LAW REVIEW 200

Is Injunctive Relief Available in a USERRA Case?

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Carlos Bedrossian, M.D., is a colonel in the Air Force Reserve Medical Corps and an ROA Life Member. He has spent a great deal of his own money in a lawsuit against Northwestern University (Feinberg School of Medicine), challenging his dismissal from his faculty position. The recent decision of the United States Court of Appeals for the Seventh Circuit illustrates a deficiency in the Uniformed Services Employment and Reemployment Rights Act (USERRA) that cries out for a legislative fix. I want to make this and other legislative fixes a priority of ROA, because the effective enforcement of USERRA is of critical importance to our members and potential members. More importantly, effectively enforcing USERRA is critical to adequate national defense, and our ROA mission, as set forth in our congressional charter, is to support the development and implementation of policies that will provide adequate national defense.

Congress enacted USERRA in 1994, as a complete rewrite of the Veterans' Reemployment Rights (VRR) law, which can be traced back to 1940. USERRA is codified in Title 38, United States Code, Sections 4301 through 4334 (38 U.S.C. 4301-4334). Congress amended USERRA in 1996, 1998, 2000, and 2004.

The VRR law served the nation reasonably well for 54 years, until Congress enacted USERRA in 1994. Because the VRR law had seen too many piecemeal amendments and had become confusing and cumbersome, the task force identified multiple loopholes and provisions requiring improvement. Susan Webman and I drafted USERRA and its legislative history with a view toward closing the loopholes and making the enforcement of the re-employment statute more than an empty promise. The recent 7th Circuit decision in Colonel Bedrossian's case illustrates one deficiency that we thought we had corrected, but apparently had not.

Section 4323(e) of USERRA, 38 U.S.C. 4323(e), states: "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." Unfortunately, there is no legislative history of this particular subsection—there is only a brief mention in a House committee report that simply restates the provision. (See House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449-2515.) But I recall what I had in mind when I drafted this provision.

Under both the VRR law and USERRA, DOL investigates complaints of violations and refers the investigative files to the Department of Justice (DOJ) if unable to obtain employer compliance, and DOJ files suit against state and local governments and private employers in appropriate cases. (It is also possible, under either law, to file suit directly, with retained private counsel, as Dr. Bedrossian did in this case, unless the employer is a state. See Law Review 89.) I recall, about 20 years ago, while I was employed at DOL, a

case against a local police department in New York State. The complainant was an enlisted Reservist who sought to attend Officer Candidate School (OCS) to earn a commission in the Army Reserve. Of course, OCS is not something that you can complete during a standard two-week annual training tour.

Under the VRR law, there was a long argument in the courts as to whether there was an implied limit or "rule of reason" limiting the duration of an active duty for training period for which a civilian employer was required to grant a leave of absence. The Supreme Court finally ended that argument in 1991, when it decided *King v. St. Vincent's Hospital,* 502 U.S. 215 (1991). *King* clearly establishes that no such "rule of reason" exists. Section 4312(h) of USERRA, 38 U.S.C. 4312(h), expressly codifies the *King* holding in USERRA. [See Law Review 30, which discusses this issue in some detail.]

Our 1985 New York case was several years before the Supreme Court decided *King,* and the "rule of reason" debate was still raging at the time. The Reservist asked his employer, a local police department, for a lengthy military leave, to attend OCS. The employer denied the request and threatened to fire the individual if he were away from work for military training for more than two weeks. The Reservist informed us that he really wanted to attend OCS to earn a commission, but he was unwilling to bet his civilian job on the outcome of a lawsuit after he returned from OCS. He was anxious to attend OCS, but only if the U.S. government could give him some reasonable assurance that doing so would not result in the loss of his civilian job and career. The matter was urgent, because he was nearing the maximum age for commissioning; if he did not attend that particular OCS session he would not have another opportunity.

DOJ took the position that the VRR law did not provide for injunctive relief under circumstances like these. As a result, the suit was not filed. The individual did not attend OCS, and he decided to quit the Army Reserve. I had this situation in mind when I drafted what became Section 4323(e) of USERRA. I had in mind changing the result the next time around; I regret that my effort was not successful.

In an appropriate case, a Federal District Court can, upon application of the plaintiff, *enjoin* the defendant from a course of action that the defendant is about to take. Such a use of the court's equity powers is within the discretion of the court. To obtain injunctive relief, it is generally necessary for the plaintiff to establish two elements: *irreparable* injury and a likelihood of success on the merits (when the case is eventually tried). In employment law cases generally, it is difficult to obtain injunctive relief to stop a firing that the plaintiff claims to be unlawful. The idea is that the injury caused by the firing is not *irreparable* because the plaintiff can obtain, upon winning the case, back pay as a remedy for the unlawful firing. [*See Sampson v. Murray,* 415 U.S. 61 (1974).]

The Seventh Circuit held, "Unless a statute clearly mandates injunctive relief for a particular set of circumstances, the courts are to employ traditional equitable considerations (including irreparable harm) in deciding whether to grant such relief." [*Bedrossian v. Northwestern Memorial Hospital,* 409 F.3d 840 (7th Cir. 2005).] The

court further held that the language of Section 4323(e) was not sufficiently clear to overcome the presumption against injunctions in threatened firing cases.

The Seventh Circuit failed to understand that, as in the case of agreements to arbitrate (Law Review 149), *USERRA is different from all other federal laws that apply to the employment context.* In USERRA, the focus is not only on doing justice for the individual; the focus is on the *defense needs of the nation.* If folks like Colonel Bedrossian and that 1985 Army Reservist I discussed cannot be given a *reasonable assurance* that their jobs will be protected, they will not volunteer. Without such assurance, they will not be available to protect the nation in the National Guard or Reserve. Worse, others who learn of the situation will be dissuaded from enlisting or re-enlisting. It is *not* sufficient to tell these folks, "If you win, probably many years from now, you may receive back pay."

Now more than ever the effective enforcement of USERRA is essential to the nation in this time of war. More than 500,000 National Guard and Reserve personnel have been involuntarily mobilized (some more than once) since September 11, 2001. In accordance with our congressional charter, we (ROA) will be pressing DOL, DOJ, and the Office of Special Counsel (which enforces USERRA against federal agencies) to make USERRA more than an empty promise. And we will be pressing Congress to plug loopholes in the law, starting with rewriting Section 4323(e). I am attaching to this article, on the ROA Web site, a proposed statutory fix and a proposed committee report explaining the purpose and effect of this proposed statutory language.

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

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