IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MICHAEL T. GARRETT,	@	
Plaintiff,	@	
	@	
	@	CIVIL ACTION NO. 3:04-CV-556-M
v.	@	
	@	
CIRCUIT CITY STORES, INC.,	@	
	@	
Defendant.	@	

AMICUS CURIAE BRIEF OF RESERVE OFFICERS ASSOCIATION
CONCERNING DEFENDANT'S MOTION TO COMPEL ARBITRATION

I.

INTEREST OF *AMICUS*

The Reserve Officers Association (ROA) was established in 1922 and chartered by Congress in 1950 (Public Law 81-595). ROA's purpose, as set forth in the congressional charter, is "to support and promote the development and execution of a military policy for the United States that will provide adequate national security." ROA is the premier professional association for commissioned officers of our nation's seven Reserve components (Marine Corps Reserve, Army Reserve, Army National Guard, Naval Reserve, Air Force Reserve, Air National Guard, and Coast Guard Reserve). Lieutenant Colonel Michael T. Garrett, USMCR, the plaintiff in this action, is one of ROA's approximately 75,000 dues-paying members.

For more than 80 years, ROA has promoted reliance upon our nation's Reserve components as a cost-effective way of providing adequate national defense. Because they are only paid for the days when they perform military service or training, Reserve component personnel do not impose a burden on the taxpayer. Recruiting, training, compensating, and equipping the Reserve components costs only about 10% of our national defense budget, but the seven Reserve components provide almost half of our nation's total pool of trained military personnel. As of September 30, 2002, there were 1,451,815 military "regulars" on active duty and another 1,199,321 members of the

National Guard and Reserve. *Annual Report of the Reserve Forces Policy Board for Fiscal Year 2002,* page 19.

In the immediate aftermath of the Vietnam War, Congress abolished the draft and established the Total Force Policy. Under that policy, our nation is more dependent than ever before upon the Reserve components, and that is especially the case since August 1990, when the first President Bush responded to Iraq's invasion of Kuwait by authorizing the first major mobilization of the Reserve components since the Korean War (1950-53). Since August 1990, National Guard and Reserve personnel have been called to active duty repeatedly. "Since September 11, 2001, more than 373,000 National Guard members and reservists have been placed on active duty. Not since World War II have so many guard members and reservists been called up." *Daily Labor Report,* June 24, 2004, page A-11.

Since 1940, persons leaving civilian employment for voluntary or involuntary military service have had the legal right to reemployment in their civilian jobs after satisfactory completion of such service. Congress enacted the reemployment entitlement as part of the Selective Training and Service Act (STSA), our nation's first peacetime conscription statute. A year later, on the eve of the Pearl Harbor attack, Congress extended the conscription statute and expanded the right to reemployment to include voluntary enlistees, retroactive to May 1940. The reemployment statute came to be known informally as the Veterans' Reemployment Rights (VRR) law. The VRR law was codified at 38 U.S.C. δδ 2021-2026 (1988). For a comprehensive history of the reemployment statute, we invite the court's attention to ROA's Law Review 104, entitled "Everything You Always Wanted to Know About USERRA But Were Afraid To Ask." Please go to ROA's website, www.esgr.com. Click on "Legislative Affairs" then "ROA Law Reviews."

Samuel F. Wright, the principal author of this brief, is a Captain (O-6) in the Naval Reserve Judge Advocate General's Corps, with about ten years of active duty and more than 27 years total active and reserve service. He has been a member of the Texas Bar since 1976 (State Bar Number 22056500, presently inactive) and of the District of Columbia Bar since 1993.

Mr. Wright was employed as an attorney for the United States Department of Labor (DOL) for a decade. Together with one other DOL attorney, Susan M. Webman, Wright largely drafted the interagency task force work product that became the Uniformed Services Employment and Reemployment Rights Act (USERRA), Public Law 103-353. USERRA is the complete rewrite of and replacement for the much-amended VRR law. USERRA is codified at 38 U.S.C. δδ 4301-4333. Congress amended the law in 1996, 1998, and 2000.

For more than 22 years, Mr. Wright has been speaking to Reserve component audiences and writing for Reserve component publications about reemployment rights, in the context of recruiting, retention, and readiness of the Reserve components. In 1997, he initiated the "Law Review" column in *The Officer,* ROA's monthly magazine. The July-August 2004 issue includes Law Reviews 131-133. The back issues are available on ROA's website, www.roa.org. As a direct result of these articles and the website, Mr. Wright hears from and responds to Reserve component personnel, their employers, and lawyers all over the country and the world, including Iraq.

