LAW REVIEW 16110[1]
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(Updated June 2017)

Ninth Circuit Holds that USERRA Does Not Preclude Forced Arbitration

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

Update on Sam Wright

1.1.2.5—USERRA applies to executive employees
1.3.2.1—Prompt reinstatement after service
1.3.2.2—Continuous accumulation of seniority-escalator principle
1.4—USERRA enforcement
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Ziober v. BLB Resources, Inc., 2016 U.S. App. LEXIS 18516 (9th Cir. October 14, 2016).[3]

Employers must obey USERRA!

Kevin Ziober is a junior officer in the Navy Reserve. He worked as the Operations Director[4] for BLB

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[1] I invite the reader's attention to http://www.roa.org/lawcenter You will find more than 1500 "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), and other 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. I have dealt with USERRA and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) 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 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 at Tully Rinckey PLLC (TR), 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 (May 2015), concerning the accomplishments of the SMLC. 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] This is a decision of a three-judge panel of the United States Court of Appeals for the Ninth Circuit, the federal appellate court that sits in San Francisco and hears appeals from district courts in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington. As is always the case in our federal appellate courts, the case was heard and decided by a panel of three judges, usually but not always Circuit Judges of that circuit. In this case, the panel consisted of Circuit Judges Mary H. Murguia and Paul J. Watford and District Judge Susan R. Bolton (sitting by designation). Judge Murguia wrote the majority decision and was joined by Judge Bolton, affirming the District Court's order compelling arbitration of this case. Judge Watford concurred in the result but wrote a separate opinion.

[4] The fact that Ziober held an executive position with BLB in no way defeats his right to reemployment under USERRA, because this federal statute applies to all employees of the employer, from the president of the company to the janitor. Please see Law Review 0704 (January 2007).

Resources, Inc., a California real estate marketing and management firm. When he learned that the Navy was recalling him to active duty for service in Afghanistan, he immediately informed BLB. On his last day at work before reporting to active duty, his colleagues honored him with a party, but the company informed him that he would not have a job when he returned from his call to the colors.

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) in 1994, as 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 (STSA).[5] For more than ¾ of a century, federal law has required employers to reemploy those who leave civilian jobs for voluntary or involuntary military service, and this law is part of the fabric of our society. But many employers and supervisors (federal, state, local, and private sector) claim not to be aware of this law, or they think that they can get away with flouting it.

In its first case construing the VRRA, the Supreme Court held that this law is to be liberally construed for the veteran or service member:

> This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. *See Boone v. Lightner,* 319 U.S. 561, 575. And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits that Congress has secured the veteran under the Act.[6]

The *Fishgold* decision was written by Justice William O. Douglas. Douglas' eloquent words about the members of my father's generation[7] who were called to the colors to defeat Nazi Germany, Fascist Italy, and Imperial Japan apply equally to the Millennials, Generation Xers, and Baby Boomers who have served our country in uniform since September 11, 2001, the "date which will live in infamy" for our time.

Nearly one million National Guard and Reserve personnel have been called to the colors since September 11. More than 1200 of those recalled Guard and Reserve personnel have died fighting overseas. The entire United States military establishment, Active Component as well as Reserve Component, amounts to only ¾ of one percent of our country's population. It is largely through the sacrifices of that tiny cohort that our country has been spared a repetition of the events of that terrible Tuesday morning 15 years ago.

It is not a cliché to say that "freedom is not free." The cost may include the ultimate sacrifice and is made by those men and women who volunteer to serve our country in uniform. Yes, USERRA is sometimes inconvenient to civilian employers and to the civilian co-workers of National Guard and

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[5] Public Law 78-783, 54 Stat. 885 (1940). The STSA is the law that led to the drafting of more than ten million young men, including my late father, for World War II.

[6] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946). I discuss *Fishgold* and its implications in detail in Law Review 0803 (January 2008).

[7] My father's generation was called "The Greatest Generation" in Tom Brokaw's famous verbal formulation.

Reserve personnel, but those costs do not compare to what our men and women in uniform volunteer to undertake to do.

The lion's share of the cost of freedom is paid by those who serve in uniform. The other 99.25% of the population pay none of the cost, beyond the payment of taxes.

We need to teach this lesson to the nation's employers and supervisors (federal, state, local, and private sector). Let us start with BLB Resources, Inc. of California.

Ziober was entitled to reemployment at BLB.

