

Sergeant Major Wins Round in USERRA Fight

An Army National Guard sergeant major who says he was fired from his job as a postal worker because of his military service has won a battle in federal court.

In a July 15 decision, the U.S. Court of Appeals for the Federal Circuit essentially reaffirmed the bedrock principle of the Uniformed Services Employment and Reemployment Rights Act of 1994: An employer can't escape liability for claiming that it took an adverse employment action against an employee because of the employee's absence — when that absence was for military service.

The court sent the case back to the Merit Systems Protection Board, rejecting the board's earlier finding that Sgt. Maj. Richard Erickson had failed to show that the real reason for his firing was his service in the Army National Guard. The MSPB reviews workplace-related complaints from veterans and reservists who hold or are seeking federal jobs.

Erickson, who served with the 3rd Special Forces Battalion, 20th Special Forces Group, lives in Fort Myers, Fla.

"This is just another in a long line of reversals by the federal circuit," said Mathew Tully, an attorney specializing in USERRA law, whose firm represented Erickson and is a legal columnist for the Military Times newspapers.

"A lot of this has to do with the fact the MSPB members are not required to be lawyers," Tully said, even though "they're making legal decisions."

As a result, he said, service members are having to pay "staggering" legal costs for cases that should have been resolved earlier. "The MSPB should be trained in USERRA law," he said. The U.S. Postal Service fired Erickson in 2000 for "excessive use of military leave." They claimed his absences had exceeded the cumulative five-year absence limit set by USERRA, according to the appeals court's decision. An administrative judge later ruled that his cumulative leave did not exceed the five-year cap.

"Most of his military time is exempt" from counting against the five-year limit, Tully said. "But the post office was more concerned about paying someone overtime to do [Erickson's] job." Because Erickson had reenlisted in the Guard after he was fired by the Postal Service, the administrative judge concluded he had waived his USERRA rights by abandoning his civilian career.

Tully said Erickson participated in the invasion of Afghanistan in 2002 and has been awarded two Bronze Stars. He filed a complaint with the MSPB after leaving active duty in 2006.

When Erickson appealed the administrative judge's decision to the MSPB, the board, unlike the administrative judge, ruled that Erickson's military service was not a motivating factor in the postal service's decision to fire him in 2000 "because the agency's removal notice makes clear that the real reason for [his] removal was his absence regardless of the cause." That is the argument the appeals court has rejected and returned to the MSPB for reconsideration.

