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Federal Employees Are Protected from the Descending Escalator

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Crawford v. Department of the Army, 718 F.3d 1361 (Fed. Cir. 2013).

1.1.1.8—USERRA applies to Federal Government
1.3.1.2—Character and duration of service
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Federal Government as model employer

The first section of the Uniformed Services Employment and Reemployment Rights Act (USERRA) provides: "It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter." Title 38, United States Code, section 4301(b) [38 U.S.C. 4301(b)]. The underlying premise is very sound. If the Federal Government, through USERRA, is requiring state and local governments and private employers to make accommodations for the brave young men and women who interrupt their civilian careers to serve our country in uniform, the Federal Government must do at least as much for its own employees.

"Do as I say and not as I do" has always been a losing argument. In the immortal words of Jesus Christ: "And why beholdest thou the mote that is in thy brother's eye but considerest not the beam that is in thine own eye?" *Matthew 7:7 (King James Bible).*

In several important respects, the Federal Government, as an employer, is doing more for its own employees than USERRA requires of employers generally. The *Crawford* case is a good illustration of one of these ways.

Relationship between USERRA and other laws/policies

USERRA's second section explains the relationship between USERRA and other laws, practices, agreements, or other matters:

"(a) Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.

(b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of

additional prerequisites to the exercise of any such right or the receipt of any such benefit." 38 U.S.C. 4302. Under this section, USERRA is a floor and not a ceiling on the rights of veterans, reservists, and National Guard members.

Facts of the *Crawford* case

Darrel T. Crawford began his career with the Army Corps of Engineers (ACE) in 1986. In 2006, he worked at the ACE's New York District Information Office as an Information Technology (IT) Specialist, GS-2210-11. Mr. Crawford was called to active duty for two years, from April 2006 until April 2008. He met the USERRA eligibility criteria for reemployment in that he left his civilian job for the purpose of performing uniformed service and he gave the employer prior oral or written notice. He was released from active duty without having received a disqualifying bad discharge from the military and without having exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which he sought reemployment.[1] After release from service in April 2008, he made a timely application for reemployment with ACE.[2]

In June 2006, while Mr. Crawford was on active duty, the ACE transferred certain information management/information technology (IM/IT) to Lockheed Martin Corporation (LMC), a federal contractor. At the same time that the ACE contracted out certain IM/IT functions to Lockheed Martin, the agency also formed a new organization called Army Corps of Engineers-Information Technology (ACE-IT). The mission of ACE-IT is to provide IM/IT services to all ACE offices in the United States. In April 2007, still while Mr. Crawford was on active duty, recruitment began for the new positions created within ACE-IT. Some ACE employees who had been affected by the contracting out to Lockheed Martin were hired by ACE-IT through a competitive selection process. Those ACE employees who had been displaced by the contracting out and who had not been selected for the new ACE-IT organization were transferred, with their consent, to non-IM/IT positions in the ACE New York District.

The escalator principle as applied to Mr. Crawford

As is so often the case in USERRA cases, the "big question" in the *Crawford* case was: What position was Mr. Crawford entitled to upon reemployment? The position that he had held before he was called to the colors no longer existed. If Mr. Crawford had not been on active duty from April 2006 until April 2008, he clearly would have lost the position that he had been holding, but he would not have lost his ACE employment. Mr. Crawford's colleagues in IT work were adversely affected by the June 2006 decision to contract out the IT function to Lockheed Martin, but they did not lose their employment. Some of them had to learn other skills and to pick up jobs outside the IT field.

Under section 4313(a)(2)(A) of USERRA, a returning veteran who meets the USERRA eligibility criteria is entitled to be reemployed "in the position of employment in which the person *would have been employed* if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform." 38 U.S.C. 4313(a)(2)(A) (emphasis supplied).

USERRA regulations by DOL and OPM

Section 4331 of USERRA provides for the Secretary of Labor, the Director of the Office of Personnel Management (OPM), the Merit Systems Protection Board (MSPB), the Office of Special Counsel (OSC), and the intelligence agencies enumerated in 5 U.S.C. 2302(a)(2)(C)(ii) to promulgate regulations about USERRA. Section 4331 in its entirety reads as follows:

"(a)The Secretary [of Labor] (in consultation with the Secretary of Defense) may prescribe regulations implementing the provisions of this chapter with regard to the application of this chapter to States, local governments, and private employers.

