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When DOJ Sues a Private Employer for Violating USERRA, Who Is the Named Plaintiff?
By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.4—USERRA enforcement.
1.5—USERRA arbitration.

Q: I am a Captain in the Air Force Reserve and a life member of the Reserve Organization of America (ROA). I have read with great interest several of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). This is a great free resource! I joined your organization as a life member

[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouses' Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

[2] BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 45 years, I have collaborated with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the Federal reemployment statute) for 38 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. §§ 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at mailto:swright@roa.org.

because I want to support this great service that you are providing for Reserve Component (RC) service members.

On the civilian side, I am a junior executive for a huge company—let us call it Daddy Warbucks Industries or DWI. Recently, I was away from my DWI job for exactly one year of military service, from 10/1/2023 until 9/30/2024. I have read and reread your Law Review 15116 (December 2015). I am certain that I meet and have documented that I meet the five USERRA conditions for reemployment.

On 8/1/2023, two months before the start of my military service period, I gave DWI oral and written notice that I would be leaving my DWI to perform service in the uniformed services. I left my job in late September to report to active duty as ordered. I served honorably, and I did not receive a disqualifying bad discharge from the Air Force. Indeed, I was not discharged at all. I was simply released from active duty, and I returned to the status of a part-time Air Force Reserve officer.

I applied for reemployment, in person and in writing, on 10/1/2024, just one day after I left active duty and well within the 90-day deadline for doing so. Although I was clearly entitled to prompt reemployment in the position that I would have attained if I had remained continuously employed at DWI (probably the position that I left), the company refused to reemploy me because Mary Jones, the person who was hired to fill my job, is doing a fine job and the company does not want to displace her.

On 11/1/2024, I made a formal, written USERRA complaint against DWI with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). The agency promptly assigned my case to an investigator, and the investigator promptly got to work on my case. She found that my USERRA claim had merit and

advised me of her finding and of my right to request referral to the United States Department of Justice (DOJ). I requested a referral, and she promptly sent my case file to DOJ.

DOJ reviewed the case file and agreed with DOL-VETS that my case has merit. DOJ just notified me, by letter, that it will be filing suit against DWI in the United States District Court here in my hometown. When DOJ files that lawsuit, who will be the named plaintiff? Will it be the United States? Or will the suit be filed in my name?

Answer, bottom line up front:

Because DWI is a private employer, not a State government agency, the lawsuit will be filed in your name.

Explanation:

Section 4323(a)(1) of USERRA provides for the DOJ to represent a person claiming that his or her USERRA rights have been violated if the case is referred to DOJ by DOL-VETS and if DOJ agrees that the case has merit. The final sentence of this subsection is as follows: "In the case of such an action against a State (as an employer), the action shall be brought in the name of the United States as the plaintiff in the action."[3] By negative implication, this means that cases brought by DOJ against private employers like DWI are brought in the name of the individual claiming that his or her USERRA rights were violated. That is why DOJ will list you as the plaintiff when it files suit on your behalf.

Q: What about cases brought by DOJ against local governments?

A: The final subsection of section 4323 reads as follows: "In this section [for purposes of USERRA enforcement], the term 'private employer'

[3] 38 U.S.C. § 4323(a)(1) (final sentence).

includes a political subdivision of a State."[4] Thus, USERRA cases filed by DOJ against local governments are filed in the name of the individual, not the United States.

Q: Would it make sense to make the United States the named plaintiff in any USERRA case brought by DOJ?

