LAW REVIEW 15025[1]

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The Clean Hands Doctrine Applies in Reemployment Cases

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1.1.1.7—USERRA applies to state and local governments
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***Hilliard v. New Jersey Army National Guard,* 527 F. Supp. 405 (D.N.J. 1981).[3]**

As I have explained in Law Review 104 and other articles, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA)[4] and President Bill Clinton signed it into law on October 13, 1994. We recently commemorated the 20th anniversary of USERRA, but this law is really almost 75 years old. USERRA was a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act, the law that led to the drafting of millions of young men (including my late father) for World War II.

Although *Hilliard* was decided 34 years ago, and 13 years before the enactment of USERRA, I have decided that the case is worthy of mention in our "Law Review" series because it is prominently mentioned in USERRA's 1994 legislative history, as follows:

> Section 4312(i) [later renumbered 4312(h)] is a codification and amplification of the Supreme Court's ruling in *King v. St. Vincent Hospital,* 112 S. Ct. 570 (1991), which held that there was no limit as to how long a National Guardsman could serve on active duty for training and still have reemployment rights under the former section 2024(d) of title 38. This new section makes clear the Committee's [House Committee on Veterans'

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[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1,300 "Law Review" articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997, and we add new articles each week.

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[3] The citation means this case can be found in Volume 527 of *Federal Supplement,* the books that publish decisions of federal district courts, and the case starts on page 405. This is a decision of the United States District Court for the District of New Jersey in 1981.

[4] Public Law 103-353.

> Affairs] intent that no "reasonableness" test be applied to determine reemployment rights and that this section prohibits consideration of timing, frequency, or duration of service so long as it does not exceed the cumulative limitations under section 4312(c) and the servicemember has complied with the requirements under sections 4312(a) and (e).
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> The Committee believes, however, that instances of blatant abuse of military orders should be brought to the attention of the appropriate military authorities (*see Hilliard v. New Jersey Army National Guard,* 527 F. Supp. 405, 411-412 (D. N.J. 1981)), and that voluntary efforts to work out acceptable alternatives could be attempted. However, there is no obligation on the part of the servicemember to rearrange or postpone already-scheduled military service nor is there any obligation to accede to an employer's desire that such service be planned for the employer's convenience. Good employer-employee relations dictate, however, that voluntary accommodations be attempted by both parties when appropriate.

House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2463.

This excerpt from USERRA's 1994 legislative history makes it sound like *Hilliard* was a "rule of reason" case.[5] In fact, *Hilliard* is a case about the "clean hands doctrine" as applied to the VRRA.

The *Oxford Dictionary of Law* defines the "clean hands doctrine" as follows: "A phrase from a maxim of equity: he who comes to [a court of] equity must come with clean hands; i.e., a person who makes a claim in equity must be free from any taint of fraud with respect to that claim. For example, a person seeking to enforce an agreement must not himself be in breach of it."

Gary Hilliard was hired by the Township of Teaneck (New Jersey) as a police officer in February 1974. In 1977, he joined the New Jersey Army National Guard as an enlisted member. When Hilliard began his police department career in February 1974, the VRRA did not apply to state and local governments. The VRRA has applied to the Federal Government and to private employers since 1940. It did not apply to state and local governments until December 2, 1974, when Congress enacted the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA).

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[5] As is explained in Law Review 15015 (February 2015) and other articles, the VRRA had a four-year limit on the cumulative duration of an individual's active duty periods, relating to a specific civilian employer. USERRA increased the limit to five years. Under the VRRA, only *active duty* (not active duty for training or inactive duty training) counted toward exhausting an individual's four-year limit. There was a 20-year argument in the courts as to whether a "rule of reason" applied to limit the duration of an individual's active duty for training period or the cumulative duration of an individual's absence from a specific civilian job for active duty for training. In 1991, the Supreme Court ended that argument when it held definitively and unanimously that no "rule of reason" limits the duration of permissible absences from civilian employment for active duty for training. *King v. St. Vincent's Hospital,* 502 U.S. 215 (1991). Section 4312(h) of USERRA and the quoted two paragraphs from USERRA's legislative history make abundantly clear that no such "rule of reason" applies under USERRA.

During the 1970s, the policy of the New Jersey Department of Defense (including the Army and Air National Guard of New Jersey) was that the individual National Guard member was required to request and obtain permission from his or her civilian employer (if a public employer, like a city or township) before applying to the National Guard for orders. On many occasions during the mid to late 1970s, Hilliard asked the police department for permission to apply for National Guard orders, including orders to attend Officer Candidate School with a view toward becoming a commissioned officer, and on each occasion the police chief denied his request.

Hilliard was frustrated with the police chief for denying his many requests for military leave and with the National Guard for its policy of giving the civilian employer a veto on National Guard orders, and he came up with a "solution" that was "too clever by half." He formed the American Scene Corporation (ASC) and named himself as the sole incorporator, stockholder, and owner. He then applied for a long National Guard training course at Fort Belvoir, Virginia. Not realizing that Hilliard still worked for the Teaneck Police Department, the National Guard issued Hilliard orders for full-time Army training, starting on May 13, 1979 and ending on August 22.

