

Under USERRA, the Employer Can Be Required To Pay the Prevailing Service Member's Attorney Fees and Costs, but under no Circumstances Can the Service Member Be Required To Pay the Employer's Fees and Costs

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

(h) Fees, Court Costs.—

(1) No fees or court costs may be charged or taxed against any person claiming rights under this chapter.

(2) In any action or proceeding to enforce a provision of this chapter by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses.³

¹ We invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1,400 "Law Review" articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997.

² Captain Wright is the author or co-author of more than 1,200 of the more than 1,400 "Law Review" articles available at www.servicemembers-lawcenter.org. He has been dealing with the federal reemployment statute for 33 years and has made it the focus of his legal career. He developed the interest and expertise in this law during the decade (1982-92) that he worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), he largely drafted the interagency task force work product that President George H.W. Bush presented to Congress (as his proposal) in February 1991. On October 13, 1994, President Bill Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA), Public Law 103-353. The version that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. Wright has also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), and as an attorney in private practice, at Tully Rinckey PLLC. For the last six years (June 2009 through May 2015), he was the Director of ROA's Service Members Law Center (SMLC), as a full-time employee of ROA. In June 2015, he returned to Tully Rinckey PLLC, this time in an "of counsel" relationship. To schedule a consultation with Samuel F. Wright or another Tully Rinckey PLLC attorney concerning USERRA or other legal issues, please call Mr. Zachary Merriman of the firm's Client Relations Department at (518) 640-3538. Please mention Captain Wright when you call.

³ 38 U.S.C. 4323(h). The citation refers to subsection (h) of section 4323 of title 38 of the United States Code. Section 4323 provides for the enforcement of the federal reemployment statute against state and local

***Hanson v. County of Kitsap*, 21 F. Supp. 3d 1124 (W.D. Wash. 2014). (*Hanson I*).**⁴

***Hanson v. County of Kitsap*, 2015 U.S. Dist. LEXIS 84213 (W.D. Wash. June 30, 2015). (*Hanson II*).**⁵

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA)⁶ in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRRA), which was originally enacted in 1940. USERRA made many important improvements in the reemployment statute, and one of those improvements was to provide for a court to order the losing employer-defendant to pay the attorney fees of the prevailing plaintiff service member or veteran.

The "American Rule" on attorney fees is that each party to a lawsuit is responsible for paying his or her or its own attorney, unless there is a statute that authorizes the court to order the losing party to pay the prevailing party's attorney fees. In 1976, Congress enacted the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. 1988. That statute provides for civil rights plaintiffs to be awarded attorney fees, upon prevailing. The losing defendant is ordered to pay the attorney fee as part of the remedy. (If the defendant prevails, the plaintiff is not required to pay the defendant's attorney fees.) This law only applies to actions brought under certain enumerated sections of title 20 and title 42 of the United States Code. The 1976 enactment of this law played a major role in making civil rights laws more than an empty promise.

Under the VRRRA, the service member or veteran could bring his or her own civil action in federal court, with his or her attorney, if the United States Department of Justice (DOJ) chose not to offer free representation, or if the service member or veteran chose not to seek free representation from DOJ. But under the VRRRA, there was no provision for requiring the defendant-employer to pay the attorney fees of the prevailing plaintiff service member or veteran, and the Civil Rights Attorney's Fees Awards Act did not apply to VRRRA cases. Until the enactment of USERRA in 1994, there was no provision for requiring the losing employer to pay

governments and private employers. Section 4324 provides for enforcement, through the Merit Systems Protection Board (MSPB), against federal agencies as employers. Section 4324 has a similar provision providing for the MSPB to order a federal executive agency, as the employer and defendant in a reemployment case, to pay attorney fees and costs: "If the [Merit Systems Protection] Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that such person is entitled to an order referred to in paragraph (2), the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses." 38 U.S.C. 4324(c)(4).