A: Yes, I am in favor of that idea, which would require a statutory amendment.[5] In 2015, DOJ proposed several USERRA amendments, including this one. Here is the relevant part of the DOJ section analysis of its 2015 legislative proposals:

> SEC. ___. ENFORCEMENT OF RIGHTS UNDER CHAPTER 43 OF TITLE 38, UNITED STATES CODE, WITH RESPECT TO A STATE OR PRIVATE EMPLOYER. (a) ACTION FOR RELIEF.— (1) INITIATION OF ACTIONS.—Paragraph (1) of subsection (a) of section 4323 of 6 title 38, United States Code, is amended by striking the third sentence and inserting the following new sentences: "If the Attorney General is reasonably satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the Attorney General may commence an action for relief under this chapter. The person on whose behalf the complaint is referred may, upon timely application, intervene in such action and may obtain such appropriate relief as provided in subsections (d) and (e).". (2) ATTORNEY GENERAL NOTICE TO SERVICEMEMBER OF DECISION.—Paragraph 13 (2) of such subsection is amended to read as follows: "(2)(A) Not later than 60 days after the date the Attorney General receives a referral under paragraph (1), the Attorney General shall transmit, in writing, to the person on whose behalf the complaint is submitted— "(i) if the Attorney General has made a decision

[4] 38 U.S.C. § 4323(i).Political subdivisions are counties, parishes (in Louisiana), cities, towns, school districts, and other units of local government.

[5] *See* Law Review 18074 (August 2018).

about whether the United States will commence an action for relief under paragraph (1) relating to the complaint of the 19 person, notice of the decision; and "(ii) if the Attorney General has not made such a decision, notice of when the Attorney General expects to make such a decision. "(B) If the Attorney General notifies a person of when the Attorney General expects to make a decision under subparagraph (A)(ii), the Attorney General shall, not later than 30 days after the date on which the Attorney General makes such decision, notify, in writing, the person of such decision.". (3) PATTERN OR PRACTICE CASES.—Such subsection is further amended— (A) by redesignating paragraph (3) as paragraph (4); and (B) by inserting after paragraph (2) (as amended by paragraph (2) of this subsection) the following new paragraph (3): "(3) Whenever the Attorney General has reasonable cause to believe that a State (as an employer) or a private employer is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights or benefits secured by this chapter, the Attorney General may commence an action under this chapter.". (4) ACTIONS BY PRIVATE PERSONS.—Subparagraph (C) of paragraph (4) of such subsection, as redesignated by paragraph (3)(A), is amended by striking "refused" and all that follows and inserting "notified by the Department of Justice that the Attorney General does not intend to bring a civil action.".

I favor this DOJ proposal for two reasons. First, it would make it easier for DOJ to seek systemic relief—to prevent employer violations affecting employees generally, not just the individual plaintiff. Second, it would help DOL-VETS to get around forced arbitration clauses that employees are often required to sign as a condition of hiring.[6]

[6] *See* Law Review 22048 (August 2022).

Q: What is "forced arbitration"? And why do you object to the employer practice of demanding that new hires sign arbitration agreements as a condition of being hired and then enforcing those agreements and making Reserve Component service members rely on arbitration, rather than federal court litigation, to enforce their USERRA rights?

A: For several years, ROA has argued that forced arbitration of USERRA disputes is fundamentally unfair and that enforcement of these "agreements" that employees were forced to sign as a condition of being hired or retained, interferes with the effective enforcement of USERRA.[7]

On June 29, 2017, Major General Jeffrey Phillips, USA (Ret.), the Executive Director of the Reserve Organization of America (ROA), testified before the Veterans' Affairs Committee of the United States House of Representatives, in favor of H.R. 2631, a bill that would have protected the employment and reemployment rights of Reserve Component service members by precluding the enforcement of unfair binding arbitration agreements extracted from such service members as a condition of hiring. You can see video and hear audio of the hearing at https://veterans.house.gov/calendar/eventsingle.aspx?EventID=1797. The ROA testimony starts at 1:19:33.

