LAW REVIEW 16074[1]
August 2016

A New Case on USERRA and Forced Arbitration

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

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

***Bodine v. Cook's Pest Control, Inc.,* 2015 U.S. Dist. LEXIS 79054 (N.D. Alabama June 18, 2015), *affirmed* 2016 U.S. App. LEXIS 13812 (11th Cir. July 29, 2016.[3]**

Substantive rights under USERRA

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA)[4] and President Bill Clinton signed it into law on October 13, 1994.[5] USERRA was a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act.[6] Like the VRRA, USERRA applies to almost all employers in

[1] Please see 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 1976 University of Houston Law School, LLM 1980 Georgetown University Law Center. 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, and for six years (2009-15) I served as 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. Although I am no longer employed by ROA, I have continued the work of the SMLC on a part-time voluntary basis. You can reach me through ROA at (800) 809-9448, extension 730, or.

[3] This is a 2015 decision by Judge R. David Proctor of the United States District Court for the Northern District of Alabama, granting the defendant employer's motion to compel arbitration of the USERRA dispute between the plaintiff (Rodney Bodine) and the defendants (Cook's Pest Control, Inc. and a supervisor, whom Bodine sued personally). With leave of court, Bodine filed an interlocutory appeal to the 11th Circuit, the federal appellate court that sits in Atlanta and hears appeals from district courts in Alabama, Florida, and Georgia. The appeal was heard by a three-judge panel consisting of Judge Charles R. Wilson and Judge Beverly B. Martin (both active judges of the 11th Circuit) and Judge Patrick E. Higginbotham, a senior-status judge of the 5th Circuit, sitting by designation. Judge Wilson wrote the majority decision and was joined by Judge Higginbotham. Judge Martin wrote a compelling and scholarly dissent.

[4] Title 38, United States Code, sections 4301 through 4335 (38 U.S.C. 4301-35).

[5] Public Law 103-353, 108 Stat. 3150. The citation means that this was the 103rd Public Law enacted during the 103rd Congress (1993-94), and you can find this Act in Volume 108 of *Statutes at Large,* starting on page 3150.

[6] Public Law 76-783, 54 Stat. 885. This is the Act that led to the drafting of more than ten million young men, including my late father, for World War II.

the United States, including the Federal Government, the states, the political subdivisions of states,[7] and private employers, regardless of size.[8] Among employers in the United States, only religious institutions,[9] Indian tribes,[10] and international organizations[11] and foreign embassies and consulates[12] are exempt from USERRA enforcement. USERRA also applies outside the United States to the United States Government, to United States corporations and institutions, and to foreign corporations and institutions that are controlled by United States corporations and institutions.[13]

Under USERRA, a person who meets five simple conditions[14] is entitled to *prompt*[15] reemployment in the civilian job that he or she *would have attained if continuously employed,* or in another position for which he or she is qualified that is of like seniority, status, and pay.[16] Upon reemployment, the individual is entitled to be treated, for seniority and pension purposes, as if he or she had been continuously employed during the period when the person was away from work for service.[17]

Under section 4311(a), it is unlawful for an employer to deny a person initial employment, reemployment, retention in employment, promotion, or a benefit of employment on the basis

---

[7] Counties, cities, school districts, and other units of local government are political subdivisions of states.

[8] You only need one employee to be an employer for the purposes of the VRRA or USERRA. *See Cole v. Swint,* 961 F.2d 58, 60 (5th Cir. 1992). USERRA's legislative history cites *Cole* with approval, showing the intent of Congress that USERRA (unlike other federal employment laws) should apply to very small employers, as well as larger employers. House Committee Report, April 28, 1993 (H.R. Rep. No. 103-65, Part 1). This report of the House Veterans' Affairs Committee is reprinted in full in Appendix B-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The reference to *Cole* can be found at page 662 of the 2016 edition of the *Manual.*

[9] Please see Law Review 1206 (January 2012).

[10] Please see Law Review 15111 (December 2015).

[11] United Nations, World Bank, International Monetary Fund, etc.

[12] Foreign embassies and consulates and international organizations have diplomatic immunity. U.S. civil and criminal laws cannot be applied to these entities.

[13] 38 U.S.C. 4319. Please see Law Review 16069 (July 2016).

