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Forced Arbitration-I Regret that I Did Not Know then (1991) What I Know Now (2019)

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Update on Sam Wright

1.4—USERRA enforcement
1.5—USERRA arbitration
1.8—Relationship between USERRA and other laws/policies

As I have explained in detail in footnote 2 and in Law Review 15067 (August 2015), Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) and President Bill Clinton signed it into law on 10/13/1994, as a long-overdue update and rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940.

I developed an interest and expertise in the federal reemployment statute during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. In

[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1700 "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 1500 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.

1986, I volunteered to serve on an interagency committee (mostly DOL and the Department of Defense or DOD) that studied the 1940 law with a view toward suggesting improvements. Early on, the committee decided that one of the problems with the VRRA was that it had been amended too many times in a piecemeal way. Thus, it was decided to draft a complete rewrite rather than a series of discrete amendments.

Together with one other DOL attorney, Susan M. Webman, I drafted the proposed VRRA rewrite in 1988. The committee blessed our work product and transmitted it to President Ronald Reagan, who referred it to the Office of Management and Budget (OMB). OMB referred the draft to every Cabinet-level department, soliciting comments. The comments were overwhelmingly negative. Most departments looked at the proposed new law as employers and objected to the burden that the reemployment statute can impose on employers, including federal agencies as well as state and local governments and private employers.

Other departments proposed amendments that would have taken away rights that veterans and service members enjoyed under the 1940 law. We saw that as defeating the purpose of what we were trying to accomplish, which was to take the 1940 law as a base and improve upon it where necessary.

Our proposed VRRA rewrite likely would have been relegated to gathering dust at the DOL Library, but an important event intervened on 8/2/1990, when Saddam Hussein's Iraq invaded and occupied Kuwait and threatened Saudi Arabia. President George H.W. Bush drew "a line in the sand" and pledged to protect Saudi Arabia and liberate Kuwait, with military force if necessary.

As part of his forceful response to Saddam Hussein's naked aggression, President Bush called up National Guard and Reserve forces in the first significant Reserve Component call-up since the end of the Korean War in 1953. This call-up drew a great deal of new attention to laws like the VRRA and the Soldiers' and Sailors' Civil Relief Act (SSCRA), laws that are necessary to protect the civilian interests of those who lay down their civilian concerns to serve our country in uniform in its hour of great need.

President Bush overruled the objections of several federal departments and transmitted the proposed VRRA rewrite to Congress, as his proposal, in February 1991. The bill passed both the House and Senate during the 102nd Congress (1991-92), but the differing versions could not be reconciled before that Congress ended. The differing versions were reconciled near the end of the 103rd Congress, and both the House and Senate passed the bill in the same form. President Clinton signed the bill into law on 10/13/1994.

Those of us who drafted USERRA had in mind that cases against state and local governments and private employers would be litigated in federal district courts, as had been the case under the VRRA, and would not be subject to binding arbitration. We were aware of arbitration in the

context of collective bargaining agreements (CBAs) between private sector employers and unions representing their employees. Under the VRRA, there was good case law to the effect that the veteran or service member was not bound by the results of arbitration under the CBA, involving the union and the employer. At our suggestion, the House Veterans' Affairs Committee included in its report on the proposed USERRA an excellent statement on this issue, as follows:

> Section 4302(a) would reaffirm that, to the extent that a federal or state law or employer plan or practice provides greater rights than those provided by the Committee [House Committee on Veterans Affairs] bill, those greater rights would not be preempted by chapter 43.
>
> Section 4302(b) would reaffirm a general preemption as to State and local laws and ordinances, *as well as 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 Railroad 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 intent that, even if a person protected by 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).[3]

When we drafted the proposed VRRA rewrite in the late 1980s, we were unaware of the possibility that an employer, in a non-union context, could extort new employees into signing on to binding arbitration of future employment-related disputes, as a condition of being hired. We thought of arbitration only in the context of unionized employees and CBAs.

On 5/13/1991, three months after President Bush had transmitted the proposed VRRA rewrite to Congress, the Supreme Court decided a very important employment law case, *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991). The Court upheld the enforceability of a pre-dispute binding arbitration "agreement" that a non-union employee was required to sign as a condition of employment. I don't remember if I heard about this case when it was decided. If I did hear about it, I did not understand the importance and relevance of the case to the

[3] House Committee Report, April 28, 1993, H.R. Rep. No. 103-65 (Part 1), reprinted in Appendix D-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted paragraphs can be found on page 703 of the 2018 edition of the *Manual.*

reemployment statute. If this issue had been on my mind at the time, I would have suggested to the staff of the House Veterans' Affairs Committee and Senate Veterans' Affairs Committee that they amend the proposed VRRA rewrite by adding language saying explicitly that section 4302(b) applied to procedural as well as substantive rights and that USERRA overrode a pre-dispute employee agreement to submit future USERRA disputes to binding arbitration.

In the first appellate case applying section 4302(b) of USERRA to a pre-dispute binding arbitration agreement, the United States Court of Appeals for the 5th Circuit[4] disparaged the significance of the quoted language from the House Veterans' Affairs Committee report as a "snippet of legislative history" and found the language to be inapposite, as follows:

> The totality of the quoted [legislative history] language, along with the imbedded citations, strongly suggests that Congress intended section 4302(b) only to prohibit the limiting of USERRA's substantive rights by union contracts and collective bargaining agreements, and that Congress did not refer to arbitration agreements between an employer and an individual employee.[5]

Fixing this problem would have been relatively easy in 1991, when *Gilmer* was decided. Fixing it now will be much more difficult, as I have explained in detail in Law Review 19035 (March 2019), the immediately preceding article in this series. I regret that I do not have the power to turn back the hands of time.

[4] The 5th Circuit is the federal appellate court that sits in New Orleans and hears appeals from district courts in Louisiana, Mississippi, and Texas.

[5] *Garrett v. Circuit City Stores, Inc.,* 449 F.3d 672, 680 (5th Cir. 2006).