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DOJ Sues Con-Way Freight for Violating USERRA

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1.3.1.1—Left job for service and gave prior notice
1.3.1.2—Character and duration of service
1.3.2.2—Continued accumulation of seniority—escalator principle
1.3.2.9—Accommodations for disabled veterans
1.4—USERRA enforcement
1.8—Relationship between USERRA and other laws/policies

On March 27, 2014, the United States Department of Justice (DOJ) filed suit against Con-Way Freight in the United States District Court for the Northern District of Illinois, on behalf of Dale Brown, an employee of Con-Way and a veteran of the United States Navy and Navy Reserve. The lawsuit alleges that Con-Way violated the Uniformed Services Employment and Reemployment Rights Act (USERRA) in the way that it treated Brown following his 2006 call to the colors and his injury in the line of duty in Iraq.

Brown began working for Con-Way in November 1987 as a Driver-Sales Representative (DSR). He joined the Navy Reserve in October 1999 and served until his honorable discharge in January 2009. In 2006, Brown was working for Con-Way at its facility in Rock Island, Illinois, when he was called to active duty and deployed to Iraq. He suffered a serious shoulder injury in a truck accident during a night mission in Iraq.

Brown's release from active duty was extended by his line-of-duty injury, treatment, and recuperation. When he was released from active

duty, he met the USERRA eligibility criteria for reemployment.[1] He returned to work for Con-Way, but not as a DSR.

As I explained in Law Review 0854 (November 2008) and other articles, the employer has special USERRA responsibilities when an individual meets the USERRA conditions for reemployment but is unable to perform the duties of his or her escalated reinstatement position (ERP)[2] because of a temporary or permanent disability sustained or aggravated during the period of uniformed service. First, the employer is required to make reasonable efforts to accommodate the disability in the ERP. Second, if the disability cannot reasonably be accommodated in the ERP, the employer must reemploy the returning disabled veteran in some other position for which he or she is qualified or can become qualified with reasonable employer efforts and that provides like seniority, status, and pay, or the closest approximation thereof consistent with the circumstances of the returning disabled veteran's case.

The pertinent USERRA section is section 4313(a)(3), which provides as follows:

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[1] As I explained in Law Review 1281 (August 2012) and other articles, a person who has left a position of employment (federal, state, local, or private sector) for voluntary or involuntary uniformed service must have given the civilian employer prior oral or written notice, unless prior notice was precluded by military necessity or otherwise impossible or unreasonable. The person's cumulative period or periods of uniformed service, relating to that specific employer relationship must not have exceeded five years, but since Brown was called to active duty involuntarily this period of service does not count toward his cumulative five-year limit with Con-Way. Please see Law Review 201 (August 2005). The person must have been released from the period of service without a disqualifying bad discharge from the military, and Brown was honorably discharged. After release from the period of service, the person must have made a timely application for reemployment, which Brown did. I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 1,046 articles about USERRA and other 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. I initiated this column in 1997, and we add new articles each week. We added 169 new articles in 2013.

[2] The escalated reinstatement position is the position that the individual would have attained if he or she had been continuously employed in the civilian job instead of leaving for uniformed service. This is usually but not always the position that the individual left.

"(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."

38 U.S.C. 4313(a)(3).

After multiple surgeries and physical rehabilitation, Brown was finally fully recovered from his shoulder injury in 2012, and he notified Con-Way that he had medical clearance to return to his DSR position, but Con-Way did not immediately return Brown to that position. Months later, Brown was rehired as a DSR, but Con-Way treated him "as a new employee with no seniority to bid on assignments" the DOJ lawsuit said.

The DOJ complaint further stated: "As a result, Brown effectively received a 40 percent reduction in pay compared to what he was earning as a DSR prior to his military leave. He also no longer has a regular work schedule because his seniority was not restored upon reinstatement and he must call in each day to see if and for how long he will work on a given day."

I suspect that part of the problem here is the union, which likely is insisting that its collective bargaining agreement (CBA) with Con-Way overrides USERRA. In fact, USERRA overrides the CBA to the extent that the CBA puts impediments upon Brown's full enjoyment of his USERRA rights. Section 4302(b) of USERRA provides: "This chapter [USERRA] *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 such right or the receipt of any such benefit." 38 U.S.C. 4302(b) (emphasis supplied).

In its first case construing the 1940 reemployment statute, the Supreme Court held: "No practice of employers *or agreement between employers and unions can cut down the service adjustment benefits that Congress has secured the veteran under the Act.*" *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946) (emphasis supplied).[3] Including *Fishgold,* there have been 17 United States Supreme Court cases on the reemployment statute, and in six of those cases the union intervened as a defendant, seeking to prevent the employer from complying with its obligations to the returning veteran.[4]

We will keep the readers informed of developments in this important case.

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[3] The citation means that you can find this case in Volume 328 of *United States Reports,* starting on page 275, and this specific quoted language can be found on page 285. I invite the reader's attention to Law Review 0803 (January 2008) for a detailed case note on the *Fishgold* case.

[4] The union typically supports the rights of the many over the rights of the few, or the one. Under the reemployment statute, the rights of the one employee (Brown) who laid aside his civilian job to serve our country in its hour of need override the economic interests of the much larger number of employees who remained behind and accrued additional company seniority while Brown was serving our country in Iraq and was recuperating from the injury he sustained in Iraq.