In his testimony, General Phillips said:

> This bill [H.R. 2631] amends the Uniformed Services Employment and Reemployment Rights Act of 1994 [USERRA] to (1) consider procedural protections or provisions under such Act concerning

[7] *See generally* Law Review 22048 (August 2022).

employment and reemployment rights of members of the uniformed services to be a right or benefit subject to the protection of such Act, and (2) make any agreement to arbitrate a claim under such provisions unenforceable unless all parties knowingly and voluntarily consent to arbitration after a complaint on the specific claim has been filed in court or with the Merit Systems Protection Board [which adjudicates claims that federal executive agencies have violated USERRA] and all parties knowingly and voluntarily consent to have that particular claim subjected to arbitration.

Currently, the courts have interpreted that employed uniformed members are not afforded procedural right protection under USERRA with respect to binding arbitration clauses. Specifically, the courts' decisions in separate federal circuits indicate that legislative intent as determined from the committee reports cannot establish procedural right protections in the area of employment and reemployment under USERRA. The courts' past decisions demonstrate that only substantive right protections can be interpreted through the language of the Act.

However, the original intent of Congress was to provide both substantive and procedural right protections under USERRA. Vague language contained in the Act caused courts to deprive uniformed members of the procedural right protections that Congress intended to grant. Section 4302 [of USERRA] makes it clear that USERRA is a floor and not a ceiling on the rights of service members as persons who are serving or have served.

> It is hard to accept that consent is voluntary when a person agrees to binding arbitration upon employment. Most people take jobs because they need to pay the rent and put food on the table. It is perhaps unsurprising that they may overlook the "future risk" of arbitration for the "present need" of income. Binding arbitration holds hostage the ability to provide food and housing for individuals and their families.

In 2008, Nicole Mitchell had a bright career, on the civilian side and the military side, as a broadcast meteorologist and a flight meteorologist. She was a Captain in the Air Force Reserve, serving as a flight meteorologist with the elite Hurricane Hunters. On the civilian side, she was a broadcast meteorologist for The Weather Channel (TWC), where she had been working since 2004. Within months of her hiring, she was moved to the station's top-rated morning show. Management renewed her four-year contract two years early, anxious to retain her services. In 2006, she signed a new contract for a four-year term starting in 2007.

The new contract had a forced-arbitration clause, and she sought to get that provision removed from the contract before she signed it, but the company insisted that the arbitration clause was "mandatory." At the time, she had no problems with the company, other than a few scheduling issues about her Air Force Reserve duty, so she signed the contract.

In 2008, NBC Universal, Bain Capital, and the Blackstone Group jointly purchased The Weather Channel, with NBC managing the channel. Initially, Nicole Mitchell was a favorite with the new management, as she had been with the old management. She was promoted to be the main anchor on the top-rated morning show.

A problem arose when management asked her to come in for an impromptu appointment during an Air Force Reserve drill weekend that

she had already scheduled six months in advance. She held her ground and refused to interrupt her military duty for this impromptu appointment. In the following months, some additional conflicts arose between her obligations to the Air Force and the unreasonable demands of management. She was demoted to less-favorable anchoring slots, ultimately ending up in an unfavorable late-night slot.

In 2010, she returned from a two-week annual training tour in the Air Force, only to be told that The Weather Channel did not want to retain her and that she would be cut when her contract expired in early 2011. As predicted, The Weather Channel fired her as soon as her contract expired.

She retained private counsel and filed suit against The Weather Channel in the United States District Court, but management used the forced-arbitration clause to remove the dispute from federal court to a "neutral arbitrator." The arbitrator appeared to have a pro-employer bias, and he had no experience with USERRA cases. She requested that the case be reassigned to a more neutral arbitrator with experience in the relevant statute, but her request was denied.

In addition to their concern about the arbitrator, she and her legal team were also concerned about the adequacy of the limited discovery process available in arbitration. They had reason to believe that management was not turning over relevant e-mails, showing that their annoyance with her was related to my service in the Air Force Reserve. Electronic discovery, which could sift through such deception, is routinely available in federal court but not in arbitration.

