UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2008 MSPB 81

Docket No. AT-3443-07-0016-I-2

Richard Erickson,

Appellant,

v.

United States Postal Service,

Agency.

April 4, 2008

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

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

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision issued on September 26, 2007, denying him any relief under the Uniformed Services Employment and Reemployment Rights Act of 1994, codified at 38 U.S.C. §§ 4301-4333 (USERRA). The agency has filed a cross-petition for review. For the reasons set forth below, we DENY the appellant's petition for review, GRANT the agency's cross-petition for review, and AFFIRM the initial decision as MODIFIED by this Opinion and Order.

BACKGROUND

¶2 Effective April 14, 2000, the appellant was removed from his position of Distribution Clerk at the agency's Fort Myers Processing and Distribution Center, Fort Myers, Florida. Initial Appeal File, MSPB Docket No. AT-3443-07-0016-I-1 (IAF 1), Tab 3, Subtabs 4A, 4B. He filed this appeal under USERRA, asserting that he was improperly removed because of his military service and requesting that he be reinstated. IAF 1, Tab 1. The administrative judge (AJ) found that the agency violated USERRA by removing the appellant from his position but nevertheless denied the appellant any relief based on his determination that the appellant subsequently waived his reemployment rights under USERRA by abandoning his civilian employment in favor of a military career. ID at 4-7. The appellant petitions for review, arguing that the AJ erred by not granting him relief for the agency's alleged USERRA violation and by finding that he had abandoned his civilian employment, thereby waiving his USERRA reemployment rights. PFR File, Tab 1 at 5, 8-10. The agency has responded in opposition to the appellant's petition and also filed a cross-petition for review arguing that the AJ erred by failing to rule on its argument that the appellant waived his USERRA rights because he failed to request reemployment. PFR File, Tab 3 at 4-5.

ANALYSIS

¶3 The appellant's arguments amount to two separate USERRA claims: First, he alleges that the agency's removal action in April 2000 amounted to discrimination on the grounds of his military service and so was a violation of USERRA. Second, he alleges that, since he ended full-time military service in December 2005, the agency has refused to reemploy him in violation of his reemployment rights under USERRA.

Discrimination Claim

¶4 A member of the uniformed services shall not be denied, inter alia, retention in employment on the basis of his military service. 38 U.S.C.

§ 4311(a); *Jasper v. U.S. Postal Service*, 73 M.S.P.R. 367, 370 (1997), *overruled on other grounds by Fox v. U.S. Postal Service*, 88 M.S.P.R. 381 (2001). An agency violates USERRA if an employee's military service is a motivating factor in the agency's action. 38 U.S.C. § 4311(c)(1). The agency removed the appellant in April 2000 based on one charge of being absent from his civilian position on military leave for over 5 years and 4 months, between February 1991 and February 2000, with no intention to return to his civilian position. IAF 1, Tab 3, Subtabs 4B, 4D. The appellant did not appeal his removal at the time; had he filed a timely adverse action appeal, his USERRA arguments would have been properly adjudicated as affirmative defenses to his removal. *See Aguilar v. U.S. Postal Service*, 102 M.S.P.R. 102, ¶ 8 (2006); *Holmes v. Department of Justice*, 92 M.S.P.R. 377, 381, ¶ 8 (2002). However, as there is no statutory time limit for filing an appeal under USERRA, *Tierney v. Department of Justice*, 89 M.S.P.R. 354, 356, ¶ 6 (2001), where an appellant files an untimely appeal of an otherwise appealable action and alleges that the agency discriminated against him in taking that action in violation of USERRA, the Board must hear the separate USERRA appeal. *Aguilar*, 102 M.S.P.R. 102, ¶ 8; *Holmes*, 92 M.S.P.R. 377, ¶ 11.

