HUNTON& WILLIAMS

Lawyer Insights

September 8, 2016

When Arbitration Is Favored Despite USERRA Violations

by Juan C. Enjamio and Robert Scavone Jr.

Published in Law360

The Eleventh Circuit recently addressed a novel issue: What should courts do when faced with an employment contract containing provisions that run afoul of a statute aimed at protecting the rights of men and women who serve in the armed forces? The Eleventh Circuit answered this question in *Bodine v. Cook's Pest Control Inc.*,[1] and held that an arbitration agreement in an employment contract is enforceable despite the fact that certain provisions of the arbitration agreement violate the Uniform Services Employment and Reemployment Rights Act of 1994 ("USERRA" or the "Act").[2]

USERRA

Congress enacted USERRA in part "to prohibit [employers from] discriminat[ing] against persons because of their service in the uniformed services."[3] The Act has broad reach; it protects individuals who have served, are serving or intend to join the uniformed services.[4] USERRA further prohibits retaliation against a veteran who exercises his or her rights under the Act.[5] An aggrieved veteran has several options when pursuing a claim under USERRA. If the employer is a state, local or private entity, the veteran may file a complaint with and seek the assistance of the secretary of labor, *see* 38 U.S.C. § 4322 and § 4323(a)(1)-(2), commence an action in state court against a state (as employer), *see* § 4323(a)(3) & (b)(2), or commence an action in federal district court against a private employer, *see* § 4323(a)(3) & (b)(3).[6]

According to the U.S. Department of Labor ("DOL"), the DOL and U.S. Department of Justice ("DOJ") work together to "ensure [veterans'] USERRA rights are protected."[7] If the veteran's claim is against a nonfederal employer, the DOL attempts to resolve the matter on behalf of the veteran. If the DOL is unsuccessful, it refers the claim to the DOJ, which may commence an action in federal district court on behalf of the veteran.

Bodine v. Cook's Pest Control Inc.

Rodney Bodine, a member of the United States Army Reserve, was part of the sales force at Cook's Pest Control in Alabama. His employment contract with Cook's contained an arbitration agreement, which included provisions that (1) permitted the arbitrator to reapportion costs and attorneys' fees, and (2) set the statute of limitations for filing a claim under the agreement at six months. USERRA does not allow for fees or costs to be taxed against a person claiming rights under the Act, *see* § 4323(h)(1), nor does it limit the time to file an action under the Act, *see* § 4327(b).

This article presents the views of the authors and do not necessarily reflect those of Hunton & Williams LLP or its clients. The information presented is for general information and education purposes. No legal advice is intended to be conveyed; readers should consult with legal counsel with respect to any legal advice they require related to the subject matter of the article.

After being terminated, Bodine brought suit against Cook's under USERRA and state law, alleging, *inter alia*, that Cook's discriminated against him because of his military service. Bodine argued that the entire arbitration agreement of his employment contract was void under USERRA's nonwaiver provision because the statute of limitations and attorneys' fees provisions of the arbitration agreement conflicted with USERRA. The Act's nonwaiver provision states as follows:

> 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.[8]

Cook's moved to compel arbitration. It conceded that the two provisions Bodine complained about did indeed violate USERRA; however, Cook's argued that the court could use the employment contract's severability clause to excise the two invalid provisions, and thus enforce the arbitration agreement pursuant to the Federal Arbitration Act's liberal policy favoring arbitration agreements. The district court agreed. Applying Alabama's severability law, the district court struck the statute of limitations and attorneys' fees provisions from the arbitration agreement, dismissed the suit without prejudice, and ordered Bodine to submit his claims to arbitration.[9] Bodine took an interlocutory appeal.

A panel of the Eleventh Circuit affirmed the district court's order and concluded that "USERRA's nonwaiver provision should not be read to automatically invalidate an entire agreement with USERRA-offending terms. Instead, the plain language of [USERRA] contemplates modification of an agreement by replacing USERRA-offending terms with those set forth by USERRA."[10] Why? The majority's rationale for finding that the admittedly invalid provisions contained in the arbitration agreement were not fatal to the agreement as a whole is grounded almost entirely in its interpretation of the word "supersede."[11] After consulting various dictionaries, the majority concluded "that the word 'supersede' involves replacing one thing with another, rather than causing something to be canceled or invalidated without replacement."[12] Thus, USERRA-offending terms are to be stricken from the agreement and replaced with USERRA terms.[13]

The majority also reasoned that, by including § 4302(a) (the "savings clause") in USERRA, Congress intended piecemeal substitution of offending terms rather than wholesale invalidation of agreements that conflict with USERRA. The savings clause states as follows:

> Nothing in this chapter shall supersede, nullify or diminish any federal or state law (including any local law or ordinance), contract, agreement, policy, plan, practice or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.[14]

Under the majority's logic, if the court "were to read 'supersede' in § 4302(b) as invalidating an entire agreement due to its USERRA-violating terms, then [it] would run afoul of § 4302(a) because so doing would 'nullify' more beneficial terms in addition to removing the invalid ones."[15] The majority also concluded that such a reading "would leave critical gaps in the employer-employee relationship."[16]