The arbitrator's decision is not reviewable by any court, and the whole process is unfair and opaque. Nicole Mitchell, a life member of ROA and currently a serving Lieutenant Colonel in the Air National Guard and a member of the Minnesota State Senate, was convinced that she would have had a much better shot with a federal district judge determining

questions of law, reviewable by the Court of Appeals, and with questions of fact determined by a jury of her peers.

The Federal Arbitration Act

Congress enacted the Federal Arbitration Act (FAA) in 1925, and the Act is codified in title 9 of the United States Code. The FAA provides that "a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[8] The FAA also provides the authority for a federal district court to compel arbitration of a dispute.[9] The Supreme Court has held that these provisions manifest a "liberal federal policy favoring arbitration agreements."[10]

Congress enacted USERRA 69 years after it enacted the FAA, but the provisions of the two laws must be reconciled, if possible, because "repeals by implication are disfavored—very much disfavored."[11] The Supreme Court has held: "The rarity with which [the Court has] discovered implied repeals is due to the relatively stringent standard for such findings, namely, that there be an irreconcilable conflict between the two federal statutes at issue."[12]

The FAA means that if parties have agreed in advance, before any dispute has arisen, that any dispute will be adjudicated in arbitration, rather than state or federal court, they will be held to that agreement

[8] 9 U.S.C. § 2.
[9] 9 U.S.C. § 3.
[10] *Gilmer,* 500 U.S. at 25, citing *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 24 (1983).
[11] *Reading Law: The Interpretation of Legal Texts,* by Antonin Scalia and Bryan A. Garner, page 327, Thomson/West 2012. This is the definitive recent restatement of the principles of statutory construction, the rules developed over many centuries by courts in the United States, Great Britain, and other common law countries for the interpretation of constitutions, statutes, and other legal texts.
[12] *J.E.M. Agricultural Supply, Inc. v. Pioneer Hi-Bred International, Inc.,* 534 U.S. 124, 142 (2001).

when a dispute arises. When Congress enacted the FAA, it apparently had in mind disputes between or among sophisticated business entities, like a dispute between the United States Steel Corporation and Ford Motor Company over a contract for the supply of steel for automobile manufacturing, and arbitration is entirely appropriate in cases of that nature. Unfortunately, the Supreme Court has held that the FAA also applies in the employment context and that if an employee has agreed in advance to submit employment-related disputes to arbitration, instead of litigating them in court, the employee will be held to that agreement.[13]

I think that arbitration is not an appropriate and just way to adjudicate employment and consumer disputes. For the employer or other company, these disputes are an everyday occurrence. For the individual employee or consumer, such a dispute is a once-in-a-lifetime occurrence. The arbitrator has an enormous financial incentive to rule against the individual and for the company, so that the company will select the same arbitrator again for the next dispute.

It is true that the arbitrator is supposedly required to apply the text and legislative history of the relevant statute (like USERRA) and the case law under that statute, just as a federal district court judge would. The problem is that there is no remedy if the arbitrator misapplies or even flouts the substantive law that he or she is supposedly applying.[14] But what I think is not especially relevant, much more relevant is what the Supreme Court and the Courts of Appeals have held.

[13] *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991).

[14] Please see Law Review 12033 (March 2012). I attended the 2019 Advanced Employment Law Symposium, sponsored by the State Bar of Texas. One part of the symposium was an exercise to evaluate the settlement value of cases. Where an enforceable arbitration agreement was in place, the settlement value was significantly reduced according to both employer side and employee side attorneys.

Gilmer

In May 1981, Robert Gilmer was hired by Interstate/Johnson Lane Corporation as a Manager of Financial Services. As required, he registered with several stock exchanges, including the giant New York Stock Exchange. In the registration application form that he was required to complete and sign, Gilmer "agreed to arbitrate any dispute, claim, or controversy" that might thereafter arise between himself and his employer.