As I have explained in Law Review 15116 (December 2015) and other articles, an individual will have the right to reemployment after a period of uniformed service if he or she meets five simple conditions:

a. Must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary uniformed service.
b. Must have given the employer prior oral or written notice.
c. Must not have 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 person seeks reemployment.
d. Must have served honorably, and must have been released from the period of service without having received a disqualifying bad discharge from the military.
e. Must have made a timely application for reemployment after release from the period of service.[8]

On Ziober's last day at work before his departure to report for active duty, when a BLB official told him that he would have no job upon his return from service, he already met the first two conditions, and it was overwhelmingly likely that he would meet the other three conditions upon his return.

Clearly, he was leaving the job to perform uniformed service, and he had given BLB notice. He was in no danger of exceeding the five-year limit, and since he was being called to active duty involuntarily his upcoming period of service did not count toward exhausting his five-year limit with respect to his employer relationship with BLB.[9] There was no reason to expect that he would not serve honorably, and indeed he did serve honorably, and he did not receive a disqualifying bad discharge from the Navy. After release from the period of service, he applied for reemployment at BLB almost immediately, well within the 90-day deadline.

Because he met the five USERRA conditions when he was released from active duty in 2014, he

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[8] 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 lf service.

[9] 38 U.S.C. 4312(c)(4)(A). Please see Law Review 16043 (May 2016) for a detailed discussion of the five-year limit.

was entitled to prompt reinstatement[10] in the position of employment that he would have attained if he had been continuously employed by BLB or in another position (for which he was qualified) that was of like seniority, status, and pay.[11] Ziober was entitled to prompt reemployment in an appropriate position even if so reemploying him necessitated displacing another BLB employee.[12]

When BLB told Ziober, on his way out the door to report to active duty, that there would be no job for him at BLB upon his return, the company added to his stress at what was already a stressful time.[13] The whole point of USERRA, as well as the Servicemembers Civil Relief Act, is to remove civilian concerns from the service member's mind, to the maximum extent possible, so that the service member can devote his or her full attention to military duties while deployed.

This is a safety issue, for the individual service member and for his or her colleagues. If I am in the foxhole next to Ziober, I should not have to worry that he is not paying full attention to his segment of the perimeter because he cannot set aside his worry about losing his job at BLB Resources in California.

Service members like Ziober should not be forced[14] to arbitrate their USERRA claims.

In April 2014, after Ziober returned from active duty in Afghanistan and after BLB unlawfully denied his application for reemployment, he sued the company in the United States District Court for the Central District of California. BLB filed a motion to compel arbitration, and the District Court granted the motion. This appeal followed.

Like all BLB employees, Ziober signed a bilateral arbitration agreement that includes the following paragraph:

> To the fullest extent allowed by law, any controversy, claim or dispute between Employee and the Company … relating to or arising out of Employee's employment or the cessation of that employment will be submitted to final and binding arbitration before a neutral arbitrator … for determination in accordance with the American Arbitration Association's ("AAA") Employment Arbitration Rules and Mediation Procedures (excluding mediation),

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[10] BLB should have reinstated Ziober within two weeks after he applied for reemployment. 20 C.F.R. 1002.181.

[11] 38 U.S.C. 4313(a)(2)(A).

[12] Please see Law Review 0829 (June 2008).

[13] Please see Law Review 134 (September 2004).

[14] I have read several articles about the *Ziober* case that have been posted on military websites, and I have also read scores of comments posted by readers of those websites. Several posted comments have said, "If Ziober did not want to submit to arbitration he should not have signed the arbitration agreement." In most cases, signing on to arbitration is not a voluntary choice by the employee. In entire industries and professions, all or virtually all employers require prospective employees to sign arbitration agreements *as a condition of employment.* If you want to work in the profession for which you have trained, you must sign on to "voluntary" arbitration of future disputes related to your employment.

> including any subsequent modifications or amendments to such Rules, as the exclusive remedy for such controversy, claim or dispute.[15]

Section 4302(b) of USERRA provides:

> This chapter [USERRA] 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.*[16]

I believe that section 4302(b) of USERRA supersedes and overrides an agreement (usually signed by the employee as a condition of employment) to submit future USERRA disputes to binding arbitration. Unfortunately, four federal appellate courts have now rejected this argument.[17]

The problem is an unfavorable 5th Circuit precedent.

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 harassed 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 Marine Corps and Army invaded Iraq, CCSI fired Garrett to avoid the inconvenience of having to replace him temporarily if he were to be called up and then to reinstate him upon his return from service.

