UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 4

Docket No. AT-3443-07-0016-M-1

Richard Erickson,

Appellant,

v.

United States Postal Service,

Agency.

January 7, 2010

Mathew B. Tully, Esquire, Albany, New York, for the appellant.

Jeffrey L. Sheldon, Esquire, Tampa, Florida, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 This case is on remand from the U.S. Court of Appeals for the Federal Circuit, which affirmed in part, reversed in part, and remanded the Board's decision denying the appellant's request for relief under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). *Erickson v. U.S. Postal Service*, 571 F.3d 1364 (Fed. Cir. 2009). For the reasons set forth below, we again DENY the appellant's request for relief under USERRA.

BACKGROUND

¶2 USERRA prohibits discrimination against civilian employees because of their military obligations, 38 U.S.C. § 4311, and also provides reemployment rights to those who leave their jobs to serve in the uniformed services, 38 U.S.C. § 4312. *Erickson*, 571 F.3d at 1366; *Clavin v. U.S. Postal Service*, 99 M.S.P.R. 619, ¶ 5 (2005). This case implicates both the nondiscrimination and reemployment provisions of USERRA.

¶3 Prior to his removal in April 2000, the appellant was a Distribution Clerk with the agency's Fort Myers Processing and Distribution Center in Fort Myers, Florida. While employed by the agency, the appellant was absent for lengthy periods while serving on active duty with the Army National Guard Reserve. Between 1991 and 1995, he was absent from his agency position for a total of more than 22 months, and between 1996 and the date of his removal in 2000, he worked with the agency for no more than 4 days. However, during the course of his employment with the agency, the appellant's cumulative military service, excluding periods exempted by statute, fell short of the 5-year cap for retaining employment rights under USERRA. *Erickson*, 571 F.3d at 1369-70; *see* 38 U.S.C. § 4312(a), (c).

¶4 In January 2000, an agency labor relations specialist contacted the appellant by telephone to determine whether he intended to continue working with the agency. The appellant responded he would not report for work until he completed his current tour of duty in September 2001. In the course of the conversation, he further stated that he preferred military service to working with the agency. Shortly thereafter, the agency proposed to remove the appellant from his position based on his excessive use of military leave. The notice erroneously stated that the appellant had taken more than 5 years military leave, not including weekend drills and annual training, and was thus no longer entitled to employment rights under USERRA. The appellant did not respond to the notice,

and he was removed effective April 14, 2000. He did not grieve the removal or file an adverse action appeal with the Board. *Erickson*, 571 F.3d at 1366-67.

¶5 The appellant subsequently reenlisted with the National Guard and remained on active duty until December 31, 2005. *Id*. at 1367. On September 28, 2006, he filed a USERRA appeal, alleging that the agency had violated the nondiscrimination provision by removing him based on his military service. He further alleged that the agency had violated his reemployment rights under USERRA by refusing to rehire him after he ended active duty. The administrative judge assigned to the appeal concluded that the agency violated the nondiscrimination provision of USERRA when it removed the appellant for excessive use of military leave. However, the administrative judge denied relief based on his conclusion that the appellant had waived his USERRA rights by abandoning his civilian career in favor of one in the military. *Id*.

¶6 The appellant then petitioned for review, challenging the administrative judge's finding that he had abandoned his civilian employment. The agency filed a cross-petition, contending that the administrative judge had erred in failing to address its argument that the appellant did not make a proper request for reemployment following the end of his military service. The full Board affirmed the initial decision as modified by its Opinion and Order, still denying the appeal. *Erickson v. U.S. Postal Service*, 108 M.S.P.R. 494 (2008), *aff'd in part, rev'd in part, and remanded*, 571 F.3d 1364 (Fed. Cir. 2009). In doing so, the Board concluded that, contrary to the initial decision of the administrative judge, the appellant had not satisfied his initial burden of showing that his military service was a substantial or motivating factor in the agency's decision to remove him. *Id.*, ¶¶ 5-6. The Board further found that the agency did not violate the reemployment provision of USERRA, since the appellant had not made a timely request for reemployment, and even if he had, his military service through December 2005, not including periods exempted by statute, exceeded the 5-year cap for retaining reemployment rights under USERRA. *Id.*, ¶¶ 7-9. However, the

Board did not address the administrative judge's finding that the appellant had waived his USERRA rights.