In 1987, when Gilmer was 62, Interstate fired him. Gilmer claimed that the firing violated the Age Discrimination in Employment Act (ADEA), which makes it unlawful for employers to discharge, refuse to hire, or otherwise discriminate against individuals above the age of 40 based on their age. Gilmer filed an ADEA complaint with the United States Equal Employment Opportunity Commission (EEOC). After the EEOC tried unsuccessfully to conciliate the dispute between Gilmer and Interstate, Gilmer sued the company in the United States District Court for the Western District of North Carolina.

Interstate filed a motion to compel arbitration, contending that Gilmer had agreed in 1981 that he would submit any future disputes with his employer to arbitration, instead of suing in state or federal court, and that the agreement was binding and enforceable. The district court denied the motion, holding that binding arbitration was contrary to the ADEA.[15] Interstate appealed to the United States Court of Appeals for the Fourth Circuit.[16] The appellate court reversed the district court, finding "nothing in the text, legislative history, or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements."[17] The Supreme Court granted certiorari

[15] The district court decision is unpublished.
[16] The 4th Circuit is the federal appellate court that sits in Richmond, Virginia and hears appeals from district courts in Maryland, North Carolina, South Carolina, Virginia, and West Virginia.
[17] *Gilmer v. Interstate/Johnson Lane Corp.,* 895 F.2d 195, 196 (4th Cir. 1990).

(discretionary review) because there was a conflict among the federal appellate courts about the enforceability of agreements to submit future disputes to binding arbitration.

Writing for himself and six colleagues, Justice Byron White wrote:

> It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA. Indeed, in recent years we [the Supreme Court] have held enforceable arbitration agreements relating to claims arising under the Sherman Act, 15 U.S.C. §§ 1-7; section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b); the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 et seq.; and section 12(2) of the Securities Act of 1933, 15 U.S.C. § 77l(2). *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614 (1985); *Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477 (1989). In these cases, we recognized that by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.
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> Although all statutory claims may not be appropriate for arbitration, having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue. *Ibid.* In this regard, we note that the burden is on Gilmer to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims. *See McMahon,* 482 U.S. at 227. If such an intention exists, it will be discoverable in the text of the ADEA, its legislative history, or an "inherent conflict" between arbitration and the ADEA's underlying purposes. *See ibid.* Throughout such an inquiry, it should be kept in mind that "questions of arbitrability

> must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone, supra,* at 24.[18]

Gilmer conceded that nothing in the text or legislative history of the ADEA explicitly excluded arbitration of ADEA claims. The Supreme Court majority carefully reviewed each of Gilmer's complaints about arbitration and found that none of them showed an "inherent conflict" between arbitration and the ADEA. Accordingly, the Supreme Court affirmed the decision of the 4th Circuit to compel arbitration of Gilmer's ADEA claim against Interstate/Johnson Lane Corporation.

Alexander v. Gardner-Denver Co. **distinguished.**

Seventeen years earlier, the Supreme Court had held that a plaintiff asserting Title VII discrimination[19] was not precluded by an adverse arbitration decision under a collective bargaining agreement.[20] Justice White's majority decision cited that case and discussed it in detail and then distinguished it rather than overruling it. Justice White wrote:

> Gilmer vigorously asserts that our decision in *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974) and its progeny *Barrentine v. Arkansas-Best Freight System, Inc.,* 450 U.S. 728 (1981) and *McDonald v. West Branch,* 466 U.S. 284 (1984) preclude arbitration of employment discrimination claims. Gilmer's reliance on these cases, however, is misplaced.
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> In *Gardner-Denver,* the issue was whether a discharged employee whose grievance had been arbitrated pursuant to a collective-bargaining agreement was precluded from subsequently bringing a Title VII action based upon the conduct that was the subject of the grievance. In holding that the employee was not foreclosed

[18] *Gilmer,* 500 U.S. at 26.
[19] Title VII of the Civil Rights Act of 1964 forbids employment discrimination on the basis of race, color, sex, religion, or national origin.
[20] *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974).