[14] The person must have left a civilian job for the purpose of performing uniformed service and must have given the employer prior oral or written notice. The person's cumulative period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment, must not have exceeded five years. There are nine exemptions—kinds of service that do not count toward exhausting the person's five-year limit. Please see Law Review 16043 (May 2016) for a detailed discussion of the five-year limit. The person must have been released from the period of service without having received a disqualifying bad discharge from the military. Such bad discharges include punitive discharges by court martial—bad conduct discharge, dishonorable discharge, or dismissal. 38 U.S.C. 4304. After release from the period of service, the person must have made a timely application for reemployment. After a period of service of 181 days or more, the deadline to apply for reemployment is 90 days after the date of release. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

[15] After a short period of service, like a drill weekend or a traditional two-week annual training period, the service member is entitled to *immediate* reinstatement upon reporting back to work. After a longer period of service, the returning service member must be placed back on the payroll within two weeks after his or her application for reemployment. *See* 20 C.F.R. 1002.181. The citation is to title 20, Code of Federal Regulations, section 1002.181.

[16] 38 U.S.C. 4313(a)(2)(A).

[17] 38 U.S.C. 4316(a), 4318.

of the person's membership in a uniformed service, application to join a uniformed service, performance of service, or application or obligation to perform service.[18] Under section 4311(b), it is unlawful for an employer to discriminate in employment against or take an adverse employment action against a person because that person has taken an action to enforce USERRA, has testified or otherwise made a statement in or in connection with a USERRA proceeding, has assisted or otherwise participated in a USERRA investigation, or has exercised a USERRA right.[19]

Section 4311(c) makes it clear that the plaintiff challenging an employment action (e.g., a firing) under section 4311(a) or 4311(b) is not required to prove that the protected activity or status was *the reason* for the adverse employment action. It is sufficient to prove that the protected activity or status was *a motivating factor* in the employer's decision to take the adverse action. If the plaintiff proves motivating factor, the *burden of proof* (not just the burden of going forward with the evidence, as under Title VII of the Civil Rights Act of 1964) shifts to the employer to *prove* (not just say) that it *would have taken the same adverse action* in the absence of the protected activity or status.[20]

Procedural rights under USERRA

With respect to private employers and political subdivisions of states,[21] USERRA provides a reasonably effective enforcement mechanism, although there is room for improvement. A person claiming USERRA rights against a private employer or political subdivision can bring suit in the appropriate federal district court[22] in his or her own name and with his or her own attorney.[23] If the individual proceeds with private counsel and prevails, the court may order the employer to pay the plaintiff's attorney fees, expert witness fees, and other litigation expenses.[24]

---

[18] 38 U.S.C. 4311(a).
[19] 38 U.S.C 4311(b).
[20] 38 U.S.C. 4311(c).
[21] A political subdivision of a state is treated as a private employer, for purposes of USERRA enforcement. 38 U.S.C. 4323(i). Political subdivisions include counties, cities, school districts, and other units of local government. Enforcement of USERRA against the states themselves is more difficult, because of the 11th Amendment of the United States Constitution. Please see Law Review 16034 (April 2016). Section 4324 of USERRA, 38 U.S.C. 4324, provides the enforcement mechanism for USERRA claims against federal agencies, as employers. That mechanism is less satisfactory than the mechanism that applies to private employers.
[22] The appropriate district is any district where the private employer maintains a place of business or where the political subdivision exercises any authority or carries out any function. 38 U.S.C. 4323(c).
[23] 38 U.S.C. 4323(b)(3). It is also possible for the individual to represent himself or herself in such an action, but I certainly do not recommend that course of action. Abraham Lincoln said, "A man who represents himself has a fool for a client." And the law today is so much more complicated than it was during Lincoln's lifetime.
[24] 38 U.S.C. 4323(h)(2).

USERRA provides: "No fees or court costs may be charged or taxed against any person claiming rights under this chapter."[25] This means that the USERRA is not required to pay the filing fee that a plaintiff in a federal civil proceeding otherwise must pay.[26] It also means that the losing USERRA plaintiff does not have to pay the prevailing defendant's court costs.[27] And this provision means that the USERRA plaintiff cannot be required to pay the defendant's attorney fees, even in situations where a plaintiff is otherwise required to pay attorney fees under the Federal Rules of Civil Procedure.[28]

USERRA does not have a statute of limitations, and it specifically precludes the application of any other statute of limitations:

> 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 alleging a violation of this chapter, *there shall be no limit on the period for filing the complaint or claim.*[29]

USERRA is a floor and not a ceiling.

