

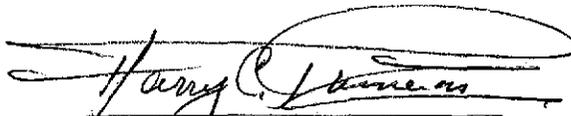
IN THE SUPREME COURT OF OHIO

State of Ohio, *ex rel.*, : Case No. 2006-2240
Harry C. Turner, III, :
 :
Relator, :
 :
-vs- :
 :
Marc C. Houk, *et al.*, :
 :
Respondents. :

RELATOR'S MEMORANDUM OPPOSING RESPONDENTS'
MOTION TO DISMISS FILED ON DECEMBER 22, 2006

COMES NOW THE RELATOR, Harry C. Turner, III, in the above-captioned matter, who would submit the following memorandum in opposition to Respondents' Motion to Dismiss, which was filed with this Honorable Court on December 22, 2006. This memorandum opposing Respondents' Motion to Dismiss is filed pursuant to S. Ct. Prac. R. XIV, Section 4(B).

Respectfully submitted,



Harry C. Turner, III
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(330) 792-0396
Relator, *Pro Se*

MEMORANDUM OPPOSING MOTION TO DISMISS

Comes now the Relator, Harry C. Turner, III, who would submit the following as a memorandum in opposition to Respondents' present motion to dismiss, which was filed on December 22, 2006.

STATEMENT OF THE CASE

On December 5, 2006, Relator filed an original action in mandamus seeking to compel Respondents to comply with the clear and unambiguous provisions of the Uniformed Services Employment and Reemployment Rights Act of 1994 (hereinafter "USERRA"), 38 U.S.C. §§ 4301 - 4334. The complaint for a peremptory or alternative writ has been verified. Previous to the filing of this original action, no "uniformed serviceman" has filed a private USERRA claim in any Ohio court of competent jurisdiction, typically, an overt reference to our Courts of Common Pleas. While the state statutory scheme speaks briefly to returning veterans' rights, those relevant portions of Ohio law are mere recitations of USERRA. (See R.C. § 124.29¹, § 5903.02.)

On December 22, 2006, Respondents filed a motion to dismiss seeking therein a decision that the only adequate remedy at law for all "uniformed servicemen" who allege a violation of the USERRA as against the State of Ohio is and should only be by and

¹ R.C. § 124.29 provides,

Any person who, at the time of holding an office or position in the public service, enters the uniformed services, as defined in section 5903.01 of the Revised Code, is entitled to reinstatement in accordance with the "Uniformed Services Employment and Reemployment Rights Act of 1994," 108 Stat. 3149, 38 U.S.C.A. 4301 to 4333.

The director of administrative services shall adopt rules in accordance with Chapter 119 of the Revised Code for the implementation of this section.

To date, the Director of Administrative Services has not adopted any rules that implement the USERRA in any form or fashion.

through the Court of Claims of Ohio. Such a decision would have far and wide implications not only for Relator but also for any number of “uniformed servicemen” returning from overseas activations in Iraq, Afghanistan, and other hostile places around the world and who also was an employee with the State of Ohio previous to such an activation. There is great public interest in the preservation of the rights of individual servicemen so called to active duty.

Not surprisingly, Respondents have not provided an entirely accurate or forthright appraisal of this present cause of action. The case at bar is distinguished in a number of ways. First and foremost, there are simply two triggering factors to consider. Second, there was and continues to be a simple failure of Respondents to reemploy Relator in his previously held civil service position with the State of Ohio. Third, this cause of action is not overly complex and can be decided on but a few facts. Finally, Relator seeks only a peremptory writ that would reemploy Relator in his previously held civil service position. In his present prayer for relief, Relator does not seek a writ compelling Respondents to promote him.

Previous to Relator’s military activation, he was an Administrative Assistant 2 to the Business Administrator located at the Ohio State Penitentiary, Youngstown, Ohio. On September 29, 2006, Relator served upon his Employer a written request to be reemployed in his previously held civil service position of administrative assistant and a copy of his discharge papers. These discharge papers provided the number of days Relator was on active duty and that the character of his service was under “honorable” conditions. On October 16, 2006, Respondents ordered Relator to take a civil service position that amounted to a reduction in position and also a transfer from Relator’s

previous classified position². Respondents forced upon Relator a significant change in “status” upon his return from active duty.

As a result of this change in status, Relator *did* file a claim with the Veterans' Employment and Training Service, alleging therein Respondents' violations of the USERRA. The Veterans' Employment and Training Service never conducted an investigation but, instead, engaged in a lengthy period of negotiation with counsel for the Respondents. Legal counsel for Respondents was extremely dilatory in responding to Relator's claim before the Veterans' Employment and Training Service. Because the Veterans' Employment and Training Service never conducted an investigation, Relator was also without recourse in seeking the intervention of the U.S. Attorney General's office. Coupled with Respondents' dilatory behavior, Relator dropped his claim with the Veterans' Employment and Training Service and filed this present cause of action with the Supreme Court of Ohio.

