LAW REVIEW 17091[1]
September 2017

Recent Second Circuit Case about a Rape at West Point

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9.0--Miscellaneous

***Doe v. Hagenbeck,* 2017 U.S. App. LEXIS 16604 (2d Cir. August 30, 2017).**

What is this case about?

This is a decision of the United States Court of Appeals for the Second Circuit, released on August 30, 2017. The Second Circuit is the federal appellate court that sits in New York City and hears appeals from district courts in Connecticut, New York, and Vermont. In accordance with the Federal Rules of Appellate Procedure, this appeal was heard by a panel of three Second Circuit judges. Judge Denny Chin was appointed by President Barack Obama and confirmed by the Senate in 2010. Judge Debra Ann Livingston was appointed by President George W. Bush and confirmed by the Senate in 2007. Senior Judge Richard C. Wesley was appointed by President George W. Bush and confirmed by the Senate in 2003. He took senior status in 2016.

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1500 "Law Review" articles about military voting rights, reemployment rights, and other military-legal topics, along with a detailed Subject Index, 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 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 35 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 or by telephone at 800-809-9448, ext. 730. I will provide up to one hour of information without charge. If you need more than that, I will charge a very reasonable hourly rate. If you need a lawyer, I can suggest several well-qualified USERRA lawyers.

Judge Livingston wrote the majority decision and was joined by Judge Wesley. Judge Chen wrote a lengthy and vigorous dissent.

The facts in this article come directly from the Second Circuit decision, and the facts in the decision come directly from the complaint that the plaintiff filed. There has been no adjudication of the facts because the defendants filed a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The district judge granted the motion to dismiss on all counts but one. As to that count, the district judge stayed his decision pending the interlocutory appeal to the Second Circuit.

A judge should grant a motion to dismiss, under Rule 12(b)(6), only if he or she believes that no relief can be granted to the plaintiff even if the facts are as alleged by the plaintiff. Thus, for purposes of this appeal the appellate court assumes the truthfulness of all facts alleged by the plaintiff (Doe) and all reasonable inferences that can be drawn from those facts.

"Jane Doe" is the pseudonym used by a former United States Military Academy (USMA) cadet. She graduated from high school in 2008 and shortly thereafter reported to the USMA. She was one of about 200 women in a class of 1300.

At about 1 a.m. on May 9, 2010, near the end of Doe's second year at the USMA, she left her dormitory room (breaking curfew) to accompany a male USMA cadet identified only as "Smith" in a walk around the USMA campus. She had already taken a sedative (for sleep) before she left her dormitory room. She accepted "a few sips of alcohol" from Smith. She lost consciousness because of the alcohol combined with the sedative. Smith had forced intercourse with her while she was unconscious. She woke up hours later, back in her bed in her dormitory room, with dirt on her clothing and other evidence that she had been raped.

The next day, Doe sought care from the USMA cadet medical clinic. She received emergency contraception and was tested for sexually transmitted diseases. The examining nurse told her that she had "signs of vaginal tearing," but there was no rape examination to collect and preserve evidence.

Doe met with Major Maria Burger, the USMA Sexual Assault Response Coordinator. Major Burger explained to her that she could file a "restricted" or an "unrestricted" report, and she chose to file a restricted report, thus preserving the confidentiality of her identity and the identity of the alleged rapist. As a result, no criminal investigation could be conducted.

On August 13, 2010, three months after the alleged rape, Doe resigned from the USMA and was honorably discharged from the Army. Because she resigned before the start of her third USMA year, she had no obligation to serve on active duty as an enlisted member or to repay the

government for the cost of two years of education. She transferred her USMA academic credits to a private university and graduated on schedule two years later.

On April 26, 2013, almost three years after the alleged rape, Doe filed suit in the United States District Court for the Southern District of New York against the United States and against Lieutenant General Franklin Lee Hagenbeck (the USMA Superintendent from July 2006 until July 2010) and Brigadier General William E. Rapp (the USMA Commandant of Cadets from 2009 until 2011). She sued these two officers in their individual capacities, meaning that they could conceivably be individually on the hook to pay any money damages awarded. The case was assigned to Senior Judge Alvin K. Hellerstein.[3]

She alleged that General Hagenbeck and General Rapp were responsible for the "climate" at the USMA that encouraged sexual harassment and sexual assault. She claimed that the Superintendent and the Commandant of Cadets ignored or even condoned ribald marching chants that glorified sexual assault. She claimed that General Hagenbeck and General Rapp were responsible, through their acts and omissions, for Smith's rape of Doe.