USERRA is a floor and not a ceiling on the rights of the service member or veteran with respect to his or her civilian employer or prospective employer. Section 4302(a) provides:

> Nothing in this chapter 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.[30]

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 receipt of any such benefit.[31]

USERRA and forced arbitration—*Garrett v. Circuit City*

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

[25] 38 U.S.C. 4323(h)(1).
[26] Please see Law Review 1231 (March 2012).
[27] Please see Law Review 15015 (February 2015).
[28] Please see Law Review 1082 (May 2010). This article is by Thomas G. Jarrard, Esq.
[29] 38 U.S.C. 4327(b) (emphasis supplied).
[30] 38 U.S.C. 4302(a) (emphasis supplied).
[31] 38 U.S.C. 4302(b) (emphasis supplied).

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.

Section 4323 of USERRA[32] 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[33] can file suit against that employer in the United States District Court for any district where the employer maintains a place of business.[34] 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.[35] 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.[36] 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.[37]

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

[32] 38 U.S.C. 4323.
[33] 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.
[34] 38 U.S.C. 4323(c)(2).
[35] 38 U.S.C. 4323(a)(1).
[36] 38 U.S.C. 4323(a)(3).
[37] 38 U.S.C. 4323(h)(2).

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 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[38] 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).[39]

---

[38] 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.

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

CCSI appealed to the United States Court of Appeals for the 5th Circuit,[40] 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 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,[41] 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.[42]

The 6th Circuit[43] 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.[44] 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.[45]

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,

---

[40] 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.

[41] *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991).

[42] *Garrett v. Circuit City Stores, Inc.,* 449 F.3d 672, 677 (5th Cir. 2006).

[43] The 6th Circuit is the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee.

[44] *See Landis v. Pinnacle Eye Care LLC,* 537 F.3d 559 (6th Cir. 2008).

[45] Please see Law Review 1233 (March 2012).

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.

USERRA and the Federal Arbitration Act

On February 12, 1925, Congress enacted the Federal Arbitration Act (FAA).[46] This was 15 years before Congress enacted the VRRA in 1940 and 69 years before Congress enacted USERRA in 1994. To the extent that there is an irreconcilable difference between the FAA (enacted in 1925) and USERRA (enacted 69 years later), USERRA must be deemed to have partially repealed the FAA, as applied to USERRA claims, but the law does not favor repeal by implication. When there is an apparent conflict between two federal statutes enacted at different times, courts go a long way to *harmonize* the two laws—that is, to interpret each statute in such a way as to avoid finding that the later-enacted law partially repealed the earlier law. I believe that the 5th Circuit (in *Garrett)* and the 6th Circuit (in *Landis)* have gone too far in limiting the reach of section 4302(b) (USERRA's non-waiver provision) in order to harmonize USERRA with the FAA.

In its first case construing the VRRA, the Supreme Court held that this law is to be "liberally construed for the benefit of he who has laid aside his civilian pursuits to serve his country in its hour of great need."[47] USERRA's legislative history makes clear that Congress intended that this "liberal construction" canon would apply under the new law as well:

> The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protection against employment-related discrimination, and the protection of certain other rights and benefits have been eminently successful for over 50 years. Therefore, the Committee [House Committee on Veterans' Affairs] wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act, remains in full force and effect in interpreting these provisions. *This is particularly true of the basic principle established by the Supreme Court that the Act is to be "liberally construed." See Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946); *Alabama Power Co. v. Davis,* 431 U.S. 581, 584 (1977).[48]

In order to harmonize USERRA (especially section 4302) with the FAA, the 5th Circuit and 6th Circuit have made a distinction between *substantive* rights, which cannot be waived, and *procedural* rights, which can be waived. This distinction is illogical and unsupported by the text and legislative history of USERRA. I contend that procedural rights are just as important as

---

[46] Public Law 68-401, 43 Stat. 883. The FAA is codified at 9 U.S.C. 1-16.

[47] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946).

[48] House Committee Report, April 28, 1993 (H.R. Rep. No. 103-65, Part 1) (emphasis supplied). You can find this committee report reprinted in its entirety in Appendix B-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found on page 659 of the 2016 edition of the *Manual.*

substantive rights. Without effective procedures to enforce USERRA, the substantive rights are of little value.

