

LAW REVIEW 199

Rights of Returning Disabled Veterans—Continued

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Charles E. Armstrong began his employment with Penn Central Railroad, as a brakeman, in Dec. 1966. He was drafted in Jan. 1969. After completing basic training, he deployed to the Republic of South Vietnam. He sustained serious shrapnel wounds to his head, in combat, necessitating the complete removal of his left eye, a craniotomy, and other medical treatment. He was honorably discharged from the Army and placed on permanent disability retirement Nov. 19, 1970.

On Dec. 1, 1970, Armstrong applied for re-employment at Penn Central. It was agreed that his disabilities precluded his returning to work as a brakeman, but it was determined that he could serve as a clerk. Penn Central initially offered to re-employ Armstrong as a clerk but then withdrew the offer, on the grounds that the clerk job was in a different bargaining unit, represented by the Brotherhood of Railroad and Airline Clerks (BRAC), a different union.

Re-employing Armstrong as a clerk would necessitate laying off another clerk who was a member of BRAC. The railroad was concerned that the union would seek to impose financial penalties for violating the collective bargaining agreement and that the union might strike over the resulting layoff of a BRAC member.

After lengthy negotiations involving Penn Central, BRAC, the Department of Labor (DOL), and the Department of Justice (DOJ), DOJ finally filed suit, on behalf of Armstrong, in the U.S. District Court for the Northern District of West Virginia. DOJ sought a court order requiring Penn Central to re-employ Armstrong as a clerk and to compensate him, by way of back pay, for the substantial delay that had occurred in complying with Armstrong's right to re-employment.

The re-employment statute in effect at the time provided as follows: “[I]f [the returning veteran is] not qualified to perform the duties of such position [the position that he or she would have attained if continuously employed] but [is] qualified to perform the duties of any other position in the employ of such employer or his successor in interest [the veteran is entitled] to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances of his case.” Penn Central and BRAC argued that this language did not entitle Armstrong to the clerk position, because it was in a different bargaining unit.

The court firmly rejected this argument: “To read into the statutory language the requirement that ‘such other position’ must be within the same craft or collective bargaining unit as the former position, as Penn Central and BRAC urge, would require the Court to ignore the plain meaning of the statute and would be inconsistent with the object of the statute and the liberal construction to which it is to be accorded.” *Armstrong v. Baker*, 394 F. Supp. 1380 (N.D.W.V. 1975).

The court also rejected the arguments raised by the union and the employer that re-employing Armstrong in a clerk position, meaning that another clerk would be laid off, was inconsistent with the collective bargaining agreement and the Railway Labor Act, the federal statute that governs labor relations in the railroad and airline industries. In the first case construing the reemployment statute, the Supreme Court held: “No practice of employers or agreements between employers and unions can cut down the service adjustment benefits that Congress has secured the veteran under the Act.” *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

Section 4313(a)(3) of the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4313(a)(3), contains language that is essentially identical to the statutory language construed by the court in *Armstrong*. This case is more than 30 years old, but it is still good law, and it will be quite useful to disabled veterans of the global war on terrorism.

I also invite the reader’s attention to Law Reviews 121, 130, and 136, concerning disabled veterans. Go to www.roa.org. Click on “Legislative Affairs” then “ROA Law Reviews.” You will find almost 200 articles, mostly about USERRA and related laws. You will find a topical index as well as a numerical index. Through this column, ROA seeks to inform its members and other Reserve Component members, as well as employers, attorneys, and others, about the requirements of USERRA and other laws that protect the rights of those who serve in our nation’s military forces and protect the rights that all of us enjoy.

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