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It Is Possible to Bypass the MSPB itself and Appeal the AJ's Decision to the Federal Circuit

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

1.2—USERRA forbids discrimination
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***Jones v. Department of Health and Human Services,* 834 F.3d 1361 (Fed. Cir. 2016).**

Background

[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.

John Paul Jones, III is a Vietnam veteran. He was honorably discharged in 1970. In 2015, 45 years later, he filed 16 separate appeals with the Merit Systems Protection Board (MSPB), alleging that the Department of Health and Human Services (HHS) had denied him hiring because of his past military service, in violation of section 4311 of the Uniformed Services Employment and Reemployment Rights Act (USERRA).[3] Jones represented himself[4] before the MSPB and the United States Court of Appeals for the Federal Circuit.[5]

Did the Federal Circuit have jurisdiction to decide this appeal?

The MSPB is an independent, quasi-judicial agency in the Executive Branch of the Federal Government. It was created by the Civil Service Reform Act of 1978, which divided the former Civil Service Commission (CSC) into three separate federal agencies.[6] As I have explained in footnote 2 and in Law Review 15067 (August 2015), Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. The VRRA applied to the Federal Government, as a civilian employer, but the VRRA did not have a specific enforcement mechanism with respect to federal agencies as employers. That oversight was corrected by USERRA in 1994.

The MSPB has three members, each of whom is appointed by the President with Senate confirmation. Since January 2017, the MSPB has been down to just one member, as the terms of office of the other two members expired and they were not replaced by new presidential appointees who had been confirmed by the Senate.[7]

Under section 4324 of USERRA,[8] there is an enforcement mechanism for enforcing USERRA against federal executive agencies. That mechanism is very different from the mechanism in section 4323[9] for enforcing USERRA against state and local governments and private employers. Federal sector USERRA cases are filed in the MSPB, not in federal district courts around the country.[10]

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[3] 38 U.S.C. 4311.

[4] Abraham Lincoln said: "A man who represents himself has a fool for a client."

[5] The Federal Circuit is a specialized federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from final decisions of the MSPB. Please see Law Review 189 (August 2005).

[6] The MSPB inherited the adjudicatory functions of the CSC, while the Office of Personnel Management (OPM) inherited the administrative functions as the personnel office for the Executive Branch of the Federal Government. The Office of Special Counsel (OSC) inherited the CSC's investigative and prosecutorial functions.

[7] Please see Law Review 17114 (November 2017).

[8] 38 U.S.C. 4324.

[9] 38 U.S.C. 4323.

[10] I describe the enforcement mechanism for federal sector USERRA cases in detail in Law Review 15064 (July 2015).

An MSPB case (USERRA case or any other case) is heard initially by an Administrative Judge (AJ) of the MSPB. Jones' consolidated case was heard and decided (adversely to Jones) by an AJ, and the AJ advised Jones that the AJ decision would become final unless he appealed to the MSPB itself by 4/29/2016. For whatever reason, Jones did not appeal to the MSPB itself. Instead, he appealed directly to the Federal Circuit on 4/4/2016, 25 days before the MSPB decision became final.

HHS (represented by the Commercial Litigation Branch of the Civil Division of the Department of Justice) argued that the Federal Circuit lacked jurisdiction because Jones did not wait until the MSPB decision was final before appealing to the appellate court. The Federal Circuit rejected that argument, holding: "Nevertheless, we have also held that, when a petitioner files a petition for review with this court before an AJ's decision becomes final, the petitioner's appeal ripens once that initial decision becomes the final decision of the MSPB."[11]

Thus, if you lose your USERRA case at the AJ level, you can bypass the MSPB itself and appeal directly to the Federal Circuit. You may want to take that course of action because the MSPB has been without a quorum to decide cases since January 2017, and there is a backlog of more than 1200 cases that the MSPB must address, after it gets a quorum, before any new cases can be heard by the Board.

Ironically, you may be better off to lose at the AJ level, at least with respect to timeliness. If you win at the AJ level and the agency appeals to the MSPB, your case will go into the long MSPB queue and you cannot appeal to the Federal Circuit until the MSPB hears and decides your case.

On the merits, the Federal Circuit affirmed the AJ's decision.

As I have explained in detail in Law Review 15107 (November 2015), section 4311 of USERRA[12] makes it unlawful for an employer (federal, state, local, or private sector) to discriminate in initial employment based upon the applicant's performance of uniformed service, even decades ago. But it is necessary for the section 4311 plaintiff to prove, by a preponderance of the evidence, that his or her uniformed service was *a motivating factor* in the employer's decision not to hire the plaintiff.

If the plaintiff is currently serving in the National Guard or Reserve, it is generally not difficult to convince a judge or jury that the employer has a motive to discriminate. The employer will likely be concerned about the cost and inconvenience of accommodating the individual's absences from work necessitated by military training or service. The employer will likely be

[11] *Jones,* 834 F.3d at 1364.
[12] 38 U.S.C. 4311.

tempted to avoid that cost and inconvenience by refusing to hire a National Guard or Reserve member, even if he or she is the best qualified candidate.

In the case of a person (like Jones) whose military service ended decades ago, it seems unlikely that the employer would have a motive to discriminate. Jones will not be asking for time off from his civilian job for military service or training.

In the most unusual circumstances, like a left-wing college faculty, there may be animus against anyone who has ever served our country in uniform, based not on administrative convenience but ideological objection to military service. The AJ held, and the Federal Circuit agreed, that Jones had provided no proof that any such ideological objection to military service played any part in the HHS decision-making process in deciding upon his 16 job applications in 2015. The Federal Circuit affirmed the decision of the AJ, and this case is now final and over.

The Veterans' Preference Act is not the same thing as USERRA.

Jones may have had a valid case under the Veterans' Preference Act (VPA) and the Veterans' Employment Opportunities Act (VEOA), but he did not initiate an action under those two laws, and it is too late to do so now.

As I have explained in detail in Law Review 18008 (January 2018), the VPA (enacted in 1944) gives honorably separated veterans a five-point preference if they served in "wartime" and it gives service-connected veterans a ten-point preference, regardless of when they served. Jones is a Vietnam veteran, and he is certainly entitled to the five-point preference. He is entitled to the ten-point preference if he has a service-connected disability rated at 30% or more.

In Law Review 08050 (October 2008), I explained in detail the enforcement mechanism for the VPA, under the Veterans' Employment Opportunities Act (VEOA). Jones could have filed a claim with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). After giving that agency time to review his claim that HHS had failed to accord him his veterans' preference, as required by the VPA, he could have initiated an action in the MSPB. He did not file a complaint with DOL-VETS, so the MSPB had no jurisdiction to hear his VPA/VEOA claim.