In her lawsuit, Doe asserted four distinct causes of action:

a. A Federal Tort Claims Act (FTCA) claim against the United States for "negligent supervision, negligent training, negligent infliction of emotional distress, and abuse of process."
b. A claim against the United States under the "Little Tucker Act"[4] for "breach of the covenant of good faith and fair dealing."
c. A *Bivens* claim (explained below) against General Hagenbeck and General Rapp for violating Doe's Fifth Amendment Due Process rights.
d. A *Bivens* claim against Hagenbeck and Rapp for violating Doe's Fifth Amendment Equal Protection rights.[5]

Doe's FTCA claim against the United States was clearly precluded by the "*Feres* Doctrine" enunciated by the Supreme Court 67 years ago.[6] Doe's "Little Tucker Act" claim was also barred

[3] Judge Hellerstein was appointed by President Bill Clinton and confirmed by the Senate in 1998. He took senior status in 2011. Although he is now 84 years old, he is still hearing cases.
[4] 28 U.S.C. 1346(a)(2).
[5] The Fifth Amendment of the United States Constitution provides that a person shall not be "deprived of life, liberty, or property without due process of law." The Fifth Amendment does not include the words "equal protection of the law," but those words appear in the 14th Amendment, which was ratified on July 9, 1868. It has been held that the 14th Amendment's equal protection clause is incorporated into the Fifth Amendment's due process clause.
[6] In the landmark case of *Feres v. United States,* 340 U.S. 135 (1950), the Supreme Court determined that active duty members of the armed forces or representatives of members who died while on active duty have no cause of action under the FTCA (enacted in 1946) for personal injury or wrongful death, if the incident giving rise to the

by that same Supreme Court precedent. Her attempt to recast a tort claim as a contract claim to avoid the *Feres* doctrine was unconvincing.

On April 12, 2015, Judge Hellerstein dismissed Doe's FTCA and "Little Tucker Act" claims against the United States and her *Bivens* Due Process claim. These dismissed claims are not part of this interlocutory appeal to the Second Circuit.[7]

Judge Hellerstein refused to dismiss Doe's *Bivens* Equal Protection claim. He held that relief could conceivably be ordered under that claim, if the facts are as alleged by Doe in her complaint. The *Bivens* claim against Hagenbeck and Rapp would have proceeded to discovery and then trial, but Hagenbeck and Rapp filed a motion for leave to file an interlocutory appeal to the Second Circuit, and their motion was granted.

What is a *Bivens* claim?

Almost half a century ago, the Supreme Court decided the *Bivens* case.[8] This case established the principle that when a federal employee (in the *Bivens* case federal law enforcement officers) knowingly violates a clearly established federal constitutional or statutory right the federal employee can be held *individually liable* for the knowing violation. The Supreme Court has not explicitly overruled the *Bivens* precedent, but in several later cases the Supreme Court has limited *Bivens,* especially in the military context.

In her scholarly majority decision, joined by Judge Wesley, Judge Livingston discussed many Supreme Court and Court of Appeals cases and held that the *Bivens* precedent could not support relief for Doe in a case of this nature, and that Doe's last remaining claim should be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure—that even if the facts are as alleged by Doe no relief can be awarded, so the case should be dismissed. In an equally scholarly dissent, Judge Chin vigorously asserted that Doe's case should proceed to discovery and then trial.

This case is not necessarily over.

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injury or death was incident to the service of the plaintiff service member. *Feres* is most often implicated in medical malpractice cases involving active duty service members as patients, but it is not limited to that context. I discuss *Feres* in detail in Law Review 16070 (July 2016).

[7] Normally, a party is not allowed to appeal a district court decision that does not decide the entire case—there should ordinarily only be one appeal, after the district court proceedings have concluded. In unusual circumstances, with good cause shown and with leave of court, a party can be permitted to file an interlocutory appeal of an important district court decision that does not adjudicate all the issues. Hagenbeck and Rapp filed a motion for leave to file an interlocutory appeal, and their motion was granted.

[8] *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971).

Doe's logical next step is to ask the Second Circuit for a rehearing en banc. If that motion is granted, there will be new briefs and a new oral argument before all the active (not senior status) judges of the Second Circuit and then a new decision affirming, reversing, or modifying the panel decision. Federal appellate courts do not often grant motions for rehearing en banc, but it is entirely possible that the Second Circuit would grant such a motion in this case, because the case has been highly publicized, because it involves important legal issues, and because the panel decision was not unanimous.

If Doe does not file a motion for rehearing en banc, or if the Second Circuit denies the motion, or if the Second Circuit grants the motion and then affirms the panel decision, Doe's final appellate step is to file a petition for certiorari in the United States Supreme Court. Certiorari is granted if at least four of the nine Justices vote for certiorari, at a conference to consider certiorari petitions. Certiorari is granted in only about one percent of the cases where it is sought. If certiorari is denied the decision of the Court of Appeals is final. If certiorari is granted, there will be new briefs and a new oral argument in the Supreme Court and a Supreme Court decision.

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