> from bringing the Title VII claim, we stressed that an employee's contractual rights under a collective-bargaining agreement are distinct from the employee's statutory Title VII rights. …
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> We also noted that a labor arbitrator has authority only to resolve questions of contractual rights. *Id.* at 54. We further expressed concern that in collective-bargaining arbitration "the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." *Id.* at 58, note 19.[21]

The point is that *Alexander v. Gardner-Denver Co.* and its progeny are still good law in the context of arbitration under collective bargaining agreements but not in the context of forced arbitration under individual agreements signed by employees as a condition of being hired or of continued employment.

Garrett

Michael T. Garrett was a Lieutenant Colonel in the Marine Corps Reserve.[22] On the civilian side, he worked for Circuit City Stores, Inc. (CCSI) from 1994 (when he was hired) until March 2003 (when he was fired). In 1995, CCSI sent to each "associate" (employee) a letter and package of materials about the company's newly established "Associate Issue Resolution Program." The letter explained that each employee had 30 days to object in writing to this new program of binding arbitration of any disputes that might thereafter arise involving

[21] *Gilmer,* 500 U.S. at 33-34. In USERRA cases, the conflict between the individual rights of those who serve or have served our country and the rights of most employees who have not served is particularly intense. USERRA protects the interests of the relative handful of employees who volunteer to serve, and those interests often conflict with the interests of the great majority who remain at home and in the civilian job, enjoying the protection of the minority. For example, under USERRA's escalator principle the returning veteran is entitled to be placed on the seniority roster at the point he or she would have attained if continuously employed, ahead of all employees that he or she was ahead of at the time of commencement of the period of service. The returning veteran is entitled to reemployment even if that means that another employee must be displaced.

[22] He was later promoted to Colonel and is now retired.

employees and the company. Like the great majority of CCSI employees, Garrett did not respond within the 30-day window. The company asserted that failing to respond amounted to an "agreement" to submit all future employment-related disputes to binding arbitration.

Garrett alleged that between December 2002 and March 2003, just as the United States military was preparing for combat in Iraq, his CCSI supervisors subjected him to unjustified criticism and discipline at work. In March 2003, when the United States invaded Iraq, CCSI fired Garrett. He alleged that the firing violated section 4311 of USERRA,[23] which makes it unlawful for an employer (federal, state, local, or private sector) to deny a person "retention in employment" on the basis of the person's performance of uniformed service or obligation to perform service.[24]

Garrett retained an attorney (Robert Goodman of Dallas) and sued CCSI in the United States District Court for the Northern District of Texas. The company responded by filing a motion to compel arbitration under the FAA. Goodman contacted me for assistance.[25] I contacted my friend Colonel John S. Odom, Jr., USAFR (now retired), and together we drafted and filed an amicus curiae (friend of the court) brief on behalf of the Reserve Officers Association (ROA)[26] in the District Court, urging that court to deny the motion to compel arbitration. Colonel Odom drove from his home in Shreveport to the court in Dallas and participated in oral argument as amicus.

[23] 38 U.S.C. § 4311.

[24] Section 4311 also makes it unlawful for an employer to deny a person initial employment, promotion, or a benefit of employment on this basis.

[25] At the time, I worked as an attorney for the Department of Defense organization called "Employer Support of the Guard and Reserve" (ESGR).

[26] ROA is now doing business as the Reserve Organization of America.