ROA has long recognized that the dissemination of information about the reemployment statute and the effective enforcement of that statute are critical to the men and women of our nation's Armed Forces, especially the Reserve components. In the era of the all-volunteer military, the services will be unable to recruit and retain the quality and quantity of personnel needed unless those people can be assured that they will not lose their civilian jobs as a result of their service.

II.

USERRA OVERRIDES THE ALLEGED AGREEMENT TO ARBRITRATE.

Section 4302(b) of USERRA makes it clear that Michael Garrett's alleged agreement to submit future USERRA disputes with his employer to arbitration is invalid and unenforceable. That section is as follows: "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. δ 4302(b).

USERRA's legislative history makes it even clearer that Michael Garrett's alleged agreement to submit future disputes to arbitration should not be enforced:

> Section 4302(b) would reaffirm a general preemption as to State and local laws and ordinances, as well as employer practices and agreements, which provide fewer rights or otherwise limit rights provided under amended chapter 43 or put additional conditions on those rights. *See Peel v. Florida Department of Transportation,* 600 F.2d 1070 (5th Cir. 1979); *Cronin v. Police Department of the City of New York,* 675 F. Supp. 847 (S.D.N.Y. 1987), and *Fishgold, supra,* 328 U.S. at 285, which provide that no employer practice or agreement can reduce, limit or eliminate any right under chapter 43. Moreover, this section would reaffirm that additional resort to mechanisms

> such as grievance procedures or arbitration or similar administrative appeals is not required. *See McKinney v. Missouri-Kansas-Texas Railway Co.,* 357 U.S. 265, 270 (1958); *Beckley v. Lipe-Rollway Corp.,* 448 F. Supp. 563, 567 (N.D.N.Y. 1978). It is the Committee's intent that, even if a person protected under this Act resorts to arbitration, any arbitration decision shall not be binding as a matter of law. *See Kidder v. Eastern Airlines, Inc.,* 469 F. Supp. 1060, 1064-65 (S.D. Fla. 1978).
>
> The Committee wishes to stress that rights under chapter 43 belong to the claimant, and he or she may waive those rights, either explicitly or impliedly, through conduct. Because of the remedial purposes of chapter 43, any waiver must, however, be clear, convincing, specific, unequivocal, and not under duress. Moreover, only known rights that are already in existence may be waived. *See Leonard v. United Airlines, Inc.,* 972 F.2d 155, 159 (7th Cir. 1992). An express waiver of future statutory rights, such as one that an employer might wish to require as a condition of employment, would be contrary to the public policy embodied in the Committee bill and would be void.

House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2453 (hereinafter "House Report No. 103-65").

As has been stated, USERRA was a 1994 rewrite of a statute that can be traced back to 1940. USERRA's legislative history makes clear that case law under the prior law (VRR law) is still valid in most cases:

> The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protection against employment-related discrimination, and the protection of certain other rights and benefits, have been eminently successful for over fifty years. Therefore, the Committee wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act, remains in full force and effect in interpreting these provisions. This is particularly true of the basic principle established by the Supreme Court that the Act is to be "liberally construed." *See Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946); *Alabama Power Co. v. Davis,* 431 U.S. 581, 584 (1977).

House Report No. 103-65 at 2452.

The VRR law did not confer rulemaking authority on the Department of Labor (DOL) or any other agency, but DOL did publish a *VRR Handbook* in 1956, 1970, and 1988. Several courts, including the Supreme Court, have accorded a "measure of weight" to the interpretations expressed in the *Handbook*. *See Monroe v. Standard Oil Co.,* 452 U.S. 549, 563 n. 14 (1981); *Leonard v. United Air Lines, Inc.,* 972 F.2d 155, 159 (7th Cir. 1992); *Dyer v. Hinky-Dinky, Inc.,* 710 F.2d 1348, 1352 (8th Cir. 1983); *Smith v. Industrial*

Employers and Distributors Association, 546 F.2d 314, 319 (9th Cir. 1976), *cert. denied,* 431 U.S. 965 (1977); *Helton v. Mercury Freight Lines, Inc.,* 444 F.2d 365, 368 n. 4 (5th Cir. 1971). The *VRR Handbook* is also mentioned favorably in USERRA's legislative history. House Report No. 103-65 at 2473.