(b)

(1)The Director of the Office of Personnel Management (in consultation with the Secretary and the Secretary of Defense) may prescribe regulations implementing the provisions of this chapter with regard to the application of this chapter to Federal executive agencies (other than the agencies referred to in paragraph (2)) as employers. Such regulations shall be consistent with the regulations pertaining to the States as employers and private employers, except that employees of the Federal Government may be given greater or additional rights.

(2)The following entities may prescribe regulations to carry out the activities of such entities under this chapter:

(A)The Merit Systems Protection Board.

(B)The Office of Special Counsel.

(C)The agencies referred to in section 2302(a)(2)(C)(ii) of title 5."

38 U.S.C. 4331.

Section 4331(a) of USERRA [38 U.S.C. 4331(a)] gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL published proposed USERRA regulations, for notice and comment, in September 2004. After considering the comments received, DOL made some adjustments and published the final regulations in December 2005. The regulations are published in title 20 of the Code of Federal Regulations, Part 1002 (20 C.F.R. Part 1002). Here is the pertinent subsection:

"Can the application of the escalator principle result in adverse consequences when the employee is reemployed?

Yes. The Act does not prohibit lawful adverse job consequences that result from the employee's restoration on the seniority ladder. Depending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated. For example, if an employee's seniority or job classification would have resulted in the employee being laid off during the period of service, and the layoff continued after the date of reemployment, reemployment would reinstate the employee to layoff status. Similarly, the status of the reemployment position requires the employer to assess what would have happened to such factors as the employee's opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he or she had remained continuously employed.

The reemployment position may involve transfer to another shift or location, more or less strenuous working conditions, or changed opportunities for advancement, depending upon the application of the escalator principle."

20 C.F.R. 1002.194 (bold question in original).

But the DOL USERRA Regulations apply to state and local governments and private employers, not to federal executive agencies like the ACE. The OPM USERRA Regulations provide as follows on this point:

"(a) During uniformed service. An employee may not be demoted or separated (other than military separation) while performing duty with the uniformed services except for cause. (Reduction in force is not considered 'for cause' under this subpart.) He or she is not a 'competing employee' under § 351.404 of this chapter. If the employee's position is abolished during such absence, the agency must reassign the employee to another position of like status, and pay."

5 C.F.R. 353.209(a) (bold heading in original).

The clear purpose and effect of section 353.209(a) is to exempt the returning veteran (like Mr. Crawford) from the ill effects of the descending escalator. If he had worked for a state or local government or private employer, Mr. Crawford would not be exempted from being reemployed (after his military service) in a position of lesser status and pay than the position he left in April 2006, when he was called to the colors.

USERRA enforcement by Mr. Crawford

When Mr. Crawford was released from active duty and applied for reemployment with the ACE, the ACE briefly returned him to an IT Specialist position. But in June 2008 the ACE reassigned him to the position of Program Support Specialist, which was not an IT position. Mr. Crawford instituted an enforcement action against the ACE in the MSPB.

Section 4324 of USERRA provides the enforcement mechanism with respect to federal agencies as employers. That section reads, in its entirety, as follows:

"(a)

(1)A person who receives from the Secretary a notification pursuant to section 4322(e) may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board. Not later than 60 days after the date the Secretary receives such a request, the Secretary shall refer the complaint to the Office of Special Counsel established by section 1211 of title 5.

(2)

(A)If the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred under paragraph (1) is entitled to the rights or benefits sought, the Special Counsel (upon the request of the person submitting the complaint) may appear on behalf of, and act as attorney for, the person and initiate an action regarding such complaint before the Merit Systems Protection Board.

(B)Not later than 60 days after the date the Special Counsel receives a referral under paragraph (1), the Special Counsel shall—

(i)make a decision whether to represent a person before the Merit Systems Protection Board under subparagraph (A); and

(ii)notify such person in writing of such decision.

