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New Attempt to Preclude Forced Arbitration in USERRA Cases

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Update on Sam Wright

1.4—USERRA enforcement
1.5—USERRA arbitration
1.8—Relationship between USERRA and other laws/policies

Senator Richard Blumenthal of Connecticut recently introduced S. 3042 (the proposed "Justice for Servicemembers Act of 2016") in the United States Senate. We hope and expect that a similar or identical bill will soon be introduced in the House of Representatives. The purpose of this bill is to preclude forced arbitration of disputes arising under the Uniformed Services Employment and Reemployment Rights Act (USERRA).[3]

Section 4302(a) of USERRA provides:

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[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 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. For six years (2009-15), I was the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA. Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. I have been dealing with the Veterans' Reemployment Rights Act (VRRA) and the Uniformed Services Employment and Reemployment Rights Act (USERRA) for 34 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the work product of an interagency task force that studied the VRRA with a view toward updating and improving it. In February 1991, President George H.W. Bush presented the Webman-Wright draft to Congress, as his proposal. On 10/13/1994, President Bill Clinton signed USERRA, Public Law 103-353, 108 Stat. 3150. That version was 85% the same as the Webman-Wright draft. I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice at Tully Rinckey PLLC (TR), and as SMLC Director. After ROA disestablished the SMLC last year, I returned to TR, this time in an "of counsel" role. To arrange for a consultation with me or another TR attorney, please call Ms. JoAnne Perniciaro (the firm's Client Relations Director) at (518) 640-3538. Please mention Captain Wright when you call.

[3] As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA and President Bill Clinton signed it into law on 10/13/1994, as a long-overdue rewrite of the VRRA, which was originally enacted in 1940. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35).

> 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.[4]

Section 4302(b) provides:

> This chapter supersedes any State law (including any local law or ordinance) *contract, agreement,* policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, *including the establishment of additional prerequisites* to the exercise of any such right or the enjoyment of any such benefit.[5]

S. 3042 would amend section 4302 by adding a new subsection (c), as follows:

> (1)Pursuant to this section and the procedural rights afforded by Subchapter III of this chapter [USERRA], any agreement to arbitrate a claim under this chapter is unenforceable, unless all parties consent to arbitration after a complaint on the specific claim has been filed in court or with the Merit Systems Protection Board[6] and all parties knowingly and voluntarily consent to have that particular claim subjected to arbitration.
> (2)For purposes of this subsection, consent shall not be considered voluntary when a person is required to agree to arbitrate an action, complaint, or claim alleging a violation of this chapter as a condition of future or continued employment or receipt of any right or benefit of employment.

Why is S. 3042 necessary?

Michael T. Garrett was a Lieutenant Colonel (now a Colonel) in the Marine Corps Reserve. On the civilian side, he worked for Circuit City Stores Incorporated (CCSI) as a manager. During his CCSI employment, he was frequently hassled by his CCSI supervisors concerning his Marine Corps Reserve training and service and the absences from his CCSI job that were necessitated by such training and service, although those absences were clearly protected by USERRA. In March 2003, just as the United States invaded Iraq, CCSI fired Garrett. Garrett alleged (with apparent justification) that the firing was motivated by Garrett's Marine Corps Reserve service and the likelihood that he would be called to active duty for the Iraq war.

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[4] 38 U.S.C. 4302(a).
[5] 38 U.S.C. 4302(b) (emphasis supplied).
[6] Under section 4324 of USERRA, 38 U.S.C. 4324, the Merit Systems Protection Board adjudicates claims that federal executive agencies (as employers) have violated USERRA.