I think that arbitration is a perfectly acceptable way to resolve commercial disputes between or among sophisticated actors.[49] Unfortunately, 15 years ago, and seven years after Congress enacted USERRA in 1994, the Supreme Court held that an arbitration clause in an individual's employment contract was enforceable under the FAA.[50]

Bodine v. Cook's Pest Control, Inc.

Rodney Bodine is a member of the Army Reserve. On the civilian side, he worked for Cook's Pest Control from 2012 (when he was hired) until 2014 (when he was fired). As required by the Army Reserve, he was away from his civilian job for drill weekends and annual training, and all of these periods of absence from work were protected by USERRA. His supervisor, Max Fant, repeatedly discriminated against him on the basis of his military service by making negative comments about his military obligations, encouraging him to leave the Army Reserve, taking work away from him while he was at drills or annual training, and eventually firing him in retaliation for his continued military service.

After he was fired, Bodine retained private counsel and sued Cook's and also sued Fant personally.[51] He claimed that the defendants violated section 4311(a) of USERRA by harassing him and ultimately by firing him, based on his military obligations. He also brought claims under Alabama state law.[52]

Instead of filing an answer, the defendants filed a motion to compel arbitration, just as Circuit City did in the *Garrett case.* The defendants relied upon an employment agreement that Bodine was required to sign when hired. The agreement required that Bodine agree in advance to binding arbitration of any dispute that he might at some point have with the employer, related to his employment.

The employment contract contained two provisions, relating to enforcement and arbitration, that clearly violated USERRA. One provision required the employee to agree to pay part of the

---

[49] An example of such a dispute would be a dispute about the terms of a contract between General Motors (GM) and Goodyear, whereby Goodyear sold one million tires to GM.

[50] *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105 (2001).

[51] USERRA's definition of "employer" includes "a *person,* institution, organization, or other entity to whom the employer has delegated employment-related responsibilities." 38 U.S.C. 4303(4)(A)(i) (emphasis supplied). Please see Law Review 15063 (July 2015) concerning potential personal liability of supervisors who violate USERRA, on behalf of employers.

[52] When you sued a person or corporation in federal court, under a federal statute like USERRA, you can bring closely related state law claims in the same lawsuit, under the supplemental jurisdiction of the federal court. 28 U.S.C. 1367(a). Please see Law Review 15073 (August 2015).

cost of the arbitration of a claim that he or she might submit, and that he or she pay that money up front when filing the claim. This provision clearly violated section 4323(h)(1) of USERRA,[53] which provides that the USERRA plaintiff is not required to pay a filing fee when filing a case and that he or she may not be required to pay any court costs or fees, even if he or she loses.

Another provision of the employment contract provided that there would be a six-month statute of limitations on filing any employment-related claim. This provision clearly violated section 4327(b) of USERRA,[54] which provides that there shall be no time limit for filing a USERRA claim.

The defendants conceded that these two clauses were unlawful. They asked the district judge to "blue pencil" out these two provisions and to enforcement the arbitration agreement as amended, and the district judge did exactly that. Bodine appealed to the 11th Circuit, and the two-judge majority (Judge Wilson and Judge Higginbotham) affirmed. Judge Martin filed an eloquent and scholarly dissent, in which she wrote:

> The Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") carries on a long tradition, reflected in our laws, of protecting the rights of "those who left private life to serve their country in its hour of great need." Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285, 66 S. Ct. 1105, 1111, 90 L. Ed. 1230 (1946). I read the majority's analysis to impede that tradition, and in my view, it does so based on two mistakes. First, the majority interprets 38 U.S.C. § 4302(b) in a way that is not consistent with the statute's plain text. Second, the majority gives the defendants more than they asked for—a second chance to apply contract terms that admittedly violate USERRA. In both ways, the majority weakens the rights of veterans based on a statute intended to give them strength. I respectfully dissent.
>
> I.
>
> The majority interprets § 4302(b) as invalidating only the pieces of an agreement that violate USERRA, rather than the whole agreement. After briefly consulting the statutory text, the majority discusses policy goals to arrive at what it calls "the most reasonable reading" of § 4302(b). But where the text of the statute is not ambiguous, we have no call to substitute [22] what we think might be a more reasonable reading of a statute—rather, "we must apply the statute according to its terms." Carcieri v. Salazar, 555 U.S. 379, 387, 129 S. Ct. 1058, 1063-64, 172 L. Ed. 2d 791 (2009). The majority did not do that here.
>
> A. The Statutory Text
>
> "[O]ur inquiry begins with the statutory text, and ends there as well if the text is unambiguous." BedRoc Ltd., LLC v. United States, 541 U.S. 176, 183, 124 S. Ct. 1587, 1593, 158 L. Ed. 2d 338 (2004) (plurality). Section 4302(b) reads as follows:

[53] 38 U.S.C. 4323(h)(1).
[54] 38 U.S.C. 4327(b).

