Veterans Affairs, employer in the case] first argues that, in this case, Nichols' [the returning veteran and the plaintiff] former position was 'unavailable' because it was occupied by another, and thus it was within the department's discretion to place Nichols in an equivalent position. This is incorrect. Nichols' former position is not unavailable because it still exists, even if occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. … Although occupied by Walsh, Nichols' former position is not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him.[13]

After DCAS firmly refused to reemploy him, Lapaix found a position at the NYC Housing Authority (NYCHA). That position was clearly inferior to the position he had held and certainly would have continued to hold at DCAS, with regard to Lapaix's duties and responsibilities, persons he supervised, responsibility for policy decisions, and opportunity for further promotion within the NYC government.

Lapaix was called to the colors several more times, from January to October 2003, from March to September 2004, from May 2006 to June 2007, and from January 2008 to sometime in 2010.[14] Each time, he returned to NYC employment but was denied the appropriate position to which he was entitled under USERRA.

Assuming that Lapaix's allegations are true (and I believe that they probably are true), this is an egregious case of a major employer (NYC) flouting its obligations under USERRA. Even in New York City, site of the majority of the casualties on September 11, all too many unpatriotic employers and supervisors seek to flout USERRA.

The defendants sought to get the judge to dismiss this case under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Under that rule, the judge should dismiss the case only if she can say that *even assuming that the plaintiff's factual allegations are true* there is no way for the plaintiff to prevail or that the plaintiff has failed to state a plausible claim for relief. Judge Schofield properly denied the motion to dismiss, and that was 15 months ago (August 2014).

The next step is the discovery process, under which the plaintiff can obtain documents, testimony, and other evidence from the defendants and the defendants can obtain the same from the plaintiff. After the discovery process has been completed, the defendants can make a motion for summary judgment, under Rule 56 of the Federal Rules of Civil Procedure. At that

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[13] *Nichols v. Department of Veterans Affairs,* 11 F.3d 160, 163 (Fed. Cir. 1993).

[14] Lapaix did not exceed the five-year limit under section 4312(c), and at least some of these periods were exempt from the computation of the five-year limit.

point, the judge will grant the summary judgment motion only if she can conclude, based on the evidence that has been produced, that there is no evidence (beyond a “mere scintilla”) in support of the plaintiff’s case and that no reasonable jury could find for the non-moving party (the plaintiff). If summary judgment is denied, the next step is a trial.

In a complex case like this, the discovery process and pre-trial period can take a long time, especially in the Southern District of New York, with its very crowded dockets. We will keep the readers informed of developments in this most interesting and important case.