Section 4323 of USERRA[7] provides that a person claiming that his or her USERRA rights have been violated by a private employer or a political subdivision of a state[8] can file suit against that employer in the United States District Court for any district where the employer maintains a place of business.[9] The individual claiming USERRA rights can be represented by the United States Department of Justice (DOJ), if the individual filed a formal written complaint with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), and if that agency referred the case to DOJ after completing its investigation, and if DOJ agrees that the claimant is entitled to the USERRA benefits that he or she seeks.[10] Alternatively, the person claiming USERRA benefits can be represented by private counsel that he or she has retained, if the individual chose not to complain to DOL-VETS, or if the individual complained to DOL-VETS but chose not to request referral to DOJ after completion of the DOL-VETS investigation, or if DOJ turned down the individual's request for representation.[11] If the individual is represented by private counsel and prevails, the court may award the individual reasonable attorney fees, expert witness fees, and litigation expenses.[12]

In this case, Garrett chose not to file a complaint with DOL-VETS. Instead, he retained attorney Robert E. Goodman, Jr., of Dallas, Texas, and filed suit against CCSI in the United States District Court for the Northern District of Texas. The case was assigned to Judge Barbara M.G. Lynn.

In lieu of filing an answer, CCSI filed a motion to compel arbitration, based on an "agreement" that Garrett "signed" in which he "agreed" that if he ever had a dispute with CCSI related to his employment he would submit the dispute to arbitration rather than filing suit in federal or state court. Sometime after Garrett was hired by CCSI, the company sent to each employee (including Garrett) a letter and package of materials about CCSI's recently adopted arbitration program. Each employee was given 30 days to respond if he or she desired to opt out of this arbitration mechanism. Like the vast majority of CCSI employees, Garrett did not respond to the letter. Based on this "agreement by default," CCSI asserted that Garrett was bound to submit his USERRA dispute to arbitration rather than to the federal district court. Accordingly, the company argued that the court should grant the company's motion to compel arbitration.

Garrett's attorney (Goodman) contacted me, and I contacted Reserve Officers Association (ROA) member Colonel John S. Odom, Jr., USAFR (now retired), an attorney in Shreveport, Louisiana and an expert on USERRA, the Servicemembers Civil Relief Act (SCRA), and other laws

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[7] 38 U.S.C. 4323.
[8] A political subdivision of a state is treated, for USERRA enforcement purposes, as if it were a private employer. 38 U.S.C. 4323(i). There is a different enforcement mechanism for USERRA cases against states, because of the 11th Amendment to the United States Constitution.
[9] 38 U.S.C. 4323(c)(2).
[10] 38 U.S.C. 4323(a)(1).
[11] 38 U.S.C. 4323(a)(3).
[12] 38 U.S.C. 4323(h)(2).

that are especially pertinent to those who serve our country in uniform. On behalf of ROA, Colonel Odom and I drafted and filed an *amicus curiae* (friend of the court) brief, and Colonel Odom argued orally for ROA in the district court hearing on the arbitration issue. Colonel Odom and I cited the text and legislative history[13] of USERRA and asserted that the motion to compel arbitration should be denied because section 4302(b) renders void agreements to submit future USERRA disputes to binding arbitration.

Judge Lynn agreed with our argument and denied the motion to compel arbitration. Her scholarly opinion includes the following paragraph:

> 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 serve 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).[14]

CCSI appealed to the United States Court of Appeals for the 5th Circuit,[15] and Colonel Odom and I filed a new *amicus* brief in the appellate court. The 5th Circuit reversed Judge Lynn and granted the motion to compel arbitration. The 5th Circuit decision includes the following paragraph:

> It is not evident from the statutory language [of USERRA] that Congress intended to preclude arbitration simply by granting the possibility of a federal judicial forum. As