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 receipt of any such benefit.

38 U.S.C. § 4302(b) (emphasis added). By its plain language, the statute supersedes "any . . . contract [or] agreement," not merely the illegal pieces of a contract or agreement, as the majority says. Id. (emphasis added). Nowhere does the statute include the limitation found by the majority. Everything listed in § 4302(b) ("law . . . , contract, agreement, policy, plan, practice, or other matter") is a whole, not a piece of a larger whole (for example, "contract provision" or "term of agreement").1 We must assume that Congress says in a statute what it means [23] and means in a statute what it says. BedRoc Ltd., LLC, 541 U.S. at 183, 124 S. Ct. at 1593.

We know that Congress can target pieces of a contract in a non-waiver statute, when that is what it intends. Twenty years before USERRA was enacted, Congress included a non-waiver provision that targeted pieces of a contract in the National Mobile Home Construction and Safety Standards Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (codified as amended at 42 U.S.C. § 5401 et seq. (2012)). There, Congress limited the effect of the statute's non-waiver provision to "any provision of a contract or agreement" that purported to limit the rights of mobile home purchasers under the Act. 42 U.S.C. § 5421 (emphasis added). Despite knowing how to limit the scope of a non-waiver provision, Congress chose not to in USERRA, and we should understand that choice as deliberate. See Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. , , 133 S. Ct. 2517, 2529, 186 L. Ed. 2d 503 (2013). Congress plainly said the statute supersedes "contract[s]" and "agreement[s]" that reduce USERRA rights.2

I read the text of § 4302(b) to be unambiguous, so our inquiry should end there. The majority, on the other hand, appears to view § 4302(b) as ambiguous based on different dictionary definitions of the word "supersede."3 Specifically, the majority reasons that because "supersede" is defined as "replacing one thing with another," § 4302(b) cannot mean what it says without "leav[ing] critical gaps in the employer-employee relationship." Instead, the majority reasons that Congress must have intended for § 4302(b) to preempt only the pieces of a contract or agreement that violate USERRA. But the Supreme Court has cautioned that we should "decline to manufacture ambiguity where none exists." United States v. Culbert, 435 U.S. 371, 379, 98 S. Ct. 1112, 1116, 55 L. Ed. 2d 349 (1978). Section 4302(b)'s use of the word "supersede" does not render the statute [25] ambiguous so as to allow for speculation about Congress's desired (but not expressed) intent.

I am not persuaded by the majority's explanation about why "supersede" cannot be read to mean the entire illegal contract or agreement is replaced with USERRA provisions. The majority mentions "critical gaps" this reading would leave in the employment relationship, but it does not specify what those gaps are or how they would harm veterans' USERRA rights.4 Something as fundamental as pay can serve as an example.

Even if an illegal employment contract contained pay terms that were superseded along with the rest of the contract under my reading of § 4302(b), there [26] are other ways to ascertain what pay the veteran is entitled to. See, e.g., 20 C.F.R. § 1002.193(a) (noting that sources of pay information under USERRA "include agreements, policies, and practices in effect at the beginning of the employee's service"); id. § 1002.236(a) (noting that predicted pay raises under USERRA may be ascertained from the "employee's own work history . . . and the work and pay history of employees in the same or similar position"). With this in mind, I am not able to see what "critical gaps" would impair a veteran's rights under a plain-language reading of § 4302(b).