The district judge agreed with our argument that section 4302(b) of USERRA[27] overrode the FAA and denied CCSI's motion to compel arbitration.[28] CCSI appealed to the 5th Circuit, where the case was assigned to a panel of three appellate judges.[29] The 5th Circuit panel reversed the district court and ordered Garrett to submit his USERRA claim to binding arbitration. In her scholarly decision,[30] Judge Jones wrote:

> The FAA was enacted "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 24 (1991). The FAA states that written arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Court has reinforced the strong federal policy favoring arbitration. *Mitsubishi Motors Corp.,* 473 U.S. 614, 626-27. Accordingly, once a party makes an agreement to arbitrate, that party is held to arbitration "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors Corp., Inc. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 626-27 (1985). Garrett bears the burden to prove that Congress intended to preclude a waiver of a judicial forum for USERRA claims. *See Gilmer,* 500 U.S. at 26.
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> In *Gilmer*, the Supreme Court considered the favored status of arbitration in the employment context when an individual subject to an arbitration agreement alleged a violation of federal

[27] 38 U.S.C. § 4302(b). That subsection provides: "This chapter [USERRA] 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."* (Emphasis supplied.)
[28] *Garrett v. Circuit City Stores, Inc.,* 338 F. Supp. 2d 717 (N.D. Tex. 2004).
[29] The three judges were Edith Jones (then the Chief Judge of the 5th Circuit), Carol Dineen King, and James L. Dennis. Judge Jones wrote the decision and was joined by the other two judges in a unanimous panel decision.
[30] By calling her decision scholarly, I do not mean to imply that I agree with it, either as a matter of law or policy.

discrimination statutes. *Gilmer,* 500 U.S. at 23. The Court held that statutory discrimination claims under the Age Discrimination in Employment Act were subject to mandatory arbitration under the FAA. *Id.,* at 35. In so holding, the Court clarified several issues concerning the FAA's application: (1) "It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to FAA," (2) although arbitration involves submission to an alternate nonjudicial forum *id.,* at 26, it does not require a party to forego substantive rights afforded by the particular statute, *id.*; (3) arbitration is not inconsistent with the important social policies being addressed by federal statutes, *id.,* at 28; and (4) limited discovery provisions are nevertheless sufficient to allow a fair opportunity to present discrimination claims, *id.,* at 31.

The Court also distinguished between an employer/employee agreement enforceable pursuant to the FAA and union collective bargaining agreements. *Id.,* at 34. Although both agreements may include arbitration provisions, they may require different treatment under federal law. *Id.,* at 34-35. When all employees in a unit are represented by a union, the collective interest of the bargaining unit may impinge upon individual substantive rights. *Id.* To that end, pre-*Gilmer* decisions reflected a concern for "the tension between collective representation and individual statutory rights." *Id.,* at 35. The Court stated, however, that such tension is not present in the enforcement of individual agreements between an employee and the employer. *See id.*

Finally, *Gilmer* elaborated on the difference between substantive rights conferred by Congress, such as the prohibition of age discrimination, which must be preserved, even in the arbitral forum, and procedural rights, which include choice of forum and

may be waived without running afoul of the substantive intent of Congress. *Id.,* at 26.

Because the parties agreed to arbitrate the dispute at issue, the agreement is enforceable unless Garrett can demonstrate that Congress intended to preclude arbitration. *See Mitsubishi,* 473 U.S. at 626-27. Congressional intent "will be discoverable in the text of [USERRA], its legislative history, or an 'inherent conflict' between arbitration and [USERRA]'s underlying purposes." *Gilmer,* 500 U.S. at 26.USERRA's antidiscrimination provision prohibits an employer from denying initial employment, reemployment, or any other benefit of employment to a person on the basis of membership in a uniformed service, application for membership, performance of service, application for service, or obligation of service. 38 U.S.C. § 4311(a). . Garrett contends, and the district court agreed, that section 4302(b) of USERRA precludes binding arbitration in stating:

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. § 4323(a)(1). 38 U.S.C. § 4323(a)(2). It is not evident from the statutory language that Congress intended to preclude arbitration by simply granting the possibility of a federal judicial forum. As noted above, the Supreme Court has held that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." *Mitsubishi,* 473 U.S. at 626-27. In cases involving the Sherman Act, the Securities Exchange Act of 1934, the civil protections of the

