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Uniformed Services Employment and Reemployment Rights Act: Judicial Updates and Other Developments

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1. ***Day v. Lockheed Martin Space Systems Co*., 304 Fed.Appx. 296 (5th Cir. 2008)**

   Failure to meet statutory timelines to apply for reemployment during each interval between series of back to back military orders will bar claims under USERRA

Plaintiff began employment with Martin Marietta, and its successor corporation, Appellee Lockheed Martin Corporation ("Lockheed"). During his tenure, Day periodically took leaves of absence to serve in the United States Navy Reserve. Day was absent for seven years due to a series of orders to deploy for service. In August 2004, Day was honorably discharged from active duty and sought to return to his former position at Lockheed. On December 6, 2004, Lockheed reemployed Day, and on January 1, 2007, Day retired.

In June 2007, Day sued Lockheed, alleging that: (1) it violated the Uniformed Services Employment and Reemployment Rights Act, ("USERRA") when it delayed his reemployment, (2) denied him a higher salary and other benefits, and (3) failed to follow its corporate policy. Lockheed moved for summary judgment, alleging that Day was not covered by USERRA because, during his seven-year absence, he had failed to timely apply for reemployment and therefore forfeited USERRA's protections. The district court granted Lockheed's motion, and the 5th Circuit affirmed.

The type of notification which a service member must give to their previous employer depends on the length and circumstances of their service. *See id.* § 4312(e). On September 14, 2001, Day was ordered to serve for a period of 180 days, requiring him to submit an application for reemployment within fourteen days after completing that order. *Id.* § 4312(e)(1)(c). Day completed the order on March 30, 2002, but did not reapply within fourteen days. Once Day failed to timely reapply, the terms of his employment with Lockheed were no longer covered by USERRA.

Lockheed was nevertheless required to follow its corporate policy. *See id.* § 4312(e)(3). The district court correctly found that nothing in that policy required Lockheed to comply with USERRA when the statute did not otherwise apply. Instead, the policy stated that employees must return to work when they complete their approved leave. Having forfeited the protections of USERRA, Day was not entitled to the relief he seeks through his employer's policy.

2. ***McIntosh v. Partridge*, 540 F.3d 315 (5th Cir. 2008)**

No waiver of 11th Amendment Immunity for employee claims against the State as employer.[1]

McIntosh was a dentist for the Richmond State School (RSS) and a member of the U.S. Navy Reserve. McIntosh was called to active duty to serve in Iraq and Kuwait in October 2004. During that time, RSS contracted with another dentist, June Sadowsky, D.D.S., M.P.H., to treat the residents during McIntosh's tour of duty. Dr. Sadowsky reported that the residents' teeth were in poor condition. In early 2005, Dr. Corinne Scalzitti, D.M.D., conducted an audit of the professional aspects of RSS's dental clinic, after which she concluded that decisions made by McIntosh had impaired the quality of dental care at RSS.

When McIntosh returned from military service in October 2005, he notified Partridge, the medical director of RSS, of his desire to return to his position at RSS. On November 1, 2005, Partridge told McIntosh that his clinical privileges were suspended pending an independent investigation into charges of professional incompetence and violations of the applicable standard of care. Partridge placed McIntosh on paid leave, and he reported McIntosh's conduct to the state board of dental examiners. McIntosh requested a hearing from RSS to review his suspension, but none was held. On December 23, 2005, McIntosh brought this suit against Partridge, both individually and in his official capacity, asserting claims under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4311(a), the Equal Protection and the Due Process Clauses of the Fourteenth Amendment, and Texas common law defamation.

USERRA's operative text lays out three separate types of claims and identifies which courts have jurisdiction over those claims.

> "(1) In the case of an action against a State (as an employer) or a private employer commenced by the United States, the district courts of the United States shall have jurisdiction over the action.
>
> (2) In the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State.
>
> (3) In the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action ." 38 U.S.C. § 4323(b).

After examining the text of the statute, the court found no "unmistakably clear" intention by Congress to abrogate state sovereign immunity by allowing individuals to bring USERRA claims against states as employers in federal court. Therefore, the court did not have jurisdiction to hear McIntosh's USERRA claim.

[1] 1. *McIntosh v. Partridge*, 2013 WL 1790229 (Tex. App.-Houston (1st Dist.) 2013, no pet.) -The second time is not any better. Dismissed with prejudice. On appeal, judgment modified to dismissal.

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