



USERRA Case Heads for Supreme Court

July 15, 2010

Military.com by Bryant Jordan

It's the nation's promise to those who serve in the reserves and National Guard: In return for deploying overseas to serve their country, the companies they left behind will have the same jobs available when they get back.

And, oh yeah -- it's the law.

But according to one expert, there may be up to 8,000 alleged violations of the Uniformed Services Employment and Reemployment Rights Act reported, investigated, mediated or fought in the courts each year.

Now a USERRA case involving a reservist who claims he was fired because of his military service is slated to be decided by the U.S. Supreme Court. Army Reserve Sgt. Vincent Staub sued his former employer, Proctor Hospital of Peoria, Ill., in 2004 after being fired from his job. He claims he was let go after fellow employees, bitter or resentful over his taking time off for military service, conspired to damage his job performance. Staub won in district court in Illinois but had the verdict overturned by the 7th Circuit Court of Appeals in March 2009.

"If the [appeals court decision] is upheld, it's going to make it difficult for Guard and Reserve members to win [firing] cases, or denial of initial employment or denial of promotion cases," said retired Navy Capt. Samuel L. Wright, director of the Reserve Officers Association's Servicemember's Law Center in Washington. Wright authored a "friend of the court" brief that the center has submitted in the case.

Staub's case will probably be heard in December, according to Wright, who said there are several other cases that could eventually land on the steps of the high court. And if Wright and others are correct, these are only a fraction of the growing number of USERRA cases across the country.

The Department of Labor, which handles cases through its Veterans Employment and Training Service, added 1,389 cases in 2008, the most it has added since 2004. Matthew Tully, a partner in the Washington law firm Tully Rinckey, PLLC, and an expert on USERRA law, estimates the Labor Department brings cases in about 10 to 20 percent of the complaints it gets. The Department of Justice selected 21 cases to prosecute last year -- the largest number in years, according to Wright.

The Pentagon's Employer Support for the Guard and Reserve also keeps tabs on USERRA-oriented inquiries and cases it attempts to mediate. Maj. Melissa Phillips, chief of strategic communications, told Military.com ESGR has been averaging about 2,500 cases a year for the past four years.

But the vast majority of USERRA cases are decided in the nation's courts, though it's impossible to tally how many are filed each year.

"There are 93 judicial districts" across the country where a case could be litigated, Wright said. "When you [file], there is a sheet with various categories listed, but not one for USERRA. It falls under 'other employment litigation.' So if you called all 93 courts, they still couldn't tell you how many they had because they don't have it coded."

For now, however, perhaps the most important case is Staub's.

"It's a big deal when a case goes to the Supreme Court, when the Supreme Court takes the case," he said. "This is the first time a USERRA case under the 1994 employment rights law has made it to the Supreme Court."

In overturning the original district court decision, the appeals judge essentially made the conspiracy allegation irrelevant by accepting evidence that the head of the hospital's human resources department conducted her own investigation into Staub's job performance before firing him. Once the appeals judge made that ruling, he tossed out testimony of anti-military statements and therefore found no evidence to support the jury verdict in favor of Staub, according to Wright.

"If he wins, there'll be a national standard [for this kind of case] and there'll be no question about what the standard is," Wright said. "Even if he loses -- that's the point of the Supreme Court, to establish a nationwide legal standard to govern cases that come later. But win, lose or draw, there's going to be a decision."