Racketeer Influenced and Corrupt Organizations Act (RICO), and the Securities Act of 1933, the Court has held substantive statutory rights enforceable through arbitration. With this in mind, it is significant that Section 4302(b) does not mention mandatory arbitration or the FAA, notwithstanding that the *Gilmer* decision, issued only three years before enactment of section 4302(b), extended mandatory arbitration to employment agreements. When Congress enacts laws, it is presumed to be aware of all pertinent judgments and opinions of the judicial branch. *United States v. Barlow,* 41 F.3d 935, 943 (5th Cir. 1994). Congress was on notice of *Gilmer* in 1994 but did not speak to the issue in the text of section 4302(b). The text of section 4302(b) is not a clear expression of Congressional intent concerning the arbitration of servicemembers' employment disputes.

When properly interpreted, section 4302(b) can be harmonized with the FAA and mandatory arbitration. Its operation and meaning turn, in part, on the terms "right or benefit provided by this chapter." The purpose of section 4302(b) is the protection of "any right or benefit provided by [Chapter 43 of USERRA]."38 U.S.C. § 4302(b) . Chapter 43 codifies the rights of soldiers and reservists to reemployment, to leaves of absence, to protection against discrimination and to health and pension plan benefits, among others. *See generally* 38 U.S.C. §§ 4301-4304, 4311-4319. .These are substantive rights. Additionally, section 4303(2) defines rights for the purposes of the chapter:

The term "benefit", "benefit of employment", or "rights and benefits" means any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an

employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment. § 4302(2)
section 4302(b).An agreement to arbitrate under the FAA is effectively a forum selection clause, *see Equal Employment Opportunity Commission v. Waffle House,* 534 U.S. 279, 295 (2002), not a waiver of substantive statutory protections and benefits. Thus, section 4302(b)does not conflict with the FAA's policy to encourage the procedural remedy of arbitration. As recognized by the United States Supreme Court:

[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention would be deducible from text or legislative history. *Mitsubishi,* 473 U.S. at 628.The district court overlooked this important distinction between procedural and substantive rights. *Compare Williams v. Cigna Financial Advisors, Inc., 56 F.3d 656, 660 (5th Cir. 1995)* (holding, with regard to the Older Workers Benefit Protection Act, that there is "no indication that Congress intended the OWBPA to affect agreements to arbitrate employment disputes" and that "the OWBPA protects against the waiver of a right or claim, not against the waiver of a judicial forum.")

Garrett also contends that having to arbitrate his claims results in a reduction in the total package of rights and benefits afforded by USERRA. The right or benefit that arbitration allegedly infringes upon is found in USERRA section 4323(b)(3), which the district court interpreted as a "guarantee of a federal forum for aggrieved

employees." *Garrett,* 338 F. Supp. 2d at 720. Section 4323(b)(3) provides that "the district courts of the United States shall have jurisdiction of the action" against a private employer. This language, however, neither guarantees a right to a federal court trial nor forbids arbitration as an alternate forum. On the contrary, USERRA provides several means for the resolution of disputes, and there is no guarantee of a federal forum for aggrieved employees.

In *Yellow Freight Systems, Inc. v. Donnelly,* 494 U.S. 820 (1990) , the Court construed similar language in Title VII to confer concurrent jurisdiction on federal and state courts rather than exclusive federal jurisdiction. *Id.* at 823-26. Concurrent jurisdiction suggests a broad right of the parties to select a forum, including the arbitral forum. *Gilmer,* 500 U.S. at 29. Because section 4323(b) of USERRRA, like the language in *Donnelly*, confers concurrent jurisdiction, arbitration is a permissible forum choice. *See Bird, 926 F.2d at 119-20* (broad and in some instances exclusive access to federal forum for ERISA claims is not evidence of congressional intent to preclude arbitration).

Next, while section 4323 outlines USERRA enforcement provisions for private or state employees, section 4324 affords different procedures for federal government employees, which