⁴ This is a decision of Judge Robert J. Bryan of the United States District Court for the Western District of Washington. The citation means that this case is officially published in Volume 21 of *Federal Reporter Third Series*, and the decision starts on page 1124.

⁵ This is a follow-up decision by Judge Bryan, unofficially published in LEXIS, a computerized legal research service.

⁶ Public Law 103-353. USERRA is codified at 38 U.S.C. 4301-4335.

the attorney fee of the prevailing service member or veteran.

The enactment of USERRA in 1994, and specifically the provision for requiring the losing employer to pay the attorney fees of the prevailing service member or veteran, made the prospect of finding an attorney to take the case much more realistic in practice. Attorneys sometimes take cases on a *pro bono* (no fee) basis, but an attorney cannot stay in business if he or she takes on more than a handful of *pro bono* cases in a career. To vindicate the rights of the service member or veteran, there needs to be a way for the service member or veteran to obtain competent legal counsel, and that means providing for at least the possibility of the award of attorney fees.⁷

The fee to file a civil case in federal district court is \$400. A USERRA plaintiff is exempted from the requirement to pay this fee, because section 4323(h)(1) expressly so provides.⁸

In federal civil cases, *costs* (not the same thing as attorney fees) are routinely taxed to the losing party—the losing party (plaintiff or defendant) is required to pay, at the end of the case, the costs of the prevailing party. For example, when a party takes a deposition as part of the discovery process in a civil case, the party must pay for the fee of the court reporter who records and transcribes the deposition, and the party may have to pay for the facility where the deposition is conducted. If the deposition is taken in another city, a party may have to pay transportation, lodging, and meals expenses for his or her attorney, in connection with the deposition and later for the trial. Under section 4323(h)(1), the losing USERRA plaintiff cannot be required to pay the costs incurred by the prevailing USERRA defendant (the employer).⁹ Similarly, the losing USERRA plaintiff cannot be required to pay the attorney fees of the prevailing USERRA defendant, even in circumstances where the Federal Rules of Civil Procedure might otherwise require the losing defendant to pay such fees.¹⁰

Craig D. Hanson is a member of the Washington Army National Guard, and he worked for Kitsap County¹¹ as a deputy sheriff. Hanson sued the county under USERRA, claiming that the county

⁷ USERRA's 1994 legislative history explains section 4323(h) as follows: "Section 4322(d)(3)(A) [later renumbered as 4323(h)(1)] precludes the imposition of fees or court costs for persons claiming rights or benefits under this chapter. Section 4322(d)(3)(B) [later renumbered as 4323(h)(2)] would permit a prevailing servicemember who is an employee of a private employer or state or local government to be awarded attorney's fees and other litigation expenses if the case is pursued through private counsel." House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2471.

⁸ Please see Law Review 1231 (March 2012). Similarly, under the VRRRA the service member or veteran plaintiff was exempted from the requirement to pay the filing fee: "No fees or court costs shall be taxed against any person who may apply for such [VRRRA] benefits." 38 U.S.C. 4322 (1988 edition of the United States Code).

⁹ Please see Law Review 15015 (February 2015).

¹⁰ Please see Law Review 1082 (2010), by Thomas G. Jarrard, Esq.

¹¹ Kitsap County is a political subdivision of the State of Washington. Because of the 11th Amendment of the United States Constitution, and because of section 4323(b)(2) of USERRA [38 U.S.C. 4323(b)(2)}, it is not possible to sue a state government agency in federal court, with your own attorney and in your own name. But section 4323(i)

(through the Sheriff) had violated his USERRA rights. He also sued under the Washington Law Against Discrimination (WLAD) and Washington's Public Records Act (PRA).¹²

This case dragged on for years¹³ until a trial was finally held in 2014. In that trial, the jury was unable to agree on a unanimous verdict. The second trial was held in early 2015 and Hanson won on some of his complaints. Hanson was awarded \$64,656 in damages plus \$27,431 in liquidated damages.¹⁴

