

## **Sometimes David Does Beat Goliath**

By CAPT Samuel F. Wright, JAGC, USNR\*

- 1.1.1.8—USERRA applies to the Federal Government
- 1.3.2.4—Status of the returning veteran
- 1.4—USERRA enforcement
- 1.8—Relationship between USERRA and other laws/policies.

I want to bring to your attention an important re-employment rights case that, although it was decided more than seven years ago, is not well known. I am referring to *Allen v. United States Postal Service*, 142 F.3d 1444 (Fed. Cir. 1998).

Kenneth M. Allen was a tool and parts clerk for the U.S. Postal Service (USPS) and a member of the Ohio Air National Guard. His USPS employment was interrupted by a four-month active duty period in Panama, from February to June 1994. President Clinton signed the Uniformed Services Employment and Reemployment Rights Act (USERRA) on October 13, 1994, so the "Veteran" Reemployment Rights (VR) law, in effect prior to the enactment of USERRA, applied to this case.

Mr. Allen worked for the USPS on the night shift. He wanted to transfer to the day shift, but no day shift position had arisen. In March 1994, while Allen was on active duty in Panama, the USPS created an additional tool and parts clerk day shift position at the USPS facility where Allen worked. Allen did not learn of this opportunity until he returned from active duty in June 1994. Assignment to such positions is by bid and is determined by seniority. The USPS conceded that if Allen had not been on active duty and had bid on the day shift position, he would have received it.

Upon returning to work, Mr. Allen asked USPS management to assign him to the day shift position, but USPS denied his request. Allen then initiated an action in the Merit Systems Protection Board (MSPB), a quasi-judicial federal agency that adjudicates disputes between federal agencies and federal employees under several laws, including USERRA and the VRR law.

The USPS argued that neither the collective bargaining agreement, USPS regulations, nor USPS practice required that Allen be given notice of job openings that arose while he was on active duty, and that the USPS had not violated the VR law. The MSPB agreed and ruled against Allen. Allen appealed to the United States Court of Appeals for the Federal Circuit, a specialized federal appellate court created in 1982 from the merger of the United States Court of Claims and the United States Court of Customs and Patent Appeals. The other federal circuit courts have geographical jurisdiction, but the Federal Circuit has a nationwide subject matter jurisdiction over certain kinds of cases, including appeals from final decisions of the MSPB.

Allen represented himself in both the MSPB and the Federal Circuit. In the appellate court, Lori J. Dym, USPS attorney, opposed him. With her on the appellate brief were the Hon. Frank W. Hunger, assistant attorney general for the Civil Division, Department of Justice, and R. Andrew German, managing counsel of the USPS. Abraham Lincoln once said, "A man who represents himself has a fool for a client." But Mr. Allen proved that statement to be not always correct. He defeated three high-priced federal lawyers all by himself, and he created an important precedent.

USERRA did not apply to this case because the underlying facts occurred several months before USERRA was enacted. But the Federal Circuit took note of USERRA in a footnote: "The statute enacted in 1994 [USERRA] to replace these [VRR] sections amended the clause regarding the scope of protection such that a protected person 'shall not be denied ... promotion, or any benefit of employment.' 38 U.S.C. 4311(a) (1994). Section 4303(2) now expressly defines 'benefit' to include 'the opportunity to select work hours or location of employment.' Thus Congress has made explicit what today we hold to have been implicit in the statute."

I am receiving numerous inquiries from National Guard and Reserve personnel returning from active duty periods of up to two years. In some cases, these folks are finding that they missed out on valuable promotion or transfer opportunities that opened and closed during the active duty period, and that may not recur for many years, if at all. I think that *Allen v. United States Postal Service* supports my argument that the employer is required to reconstruct promotion or transfer opportunities for the returning veteran.

But I also have a practical suggestion that will serve the interests of the servicemember, the employer, and the fellow employees. When you leave your civilian job for voluntary or involuntary military service, you should give a limited power of attorney to a trusted colleague at work-someone who will be in a position to learn of opportunities that would interest you and for which you may be qualified. That colleague should be empowered to apply or bid for such opportunities that arise during your absence. If the employer refuses to consider you for such an opportunity on the grounds that you are not immediately available to start work (because you have some months left on your mobilization, for example), then the employer is violating Section 4311(a) of USERRA. See *Beattie v. The Trump Shuttle, Inc.*, 758 F. Supp. 30 (D.D.C. 1991). See also House Report No. 103-65, 1994 United States Code Congressional & Administrative News 2449, 2456 and Law Review 36.

Mobilizing employees and their employers, and in some cases their unions, need to be aware that there are likely to be promotion or transfer opportunities that will arise during the mobilization. Some arrangement needs to be made to give the mobilized employee a realistic opportunity to be considered for such opportunities, without undue disruption of the employer's operation or the reasonable expectations of other employees.

Making that arrangement in advance is likely to be much easier on everybody than trying to reconstruct the opportunity after the servicemember returns to work. I have heard from a city attorney, complaining about a Reservist returning to the police department and demanding the

opportunity to bid for shifts. It will apparently be necessary to reopen the bidding process, which was completed before this police officer returned to work. It will be necessary to adjust the schedules of 500 other police officers. All of that probably could have been avoided if a fair arrangement had been made to enable this Reservist to bid for shifts, through another employee with a power of attorney, while the Reservist was mobilized.

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