Judge Beverly Martin penned a blistering dissent, accusing the majority of misinterpreting the plain text of USERRA and opening the door for potential "employer overreach[ ]."[17] Judge Martin first took issue with the majority's attempt to divine legislative intent. For Judge Martin, Congress used clear, unambiguous language when it drafted USERRA: "the statute supersedes 'any ... contract [or] agreement,' not merely the illegal pieces of a contact or agreement, as the majority says."[18]

© 2016 Hunton & Williams LLP

To this point, Judge Martin noted that "Congress used the all-inclusive word 'any' six times in § 4302(b)." Moreover, if Congress had intended to limit the nonwaiver provision of USERRA to parts of contracts or agreements, it knew how to do so. For example, Congress "limited the effect of the [National Mobile Home Construction and Safety Standards Act's] nonwaiver provision to 'any provision of a contract or agreement' that purported to limit the rights of mobile home purchasers under the Act." [19]

Judge Martin also took issue with the majority's rationale with respect to the savings clause. Under her reading of USERRA, "[w]hen an entire contract is superseded by § 4302(b), the savings clause steps in to preserve any 'more beneficial' rights granted to the veteran by the contract."[20] Ultimately, Judge Martin concluded that the majority's "narrow" reading of § 4302(b) was contrary to prior cases requiring that veterans' rights statues be construed liberally in favor of the benefiting the veteran.[21] She also explained that the majority's holding would cause employers to overreach when drafting employment agreements, because "employers will have nothing to lose by including illegal terms in their contracts."[22]

Notwithstanding the Eleventh Circuit's opinion in *Bodine*, employers are wise to consider USERRA's provisions when drafting employment contracts and arbitration agreements. In addition to the statute of limitations and fee provisions at issue in *Bodine*, USERRA contains provisions pertaining to jurisdiction, *see* § 4323(b), and venue, *see* § 4323(c). The Act also requires employers to "provide to persons entitled to rights and benefits under this chapter a notice of the rights, benefits and obligations of such persons and such employers under this chapter."[23]

Employers should also know that the DOJ is stepping up efforts to enforce USERRA. On Aug. 15, 2016, the DOJ filed a lawsuit against United Airlines for alleged violations of the Act. In announcing the complaint against United, the department stated that, through its "newly created Servicemembers [sic] and Veterans Initiative, [it] will continue to build on [its] strong ties with federal partners and continue using every tool at [its] disposal to protect the rights of the men and women who serve in our armed forces." The announcement indicates that the DOJ intends to "prioritize[ ] the enforcement of servicesmembers' [sic] rights under USERRA."[24]

Waiver of USERRA Rights

An important question on the minds of many employers and veterans is whether a veteran may waive his or her USERRA rights. In *Wysocki v. International Business Machine Corp.*, the Sixth Circuit concluded that "the legislative history clearly envisioned that veterans would be able to waive their individual USERRA rights by clear and unambiguous action."[25] *Wysocki* is instructive for two reasons. First, it discusses the issue of waiver, and second, it deals with the interplay between § 4302(a) and (b).

In *Wysocki*, George Wysocki alleged that IBM violated USERRA when it refused to reintegrate him after he returned from military service. Before being terminated, Wysocki signed a general release (the "release") as part of an "individual separation allowance plan" in exchange for more than $6,000. After he was terminated, Wysocki sued IBM for violating USERRA. The district court granted summary judgment in favor of IBM.

On appeal, Wysocki argued that the release — which essentially precluded him from filing suit against IBM — was superseded by USERRA. Stated differently, the issue was whether Wysocki had waived his USERRA claims by signing the release. The Sixth Circuit first opined that the rights protected by USERRA are substantive rights, not procedural rights.[26] So, for example, a person may agree to arbitrate USERRA disputes because "'[b]y agreeing to arbitration, a party does not forego the substantive rights provided by the statute, but rather it submits its claims to an arbitral forum instead of a judicial forum.'"[27] An agreement that strips away all of a veteran's procedural rights, however, would likely violate USERRA because such an agreement would "also eliminate[ ], for all practical purposes, all of the veteran's substantive rights."[28]

© 2016 Hunton & Williams LLP

After concluding that the release implicated § 4302 — i.e., it striped away all of Wysocki's rights under USERRA — the Sixth Circuit next had to determine "whether the Release was exempted from the operation of § 4302(b) by § 4302(a) [(the savings clause)], because the rights [the release] provided to Wysocki were more beneficial than the rights that he waived."[29] Indeed, "the fact that § 4302 applies to the Release, does not mean that the Release is automatically superceded [sic] by § 4302.[30] The court ultimately concluded that "the ability to waive their USERRA rights without unnecessary court interference, if they believe that the consideration they will receive for waiving those rights is more beneficial than pursuing their rights through the courts, is both valuable and beneficial to veterans."[31] Therefore, "the Release [was] exempted from the operation of § 4302(b) by § 4302(a)."[32]

It is important to note that the court in *Wysocki* scrutinized the release and found "no evidence of mistake, incapacity, fraud, misrepresentation, unconscionability or duress."[33] The court also concluded that the Release used "clear and unambiguous language," "involved valuable consideration," "stated that it covered claims based on 'veteran status,'" "and unambiguous[ly] informed Wysocki that he was waiving his USERRA rights."[34] Moreover, "it appear[ed] from the record that Wysocki ... signed the Release because he believed that the rights provided in the Release were more beneficial than his USERRA rights."[35] Under these circumstances, the court concluded that the waiver was valid.