ARGUMENT

Relator would agree that there are three basic tenets to the entitlement of a peremptory or alternative writ of mandamus. Relator must establish (1) a clear legal right to the relief requested, (2) a clear legal duty on the part of the Respondents to grant that

² Relator asserts that Respondents' act of moving Relator, from a position with a working title of Administrative Assistant 2 to the Business Administrator to a position of a working title of Storekeeper Supervisor, effective October 16, 2006, constitutes a reduction in position. According to Section 124-5-02, Ohio Administrative Code, “If a reduction . . . is alleged and no ‘section 124.34 order’ has been filed with the state personnel board of review, the employee shall prove, by a preponderance of the evidence, that the . . . reduction occurred.” Further, Section 124-1-02(Z), Ohio Administrative Code, provides, in pertinent part, “. . . an action which diminishes an employee's duties or responsibilities to the extent an audit of the employee's position would result in a reclassification to a classification assigned a lower pay range” would constitute a reduction in position. See Firestone v. Summit County Welfare Department, Court of Appeals for Franklin County, Case Number 79AP-418 (1979)(One must look at an employee's duties to determine whether those duties were so altered that if a job audit were to be performed, the incumbent's position would be reclassified to a lower pay range.)

relief, and (3) the lack of an adequate remedy in the ordinary course of the law.

(Citations omitted.)

(1) Relator has demonstrated a clear legal right to the relief prayed for:

Relator has pled facts sufficient to make a *prima facie* case for entitlement to a peremptory writ of mandamus. Relator was a full-time, permanent employee with the State of Ohio previous to his military activation on March 4, 2006. Relator held the position of Administrative Assistant 2 to the Business Administrator located at the Ohio State Penitentiary, Youngstown, Ohio, previous to his military activation. On September 29, 2006, Relator was discharged from the United States Navy. Relator served approximately 211 days of active duty with one of the uniformed services of the United States. This is also evidenced by Relator's discharge papers. In this regard, the USERRA provides,

The term 'service in the uniformed services' means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes: active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.

38 U.S.C. § 4303(13).

Immediately upon his discharge from the United States Navy, Relator served Respondents a written request to be reemployed in Relator's previous civil service position. Relator also provided a copy of his discharge papers which signified that his service was completed under "honorable" conditions. The character of one's service is essential to maintaining a claim under USERRA. Specifically,

A person's entitlement to the benefits of this chapter by reason of the service of such person in one of the uniformed services terminates upon the occurrence of any of the following events:

- (1) A separation of such person from such uniformed service with a dishonorable or bad conduct discharge.
- (2) A separation of such person from such uniformed service under other than honorable conditions, as characterized pursuant to regulations prescribed by the Secretary concerned.
- (3) A dismissal of such person permitted under section 1161(a) of title 10.
- (4) A dropping of such person from the rolls pursuant to section 1161(b) of title 10.

38 U.S.C. § 4304.

The service of Relator's request for reemployment and a copy of his discharge papers was the only requirement to "trigger" Relator's reemployment to his previously held civil service position. Because Relator served more than ninety days in a uniformed service, the USERRA provides Relator should be reemployed in the following manner:

Except as provided in paragraphs (3) and (4), in the case of a person whose period of service in the uniformed services was for more than 90 days--

(A) 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, or a position of like seniority, status and pay, the duties of which the person is qualified to perform; or

(B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status and pay, the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of a position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

38 U.S.C. § 4313(a)(2) (emphasis added).

Relator has a clear legal right to be reemployed in his previously held position of Administrative Assistant to the Business Administrator. See also Duart v. Agilent Technologies, Inc., 366 F. Supp.2d 1039, 1045 (D.Colo. 2005)(“a person entitled to reemployment under Section 4312 of USERRA shall be reemployed in the position of employment in which such person would have been employed if the continuous employment of such person had not been interrupted by military service...”)

The Duart Court also provided that “... both USERRA and its predecessor statutes are to be liberally construed for the benefit of those who left private life to serve their country,” citing Alabama Power Co. v. Davis, 431 U.S. 581, 584 (1977), Garrett v. Circuit City Stores, Inc., 338 F.Supp.2d 717, 722 (N.D.Tex 2004). See also H.R.Rep. No. 103-65 at 23 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2456 (“The Committee intends that these anti-discrimination provisions be broadly construed and strictly enforced.”)

Even if Respondents were to raise an issue that Relator’s title, pay, and benefits were the same upon his return from active duty, Relator’s change in status, i.e., reduction in position and transfer from classification would be sufficient to invoke the enforcement provisions of USERRA. Duart at 1045-1046. Finally, it is “USERRA’s stated purpose to encourage service in the armed services by eliminating or minimizing the disadvantages members of the armed services experience in their civilian careers and employment as a result of their military services.” Duart at 1046.

