

LAW REVIEW¹ 16102
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ROA Files an Amicus Curiae Brief in the Federal Circuit

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

1.8—Relationship between USERRA and other laws/policies

8.0—Veterans' preference

Parkinson v. Department of Justice, 815 F.3d 757 (Fed. Cir. 2016), vacated and rehearing en banc granted 2016 U.S. App. LEXIS 14534 (Fed. Cir. Aug. 8, 2016).

On October 3, 2016, attorneys Thomas Jarrard³ and Peter Romer-Friedman⁴ filed an amicus curiae (friend of the court) brief in the United States Court of Appeals for the Federal Circuit⁵ on behalf of

¹I invite the reader's attention to <https://www.roa.org/page/LawCenter>. You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

²BA 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 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 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 proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). 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 (DOD) 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, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

³Thomas Jarrard is an attorney in Spokane, Washington with a nationwide practice representing service members and veterans with claims under USERRA and other laws. He is a recently retired warrant officer in the Marine Corps Reserve and a life member of ROA. He assisted me in drafting and filing ROA's amicus curiae brief in the United States Supreme Court in the case of *Staub v. Proctor Hospital*, 562 U.S. 411 (2011). He is the author of Law Review 1082, Law Review 1129, and Law Review 14102 (with Rosario Vega Lynn, Esq.).

⁴Peter Romer-Friedman is an attorney in Washington, DC with considerable experience concerning USERRA and other laws that are relevant to service members, first as a staffer in the United States Senate and later as an attorney in private practice. He has been most helpful to ROA in several important matters.

⁵The Federal Circuit is the federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from the Merit Systems Protection Board (MSPB).

the Reserve Officers Association (ROA), the Veterans of Foreign Wars, the Military Order of the Purple Heart, the Military Officers Association of America, and The Retired Enlisted Association. You can find a link to their excellent brief at the end of this article.

Lieutenant Colonel John C. Parkinson⁶ was a Special Agent of the Federal Bureau of Investigation (FBI) and was assigned to the FBI Field Office in Sacramento, California. He was the group leader of the Special Operations Group in Sacramento. In 2006, the FBI leased a facility from James Rodda. Parkinson negotiated the lease on behalf of the FBI. As group leader, he was responsible for managing certain tenant improvement funds related to the build-out of the facility leased from Mr. Rodda.

In February 2008, while the build-out was under way, Parkinson met with Special Agent in Charge (SAIC) Gregory Cox and made whistleblower-eligible disclosures about alleged misconduct by other FBI employees. In August 2008, Cox and Special Agent Lucero (Parkinson's immediate superior) gave Parkinson a low performance rating, removed him as the group leader, and reassigned him to another FBI field office.

Parkinson alleged that these unfavorable personnel actions were a reprisal against him for having made whistleblower disclosures, and Parkinson alleged reprisal in a letter that he sent to Senator Charles Grassley of Iowa. Senator Grassley referred Parkinson's letter to the Office of the Inspector General (OIG) of the Department of Justice (DOJ), and OIG opened a whistleblower reprisal investigation.

In October 2008, Robert Klimt replaced Parkinson as the group leader of the Special Operations Group. Klimt complained about the status of the build-out and the management of tenant improvement funds during the time that Parkinson was the group leader. In August 2009, SAIC Cox and the Sacramento field office sent a referral to OIG, alleging misuse of tenant improvement funds by Parkinson while he was the group leader. OIG conducted an investigation of the allegations against Parkinson while simultaneously conducting an investigation of Parkinson's allegation that he was reprimed against because of his whistleblower disclosures.

OIG reported its factual findings to DOJ's Office of Professional Responsibility (OPR), and OPR proposed that Parkinson be removed from his federal employment as a Special Agent of the FBI. Parkinson was removed, in accordance with the OPR proposal.

The Merit Systems Protection Board (MSPB) is a quasi-judicial federal executive agency that was created by the Civil Service Reform Act of 1978. The MSPB has three Members, each of whom is appointed by the President with Senate confirmation. Most but by no means all federal employees have the right to appeal to the MSPB when they are fired or suspended without pay for 15 days or more.⁷ FBI employees (including Special Agents) are not permitted to appeal such dismissals and

⁶The Federal Circuit panel decision referred to Parkinson in this way but did not identify his service or his current military status.

⁷MSPB appeals are heard initially by Administrative Judges (AJs) of the MSPB. AJs conduct hearings all over the country and make findings of fact and conclusions of law. The losing party (either the appellant or the federal agency) can appeal to the MSPB itself, in our nation's capital.

suspensions to the MSPB *unless* they are preference-eligible veterans.⁸ Parkinson is a preference-eligible veteran, based on having served on active duty during one of the designated wartime periods.

Parkinson appealed his dismissal to the MSPB, and the Board (by a 2-1 vote) upheld the firing. A federal employee appellant (but not a federal agency) can appeal from the MSPB to the Federal Circuit, and Parkinson did so. Cases in the federal appellate courts, including the Federal Circuit, are initially heard by a panel of three appellate judges. Parkinson's appeal was heard by a panel of three Federal Circuit judges. By a 2-1 vote, the Federal Circuit panel reversed the MSPB, holding that the MSPB had erred because there was not enough evidence (in the panel majority's view) to support the charges that Parkinson had obstructed the OIG investigation or that he had been less than candid in his testimony to OIG and also holding that the MSPB had erred when it refused to permit Parkinson to offer evidence of whistleblower reprisal against him (for his protected communications) as an affirmative defense to the misconduct charges made against Parkinson.

For a party that has lost at the panel level in a federal appellate court, the usual next step is to ask the court to grant rehearing en banc, and DOJ did so. On August 8, 2016, the Federal Circuit granted rehearing en banc, vacated the 2-1 panel decision, and ordered the parties (Parkinson and DOJ) to submit briefing on a purely legal question:

Whether a preference-eligible employee of the FBI challenging an adverse employment action under 5 U.S.C. 7513(d) may raise whistleblower reprisal in violation of 5 U.S.C. 2303 as an affirmative defense under 5 U.S.C. 7701(c)(2)(C).

The Federal Circuit also invited amici (friends of the court) to file amicus curiae briefs on this same legal question. Responding to the court's invitation, attorneys Thomas Jarrard and Peter Romer-Friedman filed the attached brief on behalf of ROA and the other named military associations.

We will keep the readers informed of developments in this interesting and important case.

Following is the Brief of Amici Curiae:

<https://www.outtengolden.com/sites/default/files/misc/ filed-amici-curiae-brief-in-parkinson-v-dept-of-justice.pdf>

Update – May 2022

Upon convening en banc, the Court of Appeals concluded that 5 U.S.C § 2303 requires all FBI employees to bring claims of whistleblower reprisal to the Attorney General.⁹ The Court therefore found that the Board did not err in concluding that it lacked jurisdiction to hear FBI employees' claims of whistleblower reprisal under 5 U.S.C. § 7701(c)(2).¹⁰ The court vacated the portion of the

⁸For more details see Law Review 0721 (May 2007).

⁹Parkinson v. Dep't of Justice, 874 F.3d 710, 712 (Fed. Cir. 2017).

¹⁰*Id.* at 718.

panel opinion finding that FBI employees may raise whistleblower reprisal as an affirmative defense before the Board, and reinstated the panel opinion as to all other issues.¹¹

Parkinson petitioned for a writ of certiorari to the United States Court of Appeals for the Federal Circuit.¹² It was denied on June 18, 2018.¹³

¹¹*Id.*

¹²Parkinson v. Dep’t of Justice, 2138 S.Ct. 2650 (2018) (mem.).

¹³*Id.*