My reading of § 4302(b) is supported by a neighboring provision, 38 U.S.C. § 4302(a), which saves any "more beneficial" rights provided to a veteran in a contract [27] from being superseded by USERRA. Section 4302(a) is a savings clause that stops USERRA from throwing out contract rights more beneficial to veterans while invalidating the rest of the illegal contract. The majority cites this savings clause to support its interpretation of § 4302(b), but it actually undermines the majority's position. That's because the majority's interpretation of § 4302(b) renders the savings clause superfluous. Specifically, if the majority is right that § 4302(b) does away with only the illegal pieces of a contract, then there will never be any "more beneficial" contractual rights for § 4302(a) to step in and save. A piece of a contract that is illegal under USERRA cannot be "more beneficial" than USERRA. Thus, the majority's interpretation of § 4302(b) leaves no role for its companion clause, § 4302(a). Courts must be "hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 837, 108 S. Ct. 2182, 2189, 100 L. Ed. 2d 836 (1988).

On the other hand, a plain-language reading of § 4302(b) does leave a role for its companion clause. When an entire contract is superseded under § 4302(b), the savings clause steps in to preserve any "more beneficial" rights granted to the veteran by the contract. This calibrates the scope of § 4302(b) to maximize veterans' [28] rights under USERRA. Thus, reading § 4302(b) to supersede entire contracts and agreements not only adheres to the unambiguous text, but it also ensures that § 4302(a) continues to work together with § 4302(b). The majority's interpretation does not.

B. History and Purpose

Though we need not look beyond the unambiguous text of § 4302(b), a review of USERRA's legislative history and purpose reinforces the plain-language reading. A House report for USERRA stated: "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 [USERRA]." H.R. Rep. No. 103-65, at 20 (1993) (emphasis added). Section 4302(b)'s preemptive effect was thus described as "general" and understood to apply to entire "agreements" with employers, not just certain pieces of those agreements. And the House stressed that "the extensive body of case law" related to the veterans' rights statutes preceding USERRA would "remain in full force and effect." Id. at 19. This includes

Fishgold's command that every provision of a veterans' rights statute be given "as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate [29] provisions permits." 328 U.S. at 285, 66 S. Ct. at 1111. The majority's narrow, extra-textual reading of § 4302(b) is anything but a liberal construction of USERRA.

It seems to me that USERRA's purpose of vigorously protecting veterans' rights is better served by superseding more than just the illegal terms (though not any "more beneficial" terms), because doing so deters employer overreaching. Under the majority's interpretation of § 4302(b), employers will have nothing to lose by including illegal terms in their contracts—even if a legally learned veteran does recognize the illegal terms as such (hardly a foregone conclusion), the worst that can happen to the employer is delicate removal of only the illegal terms.5 Here, for example, the defendants will still get to arbitrate Mr. Bodine's case even though they drafted an arbitration agreement that infringed on his USERRA rights. The employer suffers no penalty for its bad drafting. The majority's interpretation means that even when employers don't get the unfair benefit of their illegal terms because employees like Mr. Bodine recognize the terms' illegality, USERRA will do nothing to dissuade employers from continuing to use those illegal terms in the future. This result surely does [30] not "provide the greatest benefit to our servicemen and women," as the majority says.

II.

The majority erodes veterans' rights still further by giving the defendants more than they asked for. The defendants acknowledge that certain provisions of the arbitration agreement violate USERRA. Even so, the majority opinion gives them an unrequested second chance to apply these admitted illegal contract terms. Specifically, I refer to two illegal terms in the defendants' arbitration agreement, which the majority calls the "fee term" and the "statute of limitations term." This fee term states that Mr. Bodine must pay up to $150 in arbitration costs, any fees and costs the arbitrator apportions to him, as well as the costs associated with mandatory mediation. This fee term directly violates USERRA. See 38 U.S.C. § 4323(h)(1) ("No fees or court costs may be charged or taxed against any person claiming rights under [USERRA]."). The statute of limitations term sets a six-month limitations period for any claim related to Mr. Bodine's employment contract. The statute of limitations term also directly violates USERRA. See 38 U.S.C. § 4327(b) ("Inapplicability [31] of statutes of limitations—If any person seeks to file a complaint or claim . . . alleging a violation of [USERRA], there shall be no limit on the period for filing the complaint or claim.").

Throughout this case, the defendants have not disputed that these contract terms violate USERRA, and as such they have tried to nullify the terms' effect. The defendants told the District Court:

[B]ecause [we] will voluntarily waive the [statute of limitations] defense . . . , the provision purporting to limit the statute of limitations in the arbitration agreement, as applied, is of no force or effect, and places no substantive limitation on the Plaintiff's

USERRA rights. . . . [We also] agree to bear any and all costs associated with any arbitration, mediation, or negotiation of this matter. . . . Therefore, because the Plaintiff is not required to bear any unreasonable fees to arbitrate this matter, there are no substantive restrictions on the Plaintiff's USERRA rights.