(2) Respondents are under a clear legal duty to perform the requested act:

It is abundantly clear that Respondents act on behalf of or represent the State of Ohio, and for all intents and purposes are the Employer of Relator. The USERRA, pursuant to Section 4303(4), provides, in pertinent part, that "... [e]xcept as provided in subparagraphs (B) and (C), the term 'employer' means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including . . . a State." For reasons already provided above and within Respondents' own motion to dismiss, Respondents are subject to the USERRA and have a clear and unambiguous duty to reemploy Relator in his previously held civil service position. See generally 38 U.S.C. § 4301, *et seq.*

(3) Relator has no plain and adequate remedy in the ordinary course of law:

Here, Relator departs significantly from the position of Respondents. Relator would continue to provide that he has no plain, meaningful, or adequate remedy in the ordinary course of law.

Ordinarily, under a USERRA claim, Relator would be entitled to lost wages, back pay, front pay, liquidated damages upon a finding of willful or wanton conduct. Relator's present claim does not seek relief in the form of any lost wages, back pay, front pay, or liquidated damages. Under a USERRA claim, Relator would be entitled to empanel a jury as trier-of-fact. Relator would be entitled to reasonable attorney fees, expert witness fees, and other litigation expenses. Relator would be entitled to file his claim without paying filing fees. None of this relief is available to Relator if he is forced

to file his claim before the Court of Claims of Ohio. Finally, Relator's utilization of the Courts of Common Pleas, Court of Claims of Ohio, or even the State Personnel Board of Review (if jurisdiction invoked under R.C. § 124.29) would entail a year or more of litigation. It would be incomprehensible to imagine that such a protraction would be meaningful in any sense of the law, not to mention the litigation expenses just for an order of reinstatement to a previously held civil service position.

Respondents would present that the Court of Claims [is] the logical trial forum for employment discrimination claims against the State, asserting therein also that Manning applies with equal force to USERRA claims. However, Respondents can provide no case law that the Court of Claims has ever entertained a USERRA claim or even that any USERRA claim survived a motion to dismiss in the Court of Claims. In fact, Relator would fully expect counsel for Respondents to file a motion to dismiss upon Relator's filing a USERRA claim before the Court of Claims of Ohio. Relator would be like a dog chasing his tail. And, for what effect? It is also difficult to discern how forum shopping can provide Relator with an adequate or meaningful remedy in the ordinary course of law. The unfortunate reality is that Respondents have not properly identified any State forum that has or could properly hear a USERRA claim when brought forth as a private cause of action against the State of Ohio.

In determining whether Relator has a plain and adequate remedy in the ordinary course of law, this Honorable Court has determined that "[i]f there is an alternative, the alternative must be complete, beneficial, and speedy in order to constitute an adequate remedy at law." State ex rel. Ullmann v. Hayes, 103 Ohio St.3d 405 (2004). In the three

months since Relator has returned from active duty, Respondents have clearly indicated their intention not to comply with the USERRA and reemploy Relator in his previous position. In addition, the Court of Claims cannot provide a complete, beneficial, or speedy alternative in this instance. Further, forcing Relator to file with the Court of Claims of Ohio would be tantamount to transmuting the USERRA into nothingness if not abridging significant provisions of USERRA.

In this respect, federal law is clear:

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. § 4302(a).

It does appear that Congress did intend to abrogate the Eleventh Amendment in clear and unambiguous language. See 38 U.S.C. § 4302(a). Further, both USERRA and its predecessor statutes are to be strictly enforced for the benefit of those who left private life to serve their country. Alabama Power Co., *supra*; Garrett, *supra*; H.R.Rep. No. 103-65 (1993). The question of what State court of competent jurisdiction can hear a USERRA claim appears to remain.

Finally, there is no specific state statutory language that provides Relator a right to appeal Respondents' alleged denial of Relator's reemployment, which Respondents have a legal duty to honor. Accord State ex rel. Asti v. Ohio Dept. of Youth Serv. (2005), 107 Ohio St.3d 262. See also State ex rel. Ms. Parsons Contr., Inc. v. Moyer, (1995), 72 Ohio St.3d 404, 406-407 (mandamus is appropriate remedy when relator is

being damaged by a failure of public officers to perform official acts that they are under a duty to perform); State ex rel. Glass, Molders, Pottery, Plastics & Allied Workers Internatl. Union, Local 333, AFL-CIO, CIC v. State Emp. Relations Bd. (1993), 66 Ohio St.3d 157, 159 (mandamus is an appropriate remedy in absence of statutory right of appeal).

Based upon the foregoing, Relator would affirm that he has a clear legal right to be reemployed in his previously held civil service position, that Respondents have a clear legal duty to adhere to USERRA in reemploying Relator, and that there is no plain, meaningful, or adequate remedy in the ordinary course of law. As such, Relator would be entitled to a peremptory writ of mandamus as a matter of law.

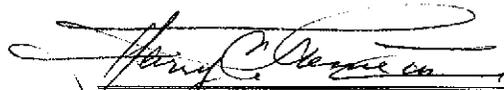
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify and affirm that a copy of the foregoing was sent by regular U.S. mail to Timothy M. Miller and Jack W. Decker at 150 East Gay Street, 22nd Floor, Columbus, Ohio 43215, on this 27th day of December, 2006.



Harry C. Turner, III