

LAW REVIEW 18059¹

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Beware of Asserting Inconsistent Claims—Part 2

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[Update on Sam Wright](#)

- 1.3.2.9—Accommodations for disabled veterans
- 1.4—USERRA enforcement
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Brown v. Con-Way Freight, Inc., 2016 U.S. Dist. LEXIS 28420 (N.D. Ill. March 7, 2016).³

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1600 "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 very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1400 of the articles.

² BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 42 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.

³ This is a decision by United States District Court Judge Virginia M. Kendall, granting the motion for summary judgment filed by the defendant Con-Way Freight, Inc. in a USERRA case filed by the United States Department of Justice on behalf of disabled Navy veteran Dale S. Brown. Judge Kendall held that Brown was estopped from asserting that he had fully recovered from his Iraq injuries and that Con-Way was required to reinstate him to his "escalator position" as a truck driver because Brown had previously asserted to other government agencies and to Con-Way that his disability was permanent.

I invite the reader's attention to my Law Review 15060 (July 2015). The title of the article is "Beware of Asserting Inconsistent Claims." In the article, I wrote about the dangers of simultaneously claiming, to the military, the Department of Veterans Affairs (VA), and/or the Social Security Administration (SSA) that you are permanently and totally disabled and unable to work while also claiming, in a case under the Uniformed Services Employment and Reemployment Rights Act (USERRA), that you are ready, willing, and able to return to work at your pre-service employer. In the article, I wrote:

You need to be very careful about asserting inconsistent claims because of the equitable doctrine of estoppel. The Oxford Dictionary of Law defines estoppel as follows: "A rule of evidence or rule of law that prevents a person from denying the truth of a statement he has made or denying the existence of facts that he has alleged to exist.

For example, there could be an estoppel problem if you tell the SSA that you are permanently and totally disabled while at the same time telling DOL-VETS [the Veterans' Employment and Training Service of the United States Department of Labor] that you are ready, willing, and able to return to work. You need a lawyer to assist you in sorting out your situation and deciding which claims you will make and which claims you will defer. Of course, this assessment may change as your physical condition improves or deteriorates.

In granting the defendant's motion for summary judgment in the *Brown* case (cited above), Judge Kendall held:

Brown is judicially estopped from bringing his present claims due to his prior, inconsistent representations regarding the permanency of his injuries. "Judicial estoppel is 'an equitable concept providing that a party who prevails on one ground in a lawsuit may not ... in another lawsuit repudiate that ground.'" *Johnson v. ExxonMobil Corp.*, 426 F.3d 887, 891 (7th Cir. 2005), as amended (Nov. 21, 2005) (quoting *United States v. Hook*, 195 F.3d 299, 306 (7th Cir.1999)). Although judicial estoppel is not subject to "inflexible prerequisites," three "factors inform the decision whether to apply the doctrine" — first, that the party's later position is "clearly inconsistent" with its prior position; second, that the party "succeeded in persuading a court to accept the party's earlier position"; and third, that the party seeking to "assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001) (internal citations and quotations omitted). A court may take in account "additional considerations [which] may inform the doctrine's application in specific factual contexts." *Id. at 751*. "What matters for purposes of judicial estoppel is whether, in reaching its earlier decision, the court relied on the representation of the one against whom estoppel is asserted." *In re Airadigm Commc'ns, Inc.*, 616 F.3d 642, 662 (7th Cir. 2010). Finally,

judicial estoppel may be applied to positions taken in both judicial and quasi-judicial proceedings. [*DeGuisepp v. Vill. of Bellwood*, 68 F.3d 187, 191 \(7th Cir. 1995\)](#).

Here, it is undisputed that Brown previously represented that his injuries were **permanent** to Con-way upon returning from service, the *Brown* I Court throughout the parties' prior litigation, the VA in 2009, and to the Navy's PEB [Physical Evaluation Board] in both 2008 and 2013.⁹ Put simply, Brown's consistent and unequivocal representations in the lead-up to this litigation were that his injuries were permanent and that he was not going to recover. While Brown now contends that his unexpected recovery should reignite his rights under USERRA, Brown's contentions must be viewed in light of the unique factual circumstances of his case. Given his many representations, the Court holds that to allow him to continue to litigate his claim would effectively allow him to play "fast and loose" with this Court, the *Brown* I Court, the VA, and the PEB. [*Airadigm Commc'ns*, 616 F.3d at 661](#).

The inconsistencies are most pronounced when considering Brown's representations to the PEB in 2013 when he requested that he be placed on the Navy's *Permanent* Disability Retired List. In terms of the first and second factors discussed above, Brown represented to the PEB in February 2013 that he was 10% disabled from his injuries, citing to, in part, pain in his right and left shoulders. (Dkt. No. 61-8.) Based upon that representation, the PEB granted Brown a 10% disability in his shoulders, which was the same rating that he received in 2009 when the PEB found that his disabilities were static. That finding included that Brown would be significantly impacted in his ability to perform his military duties, "including: unable to do prolonged, heavy work overhead." Yet, in March 2013, Brown applied to a DSR position, despite the fact that the DSR position often required heavy overhead lifting. (See Dkt. No. 60 at 13.) Such representations are clearly inconsistent.

USERRA is a great law and is to be liberally construed for the benefit of those who laid aside their civilian jobs to serve our country in uniform, but that does not mean that important legal principles like estoppel do not apply to USERRA cases.