The most recent edition of the *VRR Handbook* has the following to say about waiver:

> In all but the most unusual circumstances, a veteran cannot expressly or impliedly waive his reemployment rights before or during military service. Rights generally do not mature until the veteran requests reinstatement, and rights not yet matured will not readily be considered to have been waived. An express waiver of future statutory reemployment rights, if required by the employer as a condition of employment, is contrary to the public policy embodied in the statute and is void.

1988 *VRR Handbook,* page 22-2.

This is exactly the *Handbook* language cited with approval by the 7th Circuit in *Leonard, supra,* holding that Mr. Leonard did not waive his VRR pension rights when he withdrew his United Air Lines pension contributions when recalled to active duty for the Berlin Airlift Crisis (1948). *Accord Lapine v. Town of Wellesley,* 304 F.3d 90 (1st Cir. 2002).

Mr. Garrett did not have the right to reemployment at the time he failed to respond to Circuit City's notice stating that he must "respond within 30 days or you have thereby agreed to arbitrate." Moreover, this "waiver by default" is certainly inconsistent with USERRA's requirement that any waiver of USERRA rights be "clear, convincing, specific, unequivocal, and not under duress." House Report No. 103-65 at 2453.

III.

MANDATORY ARBITRATION IS INCONSISTENT WITH THE COMPREHENSIVE ENFORCEMENT MECHANISM THAT CONGRESS ESTABLISHED WHEN IT ENACTED USERRA.

When it enacted USERRA, Congress provided many procedural advantages for the person returning from military service and claiming USERRA rights. Those advantages include the right to the assistance of the Veterans' Employment and Training Service, U.S. Department of Labor (DOL-VETS). *See* 38 U.S.C. δ 4321. If the claimant files a written complaint, DOL-VETS "shall investigate such complaint." 38 U.S.C. δ 4322(a)(2)(B). DOL-VETS has subpoena authority for the conduct of such investigations. *See* 38 U.S.C. δ 4326. DOL-VETS is required to "attempt to resolve the

complaint by making reasonable efforts to ensure that the person or entity named in the complaint complies with the provisions of this chapter." 38 U.S.C. δ 4322(d).

If DOL-VETS finds the case to be meritorious but is unable to obtain employer compliance, DOL-VETS refers the case to the Attorney General. "If the Attorney General is reasonably satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the Attorney General may appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action for relief under this chapter for such person." 38 U.S.C. δ 4323(a)(1).

If the Attorney General declines the claimant's request for representation, or if the claimant does not request representation by the Attorney General, the claimant is permitted to initiate a civil action in the appropriate Federal District Court. *See* 38 U.S.C. δ 4323(a)(2). (USERRA specifically precludes civil actions initiated by employers. *See* 38 U.S.C. δ 4323(f).) If the claimant initiates the action with private counsel and prevails, the court may award attorney's fees and litigation expenses. *See* 38 U.S.C. δ 4323(h)(2).

"The court may require the employer to comply with the provisions of this chapter." 38 U.S.C. δ 4323(d)(1)(A). The court will also order the employer to compensate the claimant for lost wages or benefits. *See* 38 U.S.C. δ 4323(d)(1)(B). If the court finds the violation to be willful, the court can double the damages. *See* 38 U.S.C. δ 4323(d)(1)(C).

Congress has enacted other procedural advantages. "The court may use its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders to vindicate fully the rights or benefits of persons under this chapter." 38 U.S.C. δ 4323(e). "No fees or court costs may be charged or taxed against any person claiming rights under this chapter." 38 U.S.C. δ 4323(h)(1). "No State statute of limitations shall apply to any proceeding under this chapter." 38 U.S.C. δ 4323(i).

Yes, the enforcement mechanism is stacked in favor of the person returning from service and claiming reemployment rights. In 1940, when Congress first enacted the reemployment entitlement as part of the Selective Training and Service Act, Representative R. Ewing Thomason of Texas said, during the floor debate, "This is Uncle Sam's law, this is Uncle Sam who is drafting these men, and he ought to be fair enough to see that the [veterans' reemployment] law is enforced." Cong. Rec., 76th Cong., 3d Sess., page 11699 (September 7, 1940).

None of these procedural advantages can be provided to the claimant in the arbitration mechanism that Circuit City has devised. Requiring Michael Garrett to submit his case to arbitration is fundamentally inconsistent with USERRA.

IV.

CIRCUIT CITY'S ARGUMENTS ABOUT δ 4302(b) LACK MERIT.

In its reply in support of its motion to compel arbitration, in Section II(B)(3), Circuit City argues on various grounds that δ 4302(b) does not preclude arbitration, as its legislative history, cited in the text of Section II, above, indicates it does. These arguments should be rejected.