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[13] USERRA's legislative history provides: "Section 4302(b) would reaffirm a general preemption as to State and local laws and ordinances, as well as to employer practices and agreements, which provide fewer rights or otherwise limit rights provided under amended chapter 43 or put additional conditions on those rights. *See Peel v. Florida Department of Transportation,* 600 F.2d 1070 (5th Cir. 1979); *Cronin v. Police Department of the City of New York,* 675 F. Supp. 847 (S.D.N.Y. 1987), and *Fishgold, supra,* 328 U.S. at 285, which provide that no employer practice or agreement can reduce, limit, or eliminate any right under chapter 43. *Moreover, this section would reaffirm that additional resort to mechanisms such as grievance procedures or arbitration or similar administrative appeals is not required. See McKinney v. Missouri Kansas Texas Railway Co.,* 357 U.S. 265, 270 (1958); *Beckley v. Lipe-Rollway Corp.,* 448 F. Supp. 563, 567 (N.D.N.Y. 1978). It is the Committee's [House Committee on Veterans' Affairs] that even if a person protected under the Act resorts to arbitration, any arbitration decision shall not be binding as a matter of law. *See Kidder v. Eastern Airlines, Inc.,* 469 F. Supp. 1060, 1064-65 (S.D. Fla. 1978). The Committee wishes to stress that rights under chapter 43 belong to the claimant, and he or she may waive those rights, either expressly 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 Air Lines, 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 Committee Report, April 28, 1993 (H.R. Rep. No. 103-65, part 1) (emphasis supplied). This report is reprinted in full in Appendix B-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. In the 2016 edition of that book, the quoted language can be found at pages 660-61.

[14] *Garrett v. Circuit City Stores, Inc.,* 338 F. Supp. 2d 717, 722 (N.D. Tex. 2004).

[15] The 5th Circuit is the federal appellate court that sits in New Orleans and hears appeals from district courts in Louisiana, Mississippi, and Texas. There are 11 numbered circuits plus the District of Columbia Circuit and the Federal Circuit.

> noted above, the Supreme Court has held that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral rather than a judicial forum. *Mitsubishi,* 473 U.S. at 626-27. In cases involving the Sherman Act, the Securities and Exchange Act of 1934, the civil protections of the Racketeer Influenced and Corrupt Organizations Act (RICO), and the Securities Act of 1933, the Court has held substantive rights enforceable through arbitration. With this in mind, it is significant that section 4302(b) does not mention mandatory arbitration or the FAA [Federal Arbitration Act], notwithstanding the *Gilmer* decision,[16] issued only three years before the enactment of section 4302(b). When Congress enacts laws, it is presumed to be aware of all pertinent judgments and opinions of the judicial branch. *United States v. Barlow,* 41 F.3d 935, 943 (5th Cir. 1994). Congress was on notice of *Gilmer* but did not speak to the issue in the text of section 4302(b). The text of section 4302(b) is not a clear expression of Congressional intent concerning the arbitration of servicemembers' employment disputes.[17]

The 6th Circuit[18] later followed the 5th Circuit and held that section 4302(b) of USERRA does not preclude the enforcement of agreements to submit future USERRA disputes to binding arbitration.[19] The other circuits have not addressed the specific question of whether section 4302(b) renders mandatory arbitration clauses unenforceable.

It is true that an arbitrator adjudicating a USERRA case is required to apply the text, legislative history, and case law of USERRA, just as a federal district judge would. The problem is that there is no remedy if the arbitrator misapplies or even flouts a statute like USERRA, because the FAA severely limits judicial review of arbitrators' decisions.[20]

The arbitrator has an enormous financial incentive to rule for the employer and against the employee in a USERRA case or other employment law case. For the individual employee, arbitration of an employment dispute is probably a once in a lifetime experience, but for the employer arbitration is a regular occurrence. If the arbitrator can develop a pro-employer reputation, the arbitrator will get a great deal of repeat business.

Action item

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[16] *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991).
[17] *Garrett v. Circuit City Stores, Inc.,* 449 F.3d 672, 677 (5th Cir. 2006).
[18] The 6th Circuit is the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee.
[19] *See Landis v. Pinnacle Eye Care LLC,* 537 F.3d 559 (6th Cir. 2008).
[20] Please see Law Review 1233 (March 2012).

We need legislation to overturn *Garrett* and to make clear that a person claiming USERRA rights is entitled to have legal issues decided by a federal district judge (with appeal to the circuit courts and potentially the Supreme Court) and to have factual issues determined by a jury, in accordance with the Seventh Amendment to the United States Constitution.

Reader: Please contact your United States Senators and ask them to sign on as co-sponsors of S. 3042. Please contact your United States Representative and ask him or her to introduce and/or support a similar bill in the House of Representatives.