Conclusion

Whether other federal appellate courts follow *Bodine*'s lead with respect to USERRA's nonwaiver provision remains to be seen. What is clear, however, is that employers need to be mindful of potential USERRA liability when crafting employment contracts and when making employment decisions with respect to veterans, service members and employees who intend to join the armed forces.

Juan Enjamio is head of the Hunton & Williams labor and employment practice in Miami and also serves as managing partner of the firm's Miami office. He focuses his practice on the defense of companies facing complex employment disputes, and is a contributing author to the Hunton Employment & Labor Law Perspectives blog. He may be reached at (305) 810-2511 or jenjamio@hunton.com. Robert Scavone Jr. is an associate in the Miami office. He focuses his practice on complex business litigation and employment disputes, and is a contributing author to the Hunton Employment & Labor Perspectives blog. He may be reached at (305) 810-2520 or rscavone@hunton.com.

NOTES

[1] *Bodine v. Cook's Pest Control Inc.*, --- F.3d ---, No. 15-13233, 2016 WL 4056031 (11th Cir. July 29, 2016).

[2] 38 U.S.C. §§ 4301–35.

[3] *Id.* at § 4301(a)(3).

[4] *Id.* at § 4311(a). For clarity, we refer to would-be service members, service members and veterans collectively as "veterans."

[5] *Id*. at § 4311(b).

[6] The procedures for pursuing a claim against a federal executive agency or federal agency are outlined at 38 U.S.C. § 4324 and § 4325, respectively.

© 2016 Hunton & Williams LLP

[7] U.S. Dep't of Labor, Office of the Asst. Sec'y for Veterans' Emp. & Training, USERRA FY 2015, at 5, *Annual Report to Congress* (July 2016), https://www.dol.gov/vets/programs/userra/USERRA_Annual_FY2015.pdf

[8] 38 U.S.C. § 4302(b).

[9] *Bodine v. Cook's Pest Control Inc.*, No. 2:15-CV-413-RDP, 2015 WL 3796493, at *4 (N.D. Ala. June 18, 2015), *aff'd*, --- F.3d ---, No. 15-13233, 2016 WL 4056031 (11th Cir. July 29, 2016).

[10] *Bodine*, 2016 WL 4056031, at *5 (emphasis in original).

[11] *See id.* at *4.

[12] *Id.*

[13] *Id.* at *5.

[14] 38 U.S.C. § 4302(2).

[15] *Bodine*, 2016 WL 4056031, at *5.

[16] *Id.* at *4

[17] *Id.* at *10 (Martin, J., dissenting).

[18] *Id.* at *6 (emphasis and alterations in original) (quoting 38 U.S.C. § 4302(b)).

[19] *Id.* (emphasis in original).

[20] *Id.* at *8.

[21] *Id.*

[22] *Id.*

[23] 38 U.S.C. 4334(a).

[24] According to the Department of Labor, "the DOJ has filed 95 USERRA lawsuits and favorably resolved 151 USERRA complaints either through consent decrees ... or through facilitated private settlements." The Department of Labor has a website dedicated to USERRA and offers a guide to USERRA.

[25] *Wysocki v. Int'l Bus. Mach. Corp.*, 607 F.3d 1102, 1108 (6th Cir. 2010), *cert. denied*, 562 U.S. 1169 (2011) (citing House and Senate reports indicating that "either explicit[ ] or implied[ ]" waiver "through unambiguous and voluntary action by the employee" is valid).

[26] *Id.* at 1107; *see* also *Slusher v. Shelbyville Hosp. Corp.*, 805 F.3d 211, 225 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 1687 (2016) ("USERRA expressly supersedes any substantive contractual terms that reduce, limit, or eliminate the rights afforded by USERRA. Because the termination notice and termination agreement limit Slusher's substantive USERRA rights, they are superseded.").

[27] *Id.* (alteration in original) (quoting *Landis v. Pinnacle Eye Care LLC*, 537 F.3d 559, 562 (6th Cir. 2008)); *see also Garrett v. Circuit City Stores Inc.*, 449 F.3d 672, 678 (5th Cir. 2006) ("USERRA provides several means for the resolution of disputes, and there is no guarantee of a federal forum for aggrieved employees.").

[28] *Id.*

© 2016 Hunton & Williams LLP

[29] *Id.*

[30] *Id.*

[31] *Id*. at 1108.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

© 2016 Hunton & Williams LLP