LAW REVIEW 183

USERRA Applies to Hiring Hall Situations

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On April 29, 2005, Captain Wright gave this speech to a legal conference of the Associated General Contractors (AGC), a trade association for employers in the construction business. He was introduced as "the ombudsman of the Reserve Officers Association and the originator of the Law Review column." The conference was held at the historic Willard Hotel in Washington, D.C.

May 22, 2005 will mark the 15th anniversary of the 9th Circuit decision in *Imel v. Laborers Pension Trust Fund of Northern California,* 904 F.2d 1327 (9th Cir.), *cert. denied,* 498 U.S. 939 (1990). This is the central thesis of my presentation here today. *Imel* is good law; get used to it.

In 1963, two Associated General Contractors (AGC) chapters and the Northern California District Council of the Laborers' International Union of North America established the pension fund at issue in *Imel.* The fund gives retirement credit for work done between 1937 and 1962, before the fund was established, and also for work performed after 1962. Marion J. Imel was employed as a laborer, in employment covered by the fund, for more than 25 years, starting in 1951. He was drafted and served on active duty in the Army from March 6, 1953, to March 5, 1955, when he was honorably discharged.

As is common in the construction industry, Imel and his fellow union members worked for many different companies, through a hiring hall operated by the union. When Imel was discharged from the Army, in March 1955, he returned to the hiring hall and resumed his pattern of working on construction jobs as assigned. The first contractor that he worked for after returning from the Army was not the same company as the last contractor he worked for before entering active duty.

When Imel retired in 1976, he claimed pension credit for the 1953–55 military service, in accordance with the Veterans' Reemployment Rights (VRR) law, formerly codified at 38 U.S.C. 2021-2026. The fund denied him such credit, asserting that the VRR law did not apply because Imel had not applied for re-employment or returned to work, in 1955, for the same contractor that he last worked for before he was drafted in 1953. The District Court held, and the 9th Circuit agreed, that in circumstances such as these the whole Northern California construction industry was Imel's employer and that Imel had met the VRR law's eligibility criteria when he applied for re-employment through the hiring hall after returning from the Army.

The 9th Circuit decided *Imel* more than four years before Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) October 13, 1994. USERRA is a complete rewrite of the VRR law, which can be traced back to 1940. USERRA's broad definition of "employer" shows a *conscious* effort to ratify *Imel.* I invite your attention specifically to 38 U.S.C. 4303(4)(A)(i) and to USERRA's legislative history: "Section 4303(4) would define "employer" and

is to be broadly construed. It includes not only what may be considered a 'traditional' single-employer

relationship, but also (1) those under which a servicemember works for several employers in industries such as construction, longshoring, etc., where the employees are referred to employment, and (2) those where more than one entity may exercise control over different aspects of the employment relationship. *See, e.g., Adams v. Mobile County Personnel Board,* 115 LRRM 2936 (S.D. Ala. 1982); *Magnuson v. Peak Technical Services, Inc.,* 808 F. Supp. 500, 507-511 (E.D. Va. 1992). This definition would also include potential employers in the case of failure to hire an applicant as well as entities to which certain employment-related responsibilities have been delegated, such as pension funds. *See Imel v. Laborers Pension Trust Fund,* 904 F.2d 1327 (9th Cir.), *cert. denied,* 111 S.Ct. 343 (1990); *Akers v. Arnett,* 597 F. Supp. 557 (S.D. Tex. 1983), *affirmed,* 748 F.2d 283 (5th Cir. 1984)." House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2454.

I know; I was there. I worked for the U.S. Department of Labor (DOL) as an attorney for 10 years. With one other DOL attorney, Susan M. Webman, I largely drafted the interagency task force work product that became USERRA when Congress enacted it, largely intact, in 1994. Susan Webman and I also assisted in drafting the appellate briefs in *Imel* and *Akers.* We were intent that persons working in construction, longshoring, stagehand work, etc., should have enforceable rights under the law that we were drafting.

In 1997, I initiated a "Law Review" column in *The Officer,* the monthly magazine of the Reserve Officers Association (ROA). You can find all of the Law Review columns on ROA's Web site, www.roa.org. Click on "Legislative Affairs" then "ROA Law Reviews." You will find 168 articles, and more are added each month. You will find a topical index as well as a numerical index. Most but not all the articles are about USERRA. I invite your attention specifically to Law Reviews 28, 138, and 154 with respect to the *Imel* issue and the "joint employer doctrine" under USERRA.

