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Unconstitutional To Deny Hazlewood Act Educational Benefits to Veterans Based on Residence outside Texas when they Enlisted

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]
Update on Sam Wright

8.0—Veterans' preference
11.0—Veterans' claims

***Harris v. Cantu,* 81 F. Supp. 3d 566 (S.D. Texas 2015).**[3]

Keith Harris (the plaintiff in this case) was born in 1978 in Georgia. In 1996, while still living in Georgia, he graduated from high school and enlisted in the United States Army. He served on active duty for four years and was honorably discharged in 2000.[4] In 2000, Harris returned to Georgia, found a job, married and started a family. He moved to Houston, Texas in 2004.

Harris began taking college courses while he was on active duty. After he left active duty, he used his federal GI Bill educational benefits to continue his college education. He received a bachelor's degree in business from the University of Houston-Downtown in December 2011 and then enrolled in the University of Houston Law School in August 2012. He exhausted his federal GI educational benefits before he started his third and final year of law school, and at

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[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find almost 1500 "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. I am the author of more than 1300 of the articles.

[2] BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. From 2009 to 2015, I served as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA. I invite the reader's attention to Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. After ROA disestablished the SMLC last year, I returned to Tully Rinckey PLLC (the law firm where I was a partner before 2009), this time in an "of counsel" role. To arrange for a consultation with me or any other Tully Rinckey attorney, please call Ms. JoAnne Perniciaro (the firm's Client Relations Director) at (518) 218-3540. Please mention Captain Wright when you call.

[3] This is a January 15, 2015 decision of Judge Ewing Werlein, Jr., of the United States District Court for the Southern District of Texas. The citation means that you can find this court decision in Volume 81 of *Federal Supplement Third Series,* and the decision starts on page 566.

[4] The court decision refers to his honorable discharge in 2000, but it was most likely in 2004, because the standard enlistment for all five armed forces is eight years. Harris left active duty in 2000 and apparently did not affiliate with the Army Reserve or Army National Guard. He likely was a member of the Individual Ready Reserve (IRR) until 2004, when the Army honorably discharged him.

that point he sought to use educational benefits under a Texas law called the "Hazlewood Act. (HA)"

The HA provides, in relevant part, as follows:

> The governing board of each institution of higher education [supported by the State of Texas] shall exempt the following persons from the payment of tuition, dues, fees, and other required charges but excluding general deposit fees, student services fees, and any fees or charges for lodging, board, or clothing, provided the person seeking the exemption currently resides in this state *and entered the service at a location in this state,* declared this state as the person's home of record in the manner provided by the applicable military or other service, or would have been determined to be a resident of this state for purposes of Subchapter B [in state tuition rates] at the time the person entered the service.[5]

Harris met the requirements for HA educational benefits, except the requirement of Texas residence at the time of enlistment in the armed forces. Harris lived in Georgia, not Texas, when he enlisted in 1996. Based on his Georgia residence at the time of enlistment, the University of Houston denied him the HA benefit of free tuition for his final year of law school, after he had exhausted his federal GI educational benefits. Harris filed suit in the United States District Court for the Southern District of Texas, asserting that the HA requirement of Texas residence at the time of enlistment violated the Equal Protection Clause of the 14th Amendment of the United States Constitution.[6]

Section 1 of the 14th Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, *nor deny to any person within its jurisdiction the equal protection of the laws.*[7]

The Equal Protection Clause does not make it unconstitutional for a state to draw lines. Indeed, legislation is all about drawing lines. Those persons on one side of the line receive a benefit, and those on the other side are denied the benefit. The Equal Protection Clause is about *how* the states draw these lines.

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[5] Texas Education Code, section 54.341(a) (emphasis supplied).

[6] As an interim settlement, the University of Houston gave him the free tuition for his final year of law school, and Harris agreed to pay the tuition at the end of the case if the court upheld the constitutionality of the fixed point of residency requirement.

[7] United States Constitution, Amendment 14, section 1 (emphasis supplied).

If the line is drawn based on a “suspect class” (like race), or if the drawing of the line relates to a “fundamental right” (like voting), the Supreme Court has held that “heightened scrutiny” applies—the line will be upheld only if it is necessary to further a *compelling* state interest and only if the line is drawn carefully so as to minimize the burden on the protected class or right. If heightened scrutiny does not apply, the state only needs to show a "rational basis” for having drawn the line in the way that it did.

In his scholarly opinion, Judge Werlein held that excluding Harris (and others similarly situated) from HA educational benefits based on residence outside the State of Texas at the time of enlistment in the armed forces did not pass constitutional muster under the “rational basis” test. Thus, it was unnecessary to determine if heightened scrutiny applied in this case.

Judge Werlein cited several decisions of the United States Supreme Court.[8] He also cited a decision of the California Supreme Court, striking down a very similar California statute.[9] Judge Werlein held: “Accordingly, the Court holds that the fixed-point residence requirement found in Texas Education Code section 54.341(a) violates the Equal Protection Clause because it unconstitutionally discriminates against Plaintiff, an honorably discharged Texas veteran, for the sole reason that when he enlisted in the United States Army in 1996 he was a resident citizen of another state.”

Having found the fixed point residency requirement unconstitutional, Judge Werlein then had to address the question of *severability.* Whether unconstitutional provisions of a state statute are severable is a matter of state law.[10] The HA contains neither a severability clause nor a non-severability clause. Accordingly, Judge Werlein cited and relied upon a general severability clause in the Texas Government Code[11] and found the fixed point of residency requirement to be severable.

Judge Werlein enjoined the University of Houston and other Texas public university systems from HA educational benefits based on the veteran’s residence outside the State of Texas at the time of enlistment. Texas filed a timely appeal to the 5th Circuit.[12] Oral

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[8] Those decisions include *Zobel v. Williams,* 457 U.S. 55 (1982); *Shapiro v. Thompson,* 394 U.S. 618 (1969); *Hooper v. Bernalillo County Assessor,* 472 U.S. 612 (1985); and *Attorney General of New York v. Soto-Lopez,* 476 U.S. 898 (1986).

[9] *Del Monte v. Wilson,* 1 Cal. 4th 1009, 4 Cal. Rptr. 2d 826, 824 P.2d 632 (1992).

[10] *National Federation for the Blind of Texas v. Abbott,* 647 F.3d 202, 210 (5th Cir. 2011), citing *Virginia v. Hicks,* 539 U.S. 113 (2003).

[11] Texas Government Code section 311.032(c). *See also Quick v. City of Austin,* 7 S.W. 3d 109, 115 (Texas Supreme Court 1999).

[12] The 5th Circuit is the federal appellate court that sits in New Orleans and hears appeals from district courts in Louisiana, Mississippi, and Texas.

argument was held in November 2015. As of May 7, 2016, the 5th Circuit has not yet issued its decision in this case. I predict that the 5th Circuit will affirm Judge Werlein's scholarly decision and opinion. We will keep the readers informed of developments in this important and interesting case.

The Texas Legislature meets only in odd-numbered years and will next convene in January 2017. The Legislature may consider amending the HA during the 2017 legislative session, because a precipitous drop in the price of crude oil and natural gas has adversely affected the budget of the State of Texas. Texas cannot constitutionally make the HA fiscally feasible by limiting HA educational benefits to veterans who lived in Texas at the time of enlistment.

UPDATE—June 2016

Contrary to my prediction, the 5th Circuit did not affirm the decision of the United States District Court for the Southern District of Texas. A three-judge panel of the 5th Circuit reversed the District Court decision on June 23, 2016. Please see Law Review 16056 (June 2016).