¶5 Under USERRA, the appellant bears the initial burden of showing, by a preponderance of the evidence, that his military service was "a substantial or motivating factor" in the agency's adverse action; the agency then has the opportunity to produce evidence to show that it would have taken the adverse action for a valid reason anyway. *Sheehan v. Department of the Navy*, 240 F.3d 1009, 1013-14 (Fed. Cir. 2001); *Brasch v. Department of Transportation*, 101 M.S.P.R. 145, ¶ 8 (2006). Discriminatory motivation under USERRA may be established by direct evidence or reasonably inferred from a variety of factors.[1]

[1] These factors may include proximity in time between the appellant's military service and the adverse employment action, inconsistencies between the agency's proffered reason and other of its actions, the agency's expressed hostility towards employees

Brasch, 101 M.S.P.R. 145, ¶ 9. The agency expressly states in its proposal and removal notices to the appellant that the basis for its action was the appellant's continuing absence on military leave. IAF 1, Tab 3, Subtabs 4B, 4D. Although on its face this appears to be direct evidence that the appellant's military service is a motivating factor in the agency's action, the agency's removal notice makes clear that the real reason for the appellant's removal was his absence, regardless of its cause. *Id.* The agency's only stated concern is its need to fill the appellant's position. *Id.* The appellant therefore failed to carry his initial burden. Moreover, even if the appellant had met his initial burden, the agency has shown that it had a valid reason to take the adverse action anyway.

¶6 At the time of the proposed removal, February 2000, the appellant had been absent for all but 2 days of the previous 3 years. *Id.*, Subtab 4D. The appellant initially enlisted with the Florida Army National Guard for 3 years in December 1990. IAF 2, Tab 13, Exhibit 2 at 2-4. At the time of his removal, he was serving under his fifth consecutive voluntary re-enlistment. *Id.* at 5-9. The agency sent the appellant a letter, dated January 4, 2000, requiring that he contact the agency. IAF 1, Tab 3, Subtab 4G. The appellant responded by telephoning Labor Relations Specialist Rosalyn Warner, who questioned him concerning whether he intended to return to his postal position, or to continue his full-time military service into the foreseeable future. *Id.*, Subtab 4E. The appellant informed Ms. Warner that he would be on full-time active duty until the end of 2000, at least, and said that he did not like working for the agency and liked working for the military better. *Id.* The Board has long held that a prolonged absence with no foreseeable end constitutes just cause for removal. *See McKenzie v. U.S. Postal Service*, 1 M.S.P.R. 496, 497 (1980). USERRA entitles the appellant to treatment equal to that of a non-veteran, but not better treatment;

---

protected by USERRA, and disparate treatment of other similarly situated employees not protected by USERRA. *Brasch*, 101 M.S.P.R. 145, ¶ 9.

to establish USERRA discrimination, the appellant must show he was treated more harshly than a non-veteran. *See* 38 U.S.C. § 4316(b)(1)(B); *Tully v. Department of Justice*, 481 F.3d 1367, 1369-70 (Fed. Cir. 2007); *Fahrenbacher v. Department of the Navy*, 85 M.S.P.R. 500, 510 (2000), *aff'd sub nom. Sheehan v. Department of the Navy*, 240 F.3d 1009 (Fed. Cir. 2001). As removal of a non-veteran is justified for a charge of prolonged absence without foreseeable end, USERRA does not protect the appellant from such an adverse action simply because of his military status. As the appellant had been, in essence, continuously absent from his position for over 3 years and had expressed at the time an inclination not to return to his civilian position in the foreseeable future, the agency's removal of the appellant was for a valid, non-discriminatory reason. The appellant therefore has failed to prove that the agency committed prohibited discrimination under USERRA when it removed him.

Reemployment Claim

¶7 An employee whose absence from his civilian position is necessitated by military service is entitled to reemployment rights and benefits under USERRA if: (1) The employee or the military provided the employer with advance notice; (2) the cumulative absence does not exceed 5 years; and (3) the employee requests reemployment in the prescribed manner and timeframe. 38 U.S.C. § 4312(a); *Woodman v. Office of Personnel Management*, 258 F.3d 1372, 1376 (Fed. Cir. 2001). As the appellant was absent due to military service for more than 180 days, he was required to submit an application for reemployment with the agency not later than 90 days after the completion of his period of military service. *See* 38 U.S.C. § 4312(e)(1)(D). The appellant completed his military service on December 31, 2005. IAF 2, Tab 13, Exhibit 1 at 187. Accordingly, he was required to submit an application for reemployment with the agency by April 1, 2006. There is no evidence in the record that the appellant submitted a reemployment application by April 1, 2006, or that he has submitted one since.

The only action the appellant took was filing this Board appeal on September 28, 2006, which was 271 days after he completed his military service. IAF 1, Tab 1.