The first argument is that δ 4302(b) only applies to preemption by state or local law or employer benefit plans or collective bargaining agreements and so does not preclude arbitration as compelled by Federal law, namely the Federal Arbitration Act. Reply, pp. 6-7. That argument is ludicrous because it is the employer contract, agreement, policy, plan and practice of Circuit City requiring employees to submit to arbitration which gives rise to the issue of arbitration as it relates to Plaintiff's claim under USERRA. Moreover, Plaintiff never executed an arbitration agreement. He merely failed to object, with uncertain consequences, to the imposition of an arbitration policy.

In the context of labor arbitrations, the legislative history cited above makes clear that collective bargaining agreements requiring arbitration, even though they are generally enforceable under Federal labor statutes separate and apart from the Federal Arbitration Act, are not enforceable in the face of claims under USERRA or the VRR law. Such legislative history reinforces the conclusion that it is the origin of the arbitration agreement in an employer contract, agreement, policy, plan, or practice which is dispositive, and also makes clear that arbitration is not an authorized means of adjudicating a claim under USERRA even in the context of labor arbitration in which there has necessarily been arm's-length bargaining over an arbitration agreement. When no such arm's-length bargaining has occurred, as in the case of Plaintiff and Circuit City, it is necessarily even more intolerable and inconsistent with δ 4302(b) for a claim under USERRA to be considered arbitrable.

The second argument by Circuit City is that δ 4302(b) is simply inapplicable because arbitration does not impact the rights of an employee such as Garrett. Reply, p. 7. Again, the legislative history and even more clearly the unusual procedural protections afforded to employees under USERRA (addressed in Section III) reflect a completely different legislative judgment than the self-serving argument offered by Circuit City. Moreover, Circuit City's arbitration provision limits the number of depositions permitted.

That limit precludes Mr. Garrett from prosecuting his case in the same manner as in court. Plaintiff may need multiple witnesses, exceeding the authorized number of depositions, to prove his case.

Even if substantive rights are purportedly preserved, different procedural rights can impair the ability of a reservist like Lieutenant Colonel Garrett to enforce his substantive rights. Moreover, δ 4302(b) makes no distinction between substantive and procedural rights. Section 4302(b) refers to "benefits," which would necessarily include USERRA's procedural benefits for claimants. Section 4302(b) is a statutory provision with the obvious intent of enhancing employee rights. A mincing, narrow interpretation of δ 4302(b) does not suit it at all and is inconsistent with the Supreme Court's command that the reemployment statute be "liberally construed for the benefit of he who has laid aside his civilian pursuits to serve his country in its hour of need." *Fishgold,* 328 U.S. at 285.

The final argument of Circuit City is that δ 4302(b) is no different from certain provisions of the Family Medical Leave Act (FMLA) and the Fair Labor Standards Act (FLSA). Reply, p. 7. In fact, the FMLA and FLSA provisions cited by Circuit City are more closely analogous to 38 U.S.C. δ 4302(a), which provides that USERRA does not supersede a state law, agreement, policy, practice, or other matter that provides *greater or additional rights*. The FMLA and FLSA provisions cited by Circuit City and case law applying those provisions are not helpful to the determination of the proper construction of δ 4302(b).

The only FMLA provision that is remotely similar to δ 4302(b) is 29 U.S.C. δ 2652(b), as follows: "The rights established for employees under this Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan." This provision is not nearly as explicit as δ 4302(b). FMLA and FLSA cases on this point are inapposite.

It should be noted that δ 4302(b)'s preemption provision specifically precludes "the establishment of additional prerequisites to the exercise of any such [USERRA] right or the enjoyment of any such [USERRA] benefit." That which Congress has expressly precluded is exactly what Circuit City seeks to accomplish with its Motion to Compel Arbitration. Congress has given Lieutenant Colonel Garrett the right to have this
Court determine the facts and apply the law (USERRA). Circuit City's attempt to bar the door to this courtroom must fail under δ 4302(b).

Section 4302(b) of USERRA is a distinctive provision of a Federal employment statute. It should be honored and enforced as such. The Court should deny Defendant's Motion to Compel Arbitration.

Respectfully submitted,

Reserve Officers Association

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On this 26th day of July, 2004, I have served a copy of this brief, by certified mail, upon Robert E. Goodman, Jr., Esq., counsel for the plaintiff (Michael T. Garrett) and also upon John G. Harrison, Esq., counsel for the defendant (Circuit City Stores, Inc.).

Samuel F. Wright