In *Hanson II*, Judge Robert J. Bryan awarded Hanson \$471,050 in attorney fees plus \$20,716.08 in costs (litigation expenses). In his scholarly opinion, he explained the basis for determining the attorney fees as follows:

In determining what attorney's fee is reasonable in a particular case, the court arrives at the "lodestar amount," that is, multiplying the number of hours reasonably expended by a reasonable hourly rate. *Jordan v. Multnomah County*, 799 F.2d 1262, 1265 (9th Cir. 1986) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)). "While in most cases the lodestar figure is presumptively reasonable, in rare cases, a district court may make upward or downward adjustments to the presumptively reasonable lodestar on the basis of those factors set out in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir.1975), that have not been subsumed in the lodestar calculation." *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 982 (9th Cir. 2008) (internal and quotations citations omitted).

Under *Kerr*, the court considers the following factors: (1) the time and labor required,

provides: "In this section [pertaining to USERRA enforcement], the term 'private employer' includes a political subdivision of a State." 38 U.S.C. 4323(i) (emphasis supplied). This means that you can sue a political subdivision (like Kitsap County) in federal court. Political subdivisions are not "arms of the state" and do not have 11th Amendment immunity. See *Weaver v. Madison City Board of Education*, 771 F.3d 748 (11th Cir. 2014). I discuss *Weaver* in detail in Law Review 15011 (January 2015).

¹² In a case like this, the plaintiff is well served by having private counsel, rather than relying upon the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS) and the Department of Justice (DOJ). Private counsel can consider and bring claims under various statutes and legal theories, while DOL-VETS and DOJ are limited to USERRA. When you have a federal court lawsuit under a federal statute like USERRA and you have closely related state law claims that arise out of essentially the same facts, you can bring your state law claims, along with your federal claims, in the federal court under the supplemental jurisdiction of the federal court. See 28 U.S.C. 1367(a). I discuss this issue in detail in Law Review 1173.

¹³ I invite your attention to Act III, Scene 1 of *Hamlet*, written by William Shakespeare in 1602. This is the famous "to be or not to be" soliloquy contemplating suicide. While contemplating offing himself, Prince Hamlet outlines all that is wrong with human life. One item in a long list is "the law's delays." That situation has not improved in the intervening 413 years.

¹⁴ Section 4323(d)(1)(C) of USERRA provides: "The court may require the employer to pay the person [successful USERRA plaintiff] an amount equal to the amount referred to in subparagraph (B) [lost wages and benefits] as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter [USERRA] was willful." 38 U.S.C. 4323(d)(1)(C). The jury determined that some of the county's violations were willful, and Hanson was awarded double damages for those violations.

(2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the 'undesirability' of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir.1975), cert. denied, 425 U.S. 951, 96 S. Ct. 1726, 48 L. Ed. 2d 195 (1976). These considerations are consistent with Washington Rules of Professional Conduct 1.5.¹⁵

It may seem anomalous that in this case the amount awarded in attorney fees (\$471,050) greatly exceeded the financial award to the plaintiff (\$92,087). In his opinion, Judge Bryan explained why an award of attorney fees greatly in excess of the plaintiff's recovery can be proper and why it was proper in this case:

While at first, the results obtained seem to indicate that the fee request and the lodestar amount are too high, the law counsels us, in civil rights-type cases, to consider vindication of the right involved as an important part of the result obtained. Accordingly, counsel's fees that may seem far excessive when balanced against the amount obtained are not excessive when balanced against the rights vindicated.¹⁶

Three lawyers represented Hanson in this case, and two of them are life members of the Reserve Officers Association (ROA). Matthew Z. Crotty is a Lieutenant Colonel in the Washington Army National Guard. Thomas G. Jarrard is a warrant officer in the Marine Corps Reserve. Michael B. Love is not a member. I congratulate Crotty, Jarrard, and Love for their imaginative, diligent, and effective representation of Hanson. This case is now over.

¹⁵ *Hanson II*, slip opinion at 7-8.

¹⁶ *Hanson II*, slip opinion at 17-18.