¶8 The appellant argues that he requested reinstatement shortly after his removal in April 2000. It appears that the appellant complained to his union at the time of his removal. IAF 2, Tab 13, Exhibit 12 at 2. There is no evidence that the union ever filed a grievance, however. The agency deposed the appellant on March 26, 2007, wherein he stated that he did not know whether or not any such grievance was filed. *Id.*, Exhibit 1 at 126, 128. Additionally, the appellant's complaint did not assert that he wanted his job back; rather, the appellant was concerned with the status of his prior grievances over pay and leave. *Id.*, Exhibit 13 at 2. The appellant stated in his deposition that, in 2001, he verbally asked for his job back via telephone. *Id.*, Exhibit 1 at 101-115. The agency provided affidavits of the five employees identified by the appellant, stating that the appellant did not request reemployment after his removal. *Id.*, Exhibits 5, 7, 8, 10, 11. What acts as an application for reemployment is not defined by the statute; rather, a case-by-case determination is required, focusing on the intent and reasonable expectations of both the former employee and the employer in light of all the circumstances. *See McGuire v. United Parcel Service*, 152 F.3d 673, 676 (7th Cir. 1998). An application for reemployment involves more than a mere inquiry to a former supervisor, however. *Id.* at 676-77. Regardless, the appellant was still in full-time military service at the time and continued therein until December 2004. *Id.*, Exhibit 1 at 138. The appellant admitted that he did not request that the agency reinstate him following the completion of his full-time military duty in December 2005. *Id.*, at 138-39, 187.[2]

---

[2] The appellant also argues that he was actually entitled to up to 2 years to request reemployment under 38 U.S.C. § 4312(e)(2) because of his receipt of a Purple Heart for being wounded in battle. PFR File, Tab 1. That extension of time to request reemployment is intended for those who are hospitalized or incapacitated due to injuries, however, and the statute requires that the employee "at the end of the period that is necessary for the person to recover" report to his employer or submit an

¶9 The appellant argues that, even if his request for reemployment was untimely, this does not invalidate his USERRA rights. PFR File, Tab 1. Under USERRA, a person who fails to apply for reemployment within the appropriate period will not automatically forfeit his reemployment rights but will be subject to the agency's rules of conduct and discipline with regard to absences. 38 U.S.C. § 4312(e)(3). As discussed above, the appellant has not requested reemployment and so the agency has not violated USERRA by refusing to reemploy him. Furthermore, even if the appellant were to request reemployment, he is no longer entitled to reemployment rights because his cumulative absence from his civilian position has amounted to more than 10 years, far exceeding the 5 year limit in the statute. *See* 38 U.S.C. § 4312(a)(2). There are several exceptions for types of military service that do not count toward that 5-year period and the appellant has argued that the majority of his military service was within those exceptions. *See* 38 U.S.C. § 4312(c); IAF 1, Tab 21. A review of the appellant's military orders reveals that his 1 month of service from September 21 to October 20, 1996, is exempt as it was ordered under 32 U.S.C. § 503. *See* 38 U.S.C. § 4312(c)(3); IAF 1, Tab 3, Subtab 4I at 21. He also served a total of nearly 20 months of exempt service from October 2, 1997, to August 20, 1999, ordered under 32 U.S.C. 502(a). *See* 38 U.S.C. § 4312(c)(3); IAF 2, Tab 13, Exhibit 3 at 31-36. Additionally, the appellant's 12 months of service between August 1, 2003, and July 30, 2004, is exempt as it was ordered under 10 U.S.C. § 12302. *See* 38 U.S.C. § 4312(c)(4)(A); IAF 2, Tab 13, Exhibit 3 at 46-49. Thus, nearly 33 months of the appellant's near continuous absence between December 1996 and December 2005 is exempt from the 5 year calculation.

---

application for reemployment. 38 U.S.C. § 4312(e)(2)(A). In spite of his receipt of a Purple Heart, the appellant has proffered no evidence that he was so incapacitated or hospitalized at any time or that he submitted an application for reemployment upon his recovery from his illness or injury. The appellant therefore was required to submit his application for reemployment within 90 days of the completion of his military service.

However, the rest of those 9 years of military service does not fall within the exceptions of the statute; the majority of the appellant's service during that time, amounting to 5 years and 5 months, was ordered under 32 U.S.C. § 502(f). Therefore, even if the appellant had properly and timely submitted an application for reemployment with the agency, he no longer retains reemployment rights under USERRA because the cumulative length of his absence has exceeded 5 years, and so we can find no USERRA violation by the agency. *See* 38 U.S.C. § 4312(a)(2).

ORDER

¶10 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 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:

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