I discuss the 65-year (so far) history of the re-employment statute in Law Review 104, "Everything You Always Wanted to Know about USERRA But Were Afraid to Ask." In September 1940, a year after World War II had erupted in Europe, Congress enacted the Selective Training and Service Act (STSA), the nation's first peacetime draft law. We were technically at peace until December 7, 194l, the original "date which will live in infamy."

In 1932, thousands of unemployed veterans of the "Great War" (as World War I was then known) marched on Washington and set up a tent city on the National Mall, just a few hundred yards from this historic Willard Hotel. General Douglas MacArthur, Army chief of staff, led Army troops with fixed bayonets, chasing these veterans out of the nation's capital. That sad day in American history was firmly in the minds of senators and representatives when they enacted the STSA; they were intent that *never again* would any person be able to say, "I am unemployed because I served our country when called." Accordingly, Congress included the right to re-employment in the STSA, for those drafted.

The STSA provided for a *one-year sunset* on the authority to draft young men for military service. In September 1941, Congress enacted the Service Extension Act (SEA), which extended the draft authority. The SEA passed the House of Representatives by *one vote.* If the SEA had not passed, tens of thousands of young men, including my late father, would have been sent home just 11 weeks before Pearl Harbor, and the nation would have been even more woefully unprepared for the coming war.

The SEA also extended the right to re-employment to include *voluntary enlistees as well as draftees.* Almost from the very beginning, the re-employment statute has applied to *voluntary as well as involuntary service.* But to this day there is a common misconception that only draftees have re-employment rights.

On September 2, 1945, when Japan surrendered to General MacArthur on board USS *Missouri* in Tokyo Bay, there were more than 12 million men and women on active duty in our armed forces. Over the next several months after victory was achieved, *millions* of men and women returned to their homes, their families, and their civilian jobs. As you can imagine, there were lots of issues and disputes to sort out with employers and with the co-workers who had remained continuously employed during the war.

In the months following the end of World War II, there were tens of thousands of court cases about re-employment rights, and the first re-employment case made its way to the Supreme Court the next year. In that case, the Court held that the re-employment statute should be "liberally construed for he who has laid aside his civilian pursuits to serve his country in its hour of need." [*Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946).] Please note that this "liberal construction" line has been quoted with approval in hundreds of later cases, including *Imel.*

Of course, the Supreme Court was referring to the members of the "greatest generation" who had just won World War II. I respectfully submit to you, ladies and gentlemen, that this same "liberal construction" principle should apply to the Baby Boomers and the members of Generation X and Generation Y who are winning the global war on terrorism. September 11, 2001, is the "date which will live in infamy" for our generation. Since that day, almost 500,000 National Guard and Reserve personnel have been involuntarily called to active duty, and tens of thousands of others have volunteered. Of course, in a larger sense, all of these folks are volunteers, because no one has been drafted since 1972.

The point of this history lesson is that the re-employment statute is *an integral part of the fabric of our society.* I call upon you, as attorneys for construction industry employers, to educate your clients about this important legislation. I respectfully submit that you should be helping your clients to comply, not helping them to shirk their legal and moral responsibilities.

Yes, I recognize that it can be difficult, and expensive, and sometimes disruptive to put the returning veteran back on the seniority escalator, not at the point he stepped off, but "at the point he would have occupied had he kept his position continuously during the war." (*Fishgold,* 328 U.S. at 284-85.) In the 1940 congressional hearings leading up to the enactment of the STSA,

Senator Thomas of Utah explained the basic rationale of the re-employment entitlement: “If it is constitutional to require a man to serve in the Armed Forces, it is not unreasonable to require the employers of such men to rehire them upon the completion of their service, since the lives and property of employers as well as everyone else in this country are defended by such service.”

In 1972, our nation made a conscious choice, and a good choice in my view, to go to a professional, all-volunteer military, and to abolish conscription. As you can certainly appreciate, recruiting is the lifeblood of the all-volunteer military. If we are not going to conscript individuals into our military, we must provide an incentive system so that they will be willing to enlist. The re-employment statute is an important part of that incentive system, especially for the 1.2 million men and women of the National Guard and Reserve. More than ever before in the nation’s history, we depend upon these “part-time” servicemembers for full-time commitment. They make up almost half of the nation’s total military personnel pool—1.4 million “regulars” and 1.2 million members of the National Guard and Reserve.

