LAW REVIEW[1] 20005
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Favorable USERRA Decision by the 8th Circuit—Part 3
The Judicial Estoppel Issue

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About Sam Wright

1.3.1.4—Employer affirmative defenses
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***Scudder v. Dolgencorp, LLC,* 900 F.3d 1000 (8th Cir. 2018).[3]**

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1900 "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 1700 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 43 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.

[3] This is a recent decision of the United States Court of Appeals for the 8th Circuit, the federal appellate court that sits in St. Louis and hears appeals from district courts in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota. As is always the case in the federal appellate courts, the case was heard by a panel of three judges. In this case, the three judges were Steven M. Colloton, Bobby Shepherd, and David R. Stras. Judge Shepherd wrote the decision, and the other two judges joined in a unanimous panel decision.

As I have explained in Law Review 20002 (January 2020), Sergeant Samuel Scudder of the Arkansas Army National Guard had several important decisions to make when he returned wounded from his call-up and deployment to Afghanistan in 2014. One of the decisions that he made was to apply to the Social Security Administration (SSA) for Social Security Disability Income (SSDI), contending that he was permanently and totally disabled as a result of the combat wound that he received in Afghanistan in 2014. That contention, especially after the SSA accepted it, was at least arguably inconsistent with his claim that he was eligible for and entitled to reemployment at Dolgencorp, LLC, the defendant in this lawsuit.

In her decision granting Dolgencorp's motion for summary judgment, Magistrate Judge Beth Deere held:

> While he was still on leave, Mr. Scudder had applied for Social Security Disability Insurance (SSDI) benefits with the Social Security Administration (SSA). On December 6, 2016, a Social Security Administrative Law Judge approved his application for benefits, finding that he became totally disabled on December 10, 2014. Mr. Scudder was awarded SSDI benefits, which he continues to receive.[4]
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> Mr. Scudder's actions also indicate a waiver of his right to reemployment. When he was hired by Dollar General, Mr. Scudder certified that he understood the essential functions of the job he was taking included "[f]requent walking and standing" and "[f]requent and proper lifting of up to 40 pounds; occasional lifting of up to 55 pounds." In responses to discovery requests, Mr. Scudder admitted that, due to injuries he suffered on active duty, he would be unable to lift his hands above his head with ease and it would be painful to do so; he could not stand for significant periods of time; he could not stock top shelves; and he could not pick up anything heavy. (#25-3 at 4)
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> Additionally, at his deposition, Mr. Scudder testified to being treated for PTSD and short-term memory loss. (#32-1 at 16, 18-19) It is reasonable to assume that Mr. Scudder recognized his inability to perform the essential functions of his prior position with Dollar General and chose to resign.
>
> Mr. Scudder now contends that he might possibly qualify for reemployment with Dollar General if it provided him accommodations such as assistance with stocking shelves and allowing him to be seated while he worked for at least half of the day or more. (#25-3 at 4-5, #32 at 3-4, #36 at 1) Mr. Scudder has not provided any evidence from a medical source indicating that he could return to work with the suggested accommodations, and his contention contradicts his application for SSDI benefits, where he reported that he had been unable to work since December 10, 2014. (#25-2 at 4, 12)

[4] *Scudder v. Dolgencorp, LLC,* 2017 U.S. Dist. LEXIS 13200 (E.D. Ark. Aug. 18, 2017).

> Moreover, setting aside the issue of accommodations for his physical limitations, there is no way to reconcile his contention that he could be reemployed with the ALJ's finding that he could not "sustain concentration, persistence of pace on a routine, continuous basis to complete the required tasks of a job in an eight-hour workday, 40 hour workweek." (#25-2 at 23)
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> The ALJ concluded that Mr. Scudder was unable to work due to his severe impairments (#25-2 at 21-26), and Mr. Scudder's application for SSDI benefits and his statements to the ALJ regarding his inability to work are consistent with his resignation from Dollar General. See *Brown v. Con-way Freight, Inc.*, 2016 U.S. Dist. LEXIS 28420, 2016 WL 861210, at *6-7 (N.D. Ill 2016)(holding that serviceman was judicially and equitably estopped from pursuing his claim for reemployment under USERRA, because he could not legally represent that he was permanently injured and at the same time say his injury was temporary in order gain another benefit).[5]

Magistrate Judge Deere granted the defendant's summary judgment motion based on the judicial estoppel theory and on the finding that there was no material issue of fact on the issue of Scudder having made a timely and proper application for reemployment. Scudder appealed to the United States Court of Appeals for the 8th Circuit, which reversed the summary judgment for Dolgencorp on both issues. Regarding the judicial estoppel issue, the 8th Circuit panel held:

> Finally, we turn to Dollar General's assertion that Scudder's USERRA claim is barred by judicial estoppel. In order to receive SSD benefits, Scudder told the SSA he was unable to work in any capacity since December 10, 2014, but here Scudder claims a right to work at Dollar General. He cannot have it both ways, Dollar General argues.
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> The doctrine of judicial estoppel prevents a party who "assumes a certain position in a legal proceeding, and succeeds in maintaining that position," from later "assum[ing] a contrary position." New Hampshire v. Maine, 532 U.S. 742, 749, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001) (internal quotation marks omitted). That is because, "'absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory.'" Id. (quoting 18 Charles Alan Wright, Arthur Edward Miller, & Edward H. Cooper, Federal Practice and Procedure § 4477, p. 782 (1981)). In determining whether judicial estoppel applies, we consider the following factors: (1) whether "a party's later position [is] clearly inconsistent with its earlier position," (2) "whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled," and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on

[5] Id.

the opposing party if not estopped." New Hampshire, 532 U.S. at 750-51 (internal quotation marks omitted).

When applying for SSD benefits in December 2015, Scudder told the SSA he "became unable to work because of [a] disabling condition on December 10, 2014" and was still disabled. The SSA denied his application, and Scudder requested reconsideration in May 2016, again asserting he was "unable to work because of [a] medical condition." This too was denied. In August 2016—two months after he filed his USERRA claim—Scudder again told an ALJ he was "unable to work because of [his] medical condition." The ALJ found Scudder had been disabled and unable to work since December 10, 2014 and awarded Scudder SSD benefits, which he continues to receive.

At first glance, Scudder's statements to the SSA might appear to be "clearly inconsistent" with his position in the present litigation. Scudder simultaneously told the SSA he was unable to work while asserting his right to be rehired by Dollar General. However, successful application for SSD benefits is not necessarily inconsistent with a later claim asserting a right to employment. See Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 797, 119 S. Ct. 1597, 143 L. Ed. 2d 966 (1999) (holding "pursuit, and receipt, of SSD benefits does not automatically estop the recipient from pursuing an [American with Disabilities Act] claim"). That is because the Social Security Act does not take into account "reasonable accommodation" in determining whether an individual is disabled. Id. at 803. Thus, an individual could be "disabled" under the Social Security Act, but still able to work with reasonable accommodation. Id. Under USERRA, an employer must make "reasonable efforts . . . to qualify" a returning service member for employment, which includes making "reasonable efforts . . . to accommodate . . . a disability incurred in, or aggravated during, such service." 38 U.S.C. § 4313(a). Accordingly, a service member who is considered "disabled" under the Social Security Act could still be qualified for work and therefore entitled to reemployment under USERRA. Cf. Cleveland, 526 U.S. at 803.

Scudder claims he is able to work for Dollar General with [6]reasonable accommodation. And, under USERRA, the burden rests on Dollar General to make "reasonable efforts . . . to qualify" Scudder for his prior position or "a position of like seniority, status, and pay." 38 U.S.C. § 4313(a)(2)(B); see Petty v. Nashville-Davidson Cnty., 538 F.3d 431, 444 (6th Cir. 2008) ("An employer who refuses to reemploy a discharged veteran who has timely applied for reemployment has the burden of proving the veteran's disqualification for reemployment." (internal quotation marks omitted)). Dollar General has not done so. See 20 C.F.R. § 1002.198(b) ("Only after the employer makes reasonable efforts . . . may it determine that the employee is not qualified for the reemployment position."). We therefore find judicial estoppel does not bar Scudder's USERRA claim.[7]

[7] *Scudder,* 900 F.3d at 1006-07.

The 8th Circuit panel reversed the summary judgment for Dolgencorp on the judicial estoppel issue. The panel did not grant Scudder's motion for summary judgment on that issue. On remand, the issue of judicial estoppel would have been litigated, but the parties settled and brought the case to an end.

Q: In Law Review 15060 (July 2015), you wrote:

> **You need to be very careful about asserting inconsistent claims because of the equitable doctrine of estoppel. The *Oxford Dictionary of Law* defines estoppel as follows: "A rule of law or a rule of evidence that prevents a person from denying the truth of a statement he has made or from denying the existence of facts he has alleged to exist."**
>
> **For example, there could be an estoppel problem if you tell the SSA [Social Security Administration] that you are permanently and totally disabled while at the same time telling DOL-VETS [the Veterans' Employment and Training Service of the United States Department of Labor] that you are ready, willing, and able to return to work. You need a lawyer to assist you in sorting out your situation and determining which claims you will make and which you will defer. Of course, this assessment may change as your physical condition improves or deteriorates.**

After *Scudder,* do you adhere to what you wrote 4.5 years ago?

A: I acknowledge that *Scudder* is certainly relevant, but I adhere to the advice that you need to be very careful about asserting inconsistent claims.

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