Hilliard received the Army orders on April 4, but he waited to notify the police department. He notified the department by mail, received on May 10, and he reported to Fort Belvoir as ordered on May 13.

On May 15, the police chief wrote to Major General Wilford Menard, Jr., the Chief of Staff of the New Jersey Department of Defense, to inquire as to why the police department was not contacted for permission with regard to Hilliard's long period of military training.
In response, General Menard stated that Hilliard's orders had been approved on the basis of an application that did not list the police department as his employer.

Taking the position that Hilliard was absent without leave from the police department, the chief wrote to him on May 31, ordering him to return to his job or face dismissal from the police department and asking him to resign from the police department. Hilliard responded by letter dated June 8, stating that he intended to return to the police department on August 23, 1979, at the end of his Fort Belvoir training course.

While at Fort Belvoir, Hilliard was recruited for a two-year active duty assignment with the Army Corps of Engineers. In accordance with standard policy and practice, he needed a "conditional release" from the Army National Guard of his state in order to accept active duty orders in the Regular Army. The New Jersey Army National Guard decided to give Hilliard "the opportunity to correct his employment misrepresentation on his February 1979 application" for the Fort Belvoir training orders by "effectuating a retroactive resignation from the Teaneck Police Department."

The National Guard made that retroactive resignation a precondition to approval of his two-year active duty tour with the Army Corps of Engineers. Faced with that choice, Hilliard

resigned in writing from the police department. At the time he brought this lawsuit, Hilliard was on active duty with the Army Corps of Engineers.

Hilliard sued the New Jersey Army National Guard, Major General Wilfred C. Menard, Jr., and Brigadier General Peter Amodio, as well as the Township of Teaneck and three Teaneck officials: Werner Schmid, Joseph Kilmurray, and Brian Burke. His lawsuit against the National Guard and its leaders was clearly without merit.

Like USERRA, the VRRA governs the relationship between an individual service member and his or her civilian employer (federal, state, local, or private sector). *If* the individual has orders for a period of voluntary or involuntary uniformed service, the VRRA and now USERRA give the individual the job-protected right to be absent from his or her civilian job in order to perform that uniformed service.

The VRRA and USERRA do not govern the relationship between the individual National Guard member (like Hilliard) and the National Guard and its leaders. I think that it is a foolish policy for the leadership of the National Guard of a state to give civilian employers a veto on military orders, but my opinion of the wisdom of the policy is not relevant in determining the lawfulness of the policy. The VRRA and USERRA do not apply to a dispute between an individual National Guard member and the National Guard leadership.

As I explained in Law Review 63 (January-February 2003), a *resignation* from a civilian job, for the purpose of performing uniformed service, does not ordinarily amount to a waiver of the right to reemployment. If the individual meets the five conditions for reemployment,[6] he or she is entitled to reemployment, without regard to what the individual may have said or done before or during the period of service. But I do not disagree with the court's conclusion that in the unusual facts of this case Hilliard's resignation waives his right to reemployment.

The VRRA and USERRA do not require the civilian employer to pay the person for an hour, day, week, month, or year that the person is away from work for uniformed service, but Hilliard was entitled to *paid military leave* under New Jersey law for the period of the Fort Belvoir training. The court held, correctly in my view, that the "clean hands doctrine" precluded the court from ordering the township to pay Hilliard for this leave. The court held:

> It was Gary Hilliard's fraud and deceit which precipitated the controversy in issue. While it is apparent that the Teaneck Police Department's refusal to grant plaintiff's leave request was the cause of the plaintiff's blatant misrepresentation on his February 1979 leave application to the [National Guard], the fact that he chose to take matters into his own hands instead of seeking administrative or judicial relief undercuts his claim.

[6] The individual must have left a civilian job for the purpose of performing uniformed service and must have given the employer prior oral or written notice. Phrasing the notice as a "resignation" is not fatal to the right to reemployment, provided the individual makes a timely application for reemployment after release from the period of service, and also provided that the individual has not exceeded the cumulative five-year limit and has not been disqualified by having received a bad discharge from the military.

> Plaintiff simply has not displayed that standard of conduct requisite to the maintenance of this suit in equity.

Hilliard, 527 F. Supp. at 412.

National Guard and Reserve members: Please check with me before you implement hare-brained "solutions" like that devised by Hilliard. As the Director of the Service Members Law Center (SMLC), I am here at my post (at ROA headquarters) answering calls and e-mails during regular business hours Monday-Friday and until 10 pm Eastern on Mondays and Thursdays. You can reach me by telephone at (800) 809-9448, ext. 730. My e-mail is SWright@roa.org.

I am here late two evenings per week so that Reserve and National Guard members will be able to call me or e-mail me from the privacy of their own homes, not from their civilian jobs.