The re-employment statute can be traced back to 1940, but in a larger sense it can be traced back more than three centuries earlier, to 1636—to the establishment of the militia of the Massachusetts Bay Colony and by extension today’s National Guard. The legislation establishing that militia included this provision: “If any man shalbee sent forth as a souldier and shall return maimed he shalbee maintained competently by the Collonie during his life.”(Yes, that is the 17th century spelling.)

Today, as in 1636, our nation recognizes the debt that it owes to those who serve and have served in our Army, Navy, Marine Corps, Air Force, and Coast Guard, including the Reserve Components of these services. In 1865, in his Second Inaugural Address, President Abraham Lincoln set forth his goals for his second term, which of course was tragically cut short by John Wilkes Booth. His principal goal was “to bind up the nation’s wounds. To care for him who shall have borne the battle, and for his widow and his orphan.” When we complete today’s session, I invite you all to walk with me about 900 yards from this historic hotel to the Lincoln Memorial, where you can read these immortal words on the north wall, and the Gettysburg Address on the south wall.

As a nation, we owe the greatest debt to those who have made the greatest sacrifices. For those who have made the ultimate sacrifice, we must care for their widows, widowers, and orphans, and we must honor their memory. If you want to go on a walking tour with me this evening, I can also take you to the World War II Memorial, which was finally completed just one year ago.

But let me talk to you about those servicemembers who are returning with serious service-connected disabilities. Because of advances in military medicine and personal protective equipment, hundreds or perhaps thousands of servicemembers are surviving incidents that would have killed them in earlier wars, even the 1990–91 Persian Gulf War. These men and women are surviving, but they are not surviving intact. They are returning minus eyes and limbs and with other serious disabilities.

USERRA makes provisions for disabled veterans, and I address those provisions in detail in Law Reviews 121, 130, and 136. Let's take the hypothetical Mary Jones, returning to her job at the XYZ Construction Company with one leg; she lost the other one in Iraq. XYZ is required to make *reasonable efforts to accommodate* Mary's disability. If her disability cannot be reasonably accommodated in the job she would have attained if she had been continuously employed (usually but not always the position that she left), XYZ must re-employ her in another position that provides like seniority, status, and pay, or the closest approximation thereof consistent with the circumstances of Mary's case.

Maybe Mary cannot return to her job at the construction site, but she can be the receptionist in the office. The receptionist job is filled? Does not matter. XYZ must re-employ Mary in that job, even if it means displacing the current receptionist. In some circumstances, the employer is required to displace another employee in order to re-employ the returning veteran. [Please see *Cole v. Swint,* 961 F.2d 58, 60 (5th Cir. 1992); *Goggin v. Lincoln St. Louis,* 702 F.2d 698, 703-04 (8th Cir. 1983); *Fitz v. Board of Education of the Port Huron Area Schools,* 662 F. Supp. 10, 11 (E.D. Mich. 1985); *Anthony v. Basic American Foods,* 600 F. Supp. 352, 357 (N.D. Cal. 1984); *Green v. Oktibbeha County Hospital,* 526 F. Supp. 49, 55 (N.D. Miss. 1981).]

Most of the returning National Guard and Reserve members, and many of the returning regulars, have re-employment rights under USERRA. Many persons returning from regular military service do not have re-employment rights because they did not have civilian jobs before enlisting or because they are past USERRA's five-year limit on the duration of the period or periods of service. These folks do not have rights under USERRA, but they do have rights under the Americans with Disabilities Act (ADA).

I know a severely disabled Vietnam veteran. He has spent most of the last four decades watching television and waiting for the VA check to come in the mail every month. As a nation, we can do better than that, and we must do better than that for this new generation of disabled veterans. With advances in rehabilitation and prosthetics and assistive technology, and with USERRA and the ADA, even severely disabled veterans can return to the world of work. I respectfully submit that this should be a high-priority goal of our nation.

* Military title shown for purposes of identification only. The views expressed are the personal views of the author, and not necessarily the views of the Departments of the Navy or Defense, or the U.S. government.