Section 4323 of USERRA[18] 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[19] can file suit against that employer in the United States District Court for any district where the employer maintains a place of business.[20] The individual claiming USERRA rights can be represented by the United States

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[15] This paragraph is set out in the 9th Circuit decision, and I have copied it from there.

[16] 38 U.S.C. 4302(b) (emphasis supplied).

[17] In our federal judicial system, there are 93 federal district courts (trial courts) and 13 circuit courts (intermediate appellate courts) and one Supreme Court. We have circuit courts numbered one through eleven plus the District of Columbia Circuit and the Federal Circuit. As explained below, the circuit courts that have addressed this issue and have rejected my position about section 4302(b) and forced arbitration are the 5th Circuit, the 6th Circuit, and 11th Circuit, and now the 9th Circuit, in this case. The other circuits have not addressed this issue.

[18] 38 U.S.C. 4323.

[19] 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.

[20] 38 U.S.C. 4323(c)(2).

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.[21]

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.[22] 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.[23]

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 almost all 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 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

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[21] 38 U.S.C. 4323(a)(1).

[22] 38 U.S.C. 4323(a)(3).

[23] 38 U.S.C. 4323(h)(2).

legislative history[24] 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).[25]CCSI appealed to the United States Court of Appeals for the 5th Circuit,[26] 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:
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> 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

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[24] 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] intent 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.

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

[26] 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.

> 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,[27] 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.[28]

The 6th Circuit[29] 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.[30] Just recently, the 11th Circuit joined the 5th and 6th Circuits in upholding forced arbitration of USERRA cases.[31] With *Ziober,* the 9th Circuit now joins the list, and the other circuits have not yet addressed the question.

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.[32]

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, he or she will get a great deal of repeat business.

Where does Ziober go from here?

If Ziober wants to continue the fight, his logical next step is to apply to the 9th Circuit for rehearing *en banc*. If that motion is granted, there will be new briefs and a new oral argument before all the active judges of the 9th Circuit.[33] Then, the case will be decided by all the active judges, and the *en*

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

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

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

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

[31] *Bodine v. Cook's Pest Control, Inc*., No. 150-13233, 2016 WL 4056031 (11th Cir. July 29, 2016). The 11th Circuit is the federal appellate court that sits in Atlanta and hears appeals from district courts in Alabama, Florida, and Georgia. I discuss *Bodine* in detail in Law Review 16074 (August 2016).

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

[33] The active judges are those who have not taken senior status. The 9th Circuit has more active judges than any other federal appellate court.

banc decision will supersede the panel decision.

If Ziober chooses to forego applying for rehearing *en banc*, or if the 9th Circuit denies his request for rehearing *en banc*, or if the 9th Circuit grants rehearing *en banc* and then affirms the panel decision, Ziober's final step in the federal appellate process is to apply to the Supreme Court for a writ of *certiorari*. He will have the opportunity to file a short brief explaining why the case is worthy of the attention of our nation's highest court.

Certiorari is denied more than 99% of the time, and the denial of *certiorari* makes the circuit court decision final. At least four of the nine (currently eight) Justices must vote for *certiorari*, or it is denied.

One of the best ways to get the Supreme Court to grant *certiorari* is to show the Court that there is a conflict among the circuits on an important issue of federal law. The same federal statute should mean the same thing from Boston to Honolulu. If the First Circuit (in Boston) has interpreted a federal statute in one way and the Ninth Circuit (in San Francisco) has interpreted the same statute in a markedly different way, this is unsatisfactory and it is likely that the Supreme Court will grant *certiorari* in an appropriate case to resolve this conflict.

As of now, there is no conflict among the circuits on the question of whether section 4302(b) of USERRA precludes the forced arbitration of a USERRA claim. Four circuits have addressed that issue, and all four have answered the question in the negative. The other nine circuits have not yet addressed the issue, but when they do they will probably follow the Fifth, Sixth, Ninth, and Eleventh Circuits on this issue. If we are to prevail on this important issue, it will likely have to be by a statutory amendment in Congress, not by getting the Supreme Court to take up the issue.[34]

UPDATE: November 2016

Lieutenant Ziober, through his counsel, has applied to the Ninth Circuit for rehearing en banc. On November 11, 2016, attorney Matthew Crotty (a Lieutenant Colonel in the Washington Army National Guard and life member of ROA) filed an amicus curiae (friend of the court) brief with the Ninth Circuit, on behalf of ROA and several other military associations, urging the court to grant rehearing en banc. Here is a link to that brief:

UPDATE: May 2017

The *Ziober* case is now officially published. The citation is *Ziober v. BLB Resources, Inc.,* 839 F.3d 814 (9th Cir. 2016).