¶7 The U.S. Court of Appeals for the Federal Circuit reversed the Board's decision in part, finding that the agency had indeed violated the nondiscrimination provision of USERRA by removing the appellant based on his use of military leave. *Erickson*, 571 F.3d at 1368-70. The court affirmed the portion of the Board's decision finding that the agency had not violated the appellant's reemployment rights under USERRA. *Id*. at 1370-71. Finally, the court concluded it was necessary to remand the case in order for the Board to explicitly address whether, as the administrative judge found, the appellant waived his USERRA rights by abandoning his civilian career to pursue one in the military. *Id*. at 1371-72.

ANALYSIS

¶8 Our reviewing court has held that, because the reemployment provisions of USERRA, which may include discrimination claims under 38 U.S.C. § 4311, apply only to noncareer military service, an employee can waive his USERRA rights by abandoning his civilian career in favor of one in the military. *Woodman v. Office of Personnel Management*, 258 F.3d 1372, 1377-78 (Fed. Cir. 2001). In determining whether an employee has done so, the key inquiry is whether he intended to pursue a military career. *Moravec v. Office of Personnel Management*, 393 F.3d 1263, 1267-68 (Fed. Cir. 2004); *Dowling v. Office of Personnel Management*, 393 F.3d 1260, 1262 (Fed. Cir. 2004). Among the factors that may contribute to a finding of abandonment are lengthy and continuous service in the active guard reserve and multiple requests for service extensions. *See Woodman*, 258 F.3d at 1378-79 (finding that an employee who served continuously as a full-time member in the active guard reserve for 14 years and sought multiple service extensions intended to make permanent a career

in the military). At the time of his removal, the only alleged USERRA violation still at issue, the appellant was serving his fifth consecutive voluntary reenlistment, and had been serving full-time in the active guard reserve for 6 of the past 10 years, the last 4 years continuously. *Erickson*, 108 M.S.P.R. 494, ¶ 6.

¶9 Although the appellant's continuous full-time military service at the time of the alleged USERRA violation was not as lengthy as that of the employee in *Woodman*, there are other circumstances present here that weigh in favor of a finding that the appellant intended to abandon his civilian career. We find the appellant's expressed preference for military over civilian service especially significant in this regard. *See Gadue v. Office of Personnel Management*, 96 M.S.P.R. 285, ¶ 14 (2004) (finding abandonment where, inter alia, employee testified that he chose to enter on active guard duty because the position to which he was to be assigned "looked a lot better" and because of the "promotion possibilities" it offered). In addition, we find that the appellant's failure to respond to the notice of proposed removal, or to grieve or file a chapter 75 appeal of the removal action, weighs in favor of a finding that he intended to abandon his civilian career.[1] *See Moravec*, 393 F.3d at 1268 (noting petitioner's failure to object to his separation from civilian service).

¶10 When considered in isolation, the individual factors described above could be regarded as insufficient to support a finding that the appellant waived his USERRA rights. However, in our view, the circumstances presented in this case, considered together, are comparable to those our reviewing court has found

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[1] The administrative judge also observed that the appellant has served in the military for over two decades, during which time he achieved the highest rank possible for a non-commissioned officer, and was awarded the Silver Star and the Army Commendation Medal for Valor. *Erickson v. U.S. Postal Service*, MSPB Docket No. AT-3443-07-0016-I-2 (Initial Decision, Sept. 26, 2007). However, we find that the appellant's distinguished military service does not constitute evidence that he intended to abandon his civilian career.

sufficient to constitute a waiver of USERRA employment rights.[2] *See Woodman*, 258 F.3d at 1374-79; *Gadue*, 96 M.S.P.R. 285, ¶ 17. Accordingly, we DENY the appellant's request for relief under USERRA.

ORDER

¶11 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does

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[2] The appellant contends that, under 38 U.S.C. § 4316(b)(2)(B), an employee may waive his USERRA rights only by knowingly providing written notice of his intent not to return to his civilian position after military service. This is incorrect. Section 4316(b)(2)(B) does not apply to USERRA rights in general; rather, it provides that an employee who knowingly gives such notice is ineligible for rights and benefits under § 4316(b)(1)(B), i.e., the "rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan." The appellant has not alleged that he was improperly denied such rights or benefits.

not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.