(b)A person may submit a complaint against a Federal executive agency or the Office of Personnel Management under this subchapter directly to the Merit Systems Protection Board if that person—

(1)has chosen not to apply to the Secretary for assistance under section 4322(a);

(2)has received a notification from the Secretary under section 4322(e);

(3)has chosen not to be represented before the Board by the Special Counsel pursuant to subsection (a)(2)(A); or

(4)has received a notification of a decision from the Special Counsel under subsection (a)(2)(B) declining to initiate an action and represent the person before the Merit Systems Protection Board.

(c)

(1)The Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to subsection (a)(2)(A) or (b), without regard as to whether the complaint accrued before, on, or after October 13, 1994. A person who seeks a hearing or adjudication by submitting such a complaint under this paragraph may be represented at such hearing or adjudication in accordance with the rules of the Board.

(2)If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.

(3)Any compensation received by a person pursuant to an order under paragraph (2) shall be in addition to any other right or benefit provided for by this chapter and shall not diminish any such right or benefit.

(4)If the Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that such person is entitled to an order referred to in paragraph (2), the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.

(d)

(1)A person adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board under subsection (c) may petition the United States Court of Appeals for the Federal Circuit to review the final order or decision. Such petition and review shall be in accordance with the procedures set forth in section 7703 of title 5.

(2)Such person may be represented in the Federal Circuit proceeding by the Special Counsel unless the person was not represented by the Special Counsel before the Merit Systems Protection Board regarding such order or decision."

38 U.S.C. 4324.

Mr. Crawford could have made a formal complaint against the ACE with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), but he chose not to do so. Thus, in accordance with section 4324(b)(1) he was free to bring his case directly in the MSPB, through private counsel of his own choosing. Mr. Crawford was well represented by attorneys Steve Herrick, Corinna Ferrini, and Matthew D. Estes of the law firm Tully Rinckey PLLC.[3]

The MSPB is a quasi-judicial federal agency, created by the Civil Service Reform Act of 1978. USERRA, enacted in 1994, gave the MSPB important new responsibilities. MSPB cases go to an Administrative Judge (AJ) of the MSPB, who conducts a trial and reaches findings of fact and conclusions of law. The losing party can appeal to the MSPB itself, which sits here in Washington. The MSPB has three Members, each of whom is appointed by the President with Senate confirmation. The MSPB's decision can be appealed to the United States Court of Appeals for the Federal Circuit, a specialized federal appellate court that sits here in Washington.

In this case, the MSPB AJ agreed that the Program Support Specialist in which Mr. Crawford was reemployed after he was released from active duty in April 2008 was not of "like status" to the position that he had held at the time that he was called to the colors in April 2006. Neither party appealed from the AJ's orders, and they became final on March 31, 2010.

The ACE then searched for a suitable position for Mr. Crawford but claimed that the ACE only looked at *vacant* positions, while the employer was required to look at *all ACE positions,* including those currently held that other employees. In a case decided by the Federal Circuit 20 years ago, the appellate court held:

"The department [Department of Veterans Affairs, employer in the case] first argues that, in this case, Nichols' [the returning veteran and the plaintiff] former position was 'unavailable' because it was occupied by another, and thus it was within the department's discretion to place Nichols in an equivalent position. This is incorrect. Nichols' former position is not unavailable because it still exists, even if occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. … Although occupied by Walsh, Nichols' former position is not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him." *Nichols v. Department of Veterans Affairs,* 11 F.3d 160, 163 (Fed. Cir. 1993).

Mr. Crawford is undoubtedly correct that the ACE should have reviewed occupied as well as vacant ACE positions in looking for an appropriate position for Mr. Crawford, but that issue is apparently moot because the MSPB (the Board itself, here in Washington) found that Mr.

Crawford's post-service position was essentially equivalent to his pre-service position. Mr. Crawford appealed to the Federal Circuit, which affirmed the MSPB.

This important case is probably over, but we will keep the readers informed if there are further developments.

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[1] As is explained in Law Review 201 (October 2005), all involuntary service and some voluntary service are exempted from the computation of the five-year limit. I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 907 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012, and we have added another 85 so far in 2013.

[2] After a period of service of 181 days or more, the returning veteran has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service. For more information about the USERRA eligibility criteria, please see Law Review 1281.

[3] By way of full disclosure, I should mention that I was a partner at Tully Rinckey before I retired from private practice and joined ROA's full-time staff, as the first Director of the Service Members Law Center, on June 1, 2009.