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[34] As I explained in Law Review 16052 (June 2016), Senator Richard Blumenthal of Connecticut introduced S. 3042, the proposed "Justice for Servicemembers Act of 2016." If enacted, that bill would solve the forced arbitration problem by amending USERRA. The bill has not passed the Senate or the House, and the 114th Congress (2015-16) is almost over. We will need to start over with a new bill number in the Senate and the House in the 115th Congress, which convenes in January 2017.

Here is a new release about the Ziober case:

Navy Reservist Thanks Bipartisan Congressional Group for Urging the U.S. Supreme Court to Hear His Case and Hold That Veterans Can't Be Forced to Arbitrate Their Employment Claims

18 Members of Congress—including six Senators and the ranking members of the Senate Veterans' Affairs and Senate Labor Committees—file amici curiae brief in support of veterans

WASHINGTON—Today, a bipartisan group of 18 U.S. Senators and Representatives filed an amici curiae brief with the U.S. Supreme Court asking it to hear the case of Lieutenant Kevin Ziober, a Navy Reservist who was fired by his civilian employer the day before his deployment to Afghanistan. When Ziober sought to enforce his veterans' employment rights in federal court, a judge held that Ziober must arbitrate his employment claims due to an arbitration agreement Ziober was forced to sign as a condition of employment with BLB Resources, Inc., a federal contractor.

In the amici brief, the members of Congress urged the Supreme Court to reaffirm a longstanding principle that all veterans' rights laws must be interpreted for the benefit of veterans and to recognize Congress' intent to protect veterans and servicemembers against waiving any of their rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA), including their procedural enforcement rights like the right to file an action in federal court.

Lieutenant Kevin Ziober said, "I thank and salute this bipartisan group of Senators and Representatives. They are taking a stand for me and millions of other veterans whose rights are at stake in this case. I am thrilled to see that so many Democrats and Republicans have come together to protect the rights of veterans. No veteran should ever have to give up his or her rights or benefits under federal law simply to secure a job or make ends meet."

Ziober is represented by several lawyers who often represent veterans and servicemembers in USERRA actions, including: Peter Romer-Friedman and P. David Lopez of Outten & Golden LLP's Washington, DC office; R. Joseph Barton of Block & Leviton LLP's Washington, DC office; Thomas G. Jarrard of the Law Office of Thomas Jarrard in Spokane, WA; and Kathryn Piscitelli of Orlando, FL, who is the author of *The USERRA Manual*, a leading treatise on USERRA.

On April 24, 2017, the Supreme Court docketed Ziober's petition for certiorari. In June 2017, the Supreme Court will likely decide whether to hear Ziober's case. In his certiorari petition, Ziober argues that the plain language of USERRA, 38 U.S.C. § 4302(b), and the law's legislative history make clear that Congress intended to protect *all* USERRA rights from waiver and, in particular, prohibit employment agreements that require veterans to arbitrate their USERRA claims.

In October 2016, the U.S. Court of Appeals for the Ninth Circuit held that Ziober must arbitrate his USERRA claims, deepening a split among the courts of appeals over whether veterans can waive their procedural rights under USERRA. The Ninth Circuit also disregarded prior Supreme Court cases that held that the entire veterans' reemployment law and other veterans' rights statutes

must be interpreted liberally to benefit veterans, including on issues of procedural rights.

The underlying facts of Ziober's case are troubling. Ziober's employer threw him an office-wide party on his last day of work before his deployment to honor his service—with an American flag cake, balloons, and camouflage netting. Several hours later, as Ziober was about to leave for his deployment, BLB called Ziober into the HR office and summarily fired Ziober. Thus, Ziober left for his deployment to Afghanistan knowing that he would have no civilian job to return to—even though USERRA requires civilian employers to reemploy servicemembers after their military service ends.

Contact: Kevin Ziober; Ziober's counsel, Peter Romer-Friedman can arrange interviews with Ziober; 718-938-6132 or 202-847-4402 or prf@outtengolden.com

UPDATE JUNE 2017

The Supreme Court denied certiorari on June 19, 2017. 2017 U.S. LEXIS 3938. The decision of the 9th Circuit is now final.