LAW REVIEW 15029[1]

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Judge Bucklo Gets it Wrong on USERRA

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.3.2.9—Accommodations for disabled veterans

***Brown v. Con-Way Freight, Inc.,* 891 F. Supp. 2d 912 (N.D. Ill. 2012).[3]**

In 1987, Dale Brown began working for Con-Way Freight, Inc. Con-Way is a nationwide trucking company. Brown worked for Con-Way as a Driver Sales Representative (DSR). That job requires that the employee frequently lift up to 50 pounds and occasionally 75 pounds or more. A DSR is also required to "position and connect/disconnect a converter dolly with an average weight/pull force of approximately 128 pounds."

Brown was a member of the Navy Reserve and took several military leaves of absence from his job at Con-Way. In January 2006, Brown was called to active duty for an expected duration of one year. In September 2006, Brown suffered a serious shoulder injury in a truck accident during a mission in Iraq. His active duty period was extended for medical treatment and rehabilitation. He was finally released from active duty in late 2008, and he met the five conditions for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA).[4]

Because Brown met the five USERRA conditions in late 2008, the employer was required to reemploy him "in the position of employment in which the person [Brown] *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."[5]

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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] This is a decision by Judge Elaine E. Bucklo of the United States District Court for the Northern District of Illinois. The citation means that you can find this decision in Volume 891 of *Federal Supplement Second Series,* starting on page 912.

[4] Brown left his civilian job for the purpose of performing uniformed service and gave prior notice to the employer. He did not exceed USERRA's cumulative five-year limit on the duration of the period or periods of uniformed service, and since he was called to active duty involuntarily his 2006-08 period of service did not count toward his five-year limit with respect to Con-Way. Please see Law Review 201. He was released from active duty without having received a disqualifying bad discharge from the Navy. After release, he made a timely application for reemployment at Con-Way. Please see Law Review 1281 for a detailed discussion of the USERRA eligibility criteria.

[5] 38 U.S.C. 4313(a)(2)(A) (emphasis supplied).

Brown never fully recovered from the injury he suffered in the Iraq truck accident, and his disability is likely to be permanent. In February 2008, Brown underwent a functional capacity evaluation conducted by a military physician, who concluded that Brown should not lift more than 40 pounds to chest level or more than 20 pounds overhead and that Brown should avoid work that involves sudden or forceful torquing of his shoulders.

It is clear that Brown met the USERRA conditions, that he was entitled to reemployment, and that he returned to the civilian workforce with a disability incurred during his period of uniformed service. Accordingly, Brown had rights under section 4313(a)(3) of USERRA, which provides:

"(3) In the case of a person who has a disability incurred in, or aggravated during, such service, and who (after reasonable efforts by the employer to accommodate the disability) is not qualified due to such disability to be employed 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--

(A) in any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer; or

(B) if not employed under subparagraph (A), in a position which is the nearest approximation to a position referred to in subparagraph (A) in terms of seniority, status, and pay consistent with circumstances of such person's case."[6]

Brown was reemployed by Con-Way after he returned from active duty, but in a position that paid substantially less than the DSR position that he had held prior to going on active duty.[7] The issue in this case is whether the position that Con-Way provided for Brown was sufficient under USERRA, or whether Brown was entitled to a position that was equivalent to the DSR position that he held before he was called to active duty, or at least to a position that came closer to the DSR position than the position that Con-Way provided him.

Con-Way made an effort to find Brown a suitable position that he could perform, despite his physical limitations resulting from the truck accident in Iraq, but Con-Way only looked for positions *that were currently vacant.* I believe that Con-Way violated USERRA by limiting its search to vacant positions. I believe that Brown was entitled to be reemployed in a suitable position for which he was qualified, or could become qualified with reasonable employer efforts, *even if that meant bumping another employee.* I believe that Judge Bucklo erred by failing to understand the breadth of Brown's USERRA rights.

I invite the reader's attention to our Law Review 0640 (December 2006). This is a most scholarly article about the employer's USERRA and Americans with Disabilities Act (ADA) obligations to the returning disabled veteran, an article by attorneys Lisa C. Cassilly and Matthew J. Gilligan of the

[6] 38 U.S.C. 4313(a)(3).

[7] If Brown had not been called to the colors in 2006, there is every reason to believe that he would have continued to hold the DSR position.

law firm Alston & Bird. I invite the reader's attention specifically to these two paragraphs in the Cassilly-Gilligan article:

"May a Disabled Veteran "Bump" Another Employee Out of a Job?

What does an employer do if the only appropriate job for which the returning veteran qualifies is currently occupied by another employee? For example, Employee X was a forklift driver in a manufacturing facility before being called up with his National Guard unit to serve in Iraq. X loses a leg when his vehicle is struck by a roadside bomb. He returns to his employer, but can no longer drive a forklift. Despite the employer's reasonable efforts to accommodate him, X can only qualify for a clerk position in the front office—a position currently occupied by Z, an employee with seniority greater than X.

Quite different from what the ADA would require, USERRA contemplates that the employer may need to "bump" Z to accommodate the returning veteran. Here, Z's job is the only appropriate job for which the veteran can qualify. The DOL's recently published USERRA regulations provide that an employer "may not refuse to reemploy a returning service member [because] someone else was hired to fill [his] position during his absence, even if … reemployment might require the termination of the replacement employee" [20 C.F.R. § 1002.139(a)]. Moreover, a number of courts interpreting USERRA and its predecessor statute have concluded that certain hardships fall within contemplation of the act, including the possibility that reemployment of the veteran may compromise the rights of other employees, displace other employees, or even result in their termination. See, e.g., *Nichols v. Dep't Veteran Affairs,* 11 F.3d 160, 163 (Fed. Cir. 1993) which states "A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. Employers must tailor their workforces to accommodate returning veterans' statutory rights to reemployment. Although such arrangements may produce temporary work dislocations for non-veteran employees, those hardships fall within the contemplation of the act, which is to be construed liberally to benefit those who 'left private life to serve their country.'" *Hembree v. Georgia Power Co.,* No. 77-1775A, 1979 U.S. Dist. LEXIS 8187, at *11-12 (N.D. Ga. Dec. 4, 1979), aff'd, 637 F.2d 423 (11th Cir. 1981) held that the company was obligated to reemploy a disabled employee in "nearest approximation" to prior position "regardless of whether an opening currently existed and regardless of whether placing plaintiff in the job would … compromise rights of other employees". These courts place the burden on employers to "tailor their workforces to accommodate returning veterans' statutory rights to reemployment" *(Nichols,* 11 F.3d at 163)."

This case was decided by Judge Bucklo on December 15, 2012, when she granted summary judgment for Con-Way. There is no subsequent appellate history shown in LEXIS, a computerized legal research system. Brown did not appeal to the United States Court of Appeals for the 7th Circuit,[8] and the time for making such an appeal has long since passed. This case is over.

[8] The 7th Circuit is the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.