

LAW REVIEW 200 - Update

Update, March 2009:

Is Injunctive Relief Available in a USERRA Case?

By CAPT Samuel F. Wright, JAGC, USNR (Ret.)

In Law Review 200 (Oct. 2005), I discussed the implications of *Bedrossian v. Northwestern Memorial Hospital*, 409 F.3d 840 (7th Cir. 2005). Colonel Carlos Bedrossian, a physician and Air Force Reservist, worked for Northwestern Memorial Hospital. The hospital sought to fire him, because of their annoyance with him for his absences from work, necessitated by his Air Force Reserve service. Dr. Bedrossian brought suit in the United States District Court for the Northern District of Illinois, seeking a temporary injunction to prevent the employer from firing him. The District Court declined to enjoin the firing, and the Court of Appeals affirmed.

Under the general rules applicable to emergency injunctive relief, it is necessary to meet a two-part test to obtain such relief. You must show a *likelihood of success on the merits when the case finally goes to trial, as well as irreparable injury* if the emergency injunctive relief is denied. The District Court held, and the Court of Appeals affirmed, that emergency injunctive relief should not be granted to prevent a firing, because the injury is not *irreparable*. The argument goes that the injury from a firing is not irreparable, because if it is eventually held that the firing was unlawful the court can order reinstatement and back pay.

The District Court and Court of Appeals failed to appreciate that the Uniformed Services Employment and Reemployment Rights Act (USERRA) is different from other anti-discrimination laws. Congress enacted this law to address the disincentives to voluntary service in our nation's Armed Forces, especially the Reserve and National Guard. Men and women will not join the Reserve Components, or will not reenlist, if they come to believe that doing so will endanger their civilian jobs, which constitute their principal source of support. Telling the individual, "If your employer fires you, you can sue, and maybe in about four years you will get your job back and some back pay" is not sufficient to address this disincentive to Reserve Component membership.

At the time the Court of Appeals decided *Bedrossian*, section 4323(e) of USERRA read as follows: "The court *may* use its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter." 38 U.S.C. 4323(e) (emphasis supplied). On Oct. 10, 2008, President Bush signed into law the Veterans' Benefits Improvement Act of 2008, Public Law 110-389. Section 315 of this new law amended section 4323(e), changing "may" to "shall." It is clear that the intent of this amendment is to overrule the harmful *Bedrossian* precedent.

The best way to reach Captain Wright is by e-mail, at samwright50@yahoo.com.