The District Court accepted the defendants' concession that these terms are illegal, as well as the defendants' willingness to nullify their effect. The court severed the illegal terms on that basis. In arguing before this Court, the defendants [32] asked us to affirm the District Court because it was "authorized to blue-pencil this agreement in a way [so] that it does not . . . diminish any rights under USERRA." So the defendants still don't dispute that the fee and statute of limitations terms in the arbitration agreement violate USERRA. Indeed the defendants were wise not to dispute this, because these contract terms do clearly violate the statute.

The majority opinion nonetheless reverses the District Court on this ground and gives the defendants another "opportunity to present their arguments regarding the validity of the terms" before an arbitrator. I say the terms' illegality under USERRA was not disputed before, and cannot seriously be disputed now.6 Yet the majority opinion reaches out and takes away not just the federal courts' ability to supersede illegal "contract[s]" or "agreement[s]" (as the statute says), but the courts' ability to supersede even the clearly illegal pieces of those contracts. This is a bridge too far. Under the majority's decision today, an employer can insert a boilerplate arbitration agreement into its employment contract—no matter whether that agreement is legal—and federal courts will be essentially divested of authority [33] to enforce USERRA.7 Surely Congress did not intend for federal courts to be so easily and completely deprived of authority to enforce USERRA when an agreement contains blatantly illegal terms. Veterans' rights statutes preceding USERRA stretch back to World War II and "provide[] the mechanism for manning the Armed Forces of the United States." Ala. Power Co. v. Davis, 431 U.S. 581, 583, 97 S. Ct. 2002, 2004, 52 L. Ed. 2d 595 (1977); see also Coffman v. Chugach Support Servs., Inc., 411 F.3d 1231, 1235 (11th Cir. 2005) (noting that USERRA and its predecessor statutes were intended to "bolster the morale of those serving their country" (quotation omitted)). Veterans' rights statutes thus occupy a domain of special national importance, and our courts should not lightly be stripped of the power to enforce them. Under the majority's decision, the worst to happen to overreaching employers will be a delicate removal of just their illegal terms. Veterans, on the other hand, may lose their USERRA rights without redress. Take, for example, a fee term like the one here. A veteran might be forced to pay mandatory mediation and arbitration fees before she can prove (and if she can prove) to an arbitrator that USERRA has been violated.8 In decision to undo the District Court's severance of the clearly illegal terms walks back veterans' rights rather than protecting them.

* * *

This is an important case about a relatively novel issue. How we resolve it affects not only veterans' rights, but how employers regard those rights. I read the majority's interpretation of § 4302(b) to contradict the plain text of the statute in a way that fails to

> preserve § 4302(a)'s saving effect and could also foster employer overreaching. I worry also that the majority opinion will strip federal courts of not just the power to supersede "contract[s]" or "agreement[s]," but also the power to supersede pieces of contracts acknowledged to be illegal. USERRA is meant to give special protections to our veterans, and the majority opinion dilutes those protections. I respectfully dissent.

This case is not necessarily over.

Bodine's likely next step is to petition the 11th Circuit for rehearing en banc. If granted, that will mean that there will be new briefs and a new oral argument before all of the active (not senior status) judges of the 11th Circuit. The fact that there is a vigorous dissent to the panel decision means that there is a greater chance that the motion for rehearing en banc could be granted.

If Bodine chooses not to request rehearing en banc, or if his motion for rehearing en banc is denied, or if his motion for rehearing en banc is granted and the entire 11th Circuit affirms the 2-1 panel decision, Bodine's final step is to petition the Supreme Court for *certiorari* (discretionary review). At least four of the nine (currently eight) justices must vote for *certiorari,* or it is denied. The denial of *certiorari* means that the decision of the Court of Appeals is final.

Certiorari is granted in only about one percent of the cases in which it is requested. Getting the Supreme Court to hear a case is always a long shot, but I am optimistic that this case just might get the Court's attention. As Judge Martin wrote, "This is an important case about a relatively novel issue."

We will keep the readers informed of further developments in this case, if any.