See You In Court- or Not… A Review of USERRA Consent Decrees and Case Law

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Context: USERRA enacted in 1994

- There are <u>many</u> instances of possible USERRA violations, but only a relative few are litigated.
- Many of the cases that are litigated result in Consent Decrees with no precedential value.
- Consent Decrees essentially act as binding, and public, settlement agreements.
- Seem to be somewhat of a "shot across the bow" for other employers.

I. Examples of recent Consent Decrees

- Many run-of-the-mill terminations/ reemployment denials.
- Some ugly facts apparent from decrees:
  - Demotion of service member after announcement of pending military deployment.
  - **Admission** of the following: termination of service member within one day of receipt of email notice of absence due to military obligation.
- Some examples of small companies that may not have been aware of USERRA/implications, because of obvious lack of awareness of basic issues related to USERRA, and/or very clumsy handling of these issues.
- Also typical: failure to reemploy or "properly reemploy" (may be reference to elevator provision) upon return.

- Most cases result in some (usually modest) monetary compensation to the plaintiff.
- Some Consent Decrees have very fact-specific provisions and language. For instance:
  - Assistant principal in Warren County, NC received back pay, back retirement contributions, revisions to his personnel file, AND reemployment as lead teacher/ site supervisor with specified salary and acknowledged protections under NC law.
  - Warren County agreed both to comply with USERRA and not to retaliate based on this case.

- DOJ lawsuit against Forsyth County and Sheriff of Forsyth County.
- DOJ issued press release upon filing suit.
- Complaint alleged that <u>less than one year</u> after plaintiff returned from tour of duty in Iraq with NCNG, sheriff fired him <u>without cause</u>.
- Complaint alleged that plaintiff was fired because of (false) belief that he had supported another candidate for county sheriff.
- Result: payment of $96,000.00 & specified neutral reference. Very detailed decree.

You can do it… but you're fired!

- *Bailey v. Home Depot* - filed April 5, 2012; resolved May 23, 2012 via consent decree.
- Plaintiff was supervisor at Home Depot who also served in California Army National Guard.
- Allegation was that he was demoted/ fired after his repeated absences due to military service.
- Result: $45,000.00 and neutral reference.
- Decree included some interesting language.

And then the VERY bizarre: U.S.A. v. Missouri

- USERRA lawsuit against the State of Missouri as well as the Missouri National Guard and its top official, in his official capacity.
- Allegation: MNG required civilian employees to separate from the MNG, instead of placing them on leave of absence while they fulfilled their military duty, thus depriving them of their statutory entitlement to fifteen days of paid military leave per year.
- "Defendants deny that they violated USERRA and maintain that the policy was implemented with a good faith belief that it complied with USERRA."
- Resolution involved injunctive relief and extra time off.

II. Sampling of interesting case law

- *Leisek v. Brightwood Corp.*, 278 F.3d 895 (9th Cir. 2002).
- Oregon National Guard member operated a hot-air balloon with ONG logo and traveled to events 1995-1996.
- Discussed USERRA "motivating factor" in contrast to "sole cause standard" in VEVRAA of 1974.
- Issues of fact precluded summary judgment on termination claim and affirmative defense re: motivation.
- Affirmed summary judgment on reemployment claim, because plaintiff attended event without orders to do so.

- *Hill v. Michelin North America, Inc.*, 252 F.3d 307 (4th Cir. 2001) (from District of South Carolina).
- Naval Reserve member claimed transfer and then discharge motivated by status; employer claimed plaintiff was discharged for falsifying timecard. District Court granted employer summary judgment.
- Also discussed USERRA / VEVRAA differences.
- Summary judgment reversed as to claim based on transfer. Although positions paid the same, transfer to dirty and unpleasant environment may constitute denial of benefits.
- Summary judgment affirmed as to claim based on termination. Record showed rationale for such was not based on military status or service.

- The Supremes weigh in: *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 562 U.S. 411 (2011).
- Focused on construing the "motivating factor in the employer's action" language.
- Negative entry on personnel record placed by two agents of employer with (anti-military) "discriminatory animus," although those agents did not intend to cause termination.
- Court rejected argument that *de facto* decision-maker must act with such animus, and rather adopted the so-called "cat's paw" doctrine.

Supreme Court holding:

- "We therefore hold that if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA."

Other interesting tidbits

- Remanded to 7th Circuit to determine if new trial was necessary (answer: yes).
- The attorney's fees assessed were over $120,000.00, plus costs, whereas the actual damages were stipulated as less than $60,000.00.
- May place Consent Decrees (as well as myriad other private resolutions) in context.

Other lessons from recent USERRA cases

- Despite possible pro-plaintiff nature of statute, cases without merit will be shot down.
- Still, slim issues of fact may be enough for plaintiffs to create jury issues.
- A plaintiff can win summary judgment on liability issues if there is good evidence.
- While there is a "constructive discharge" claim under USERRA, it is a difficult one.
- USERRA claims may be intertwined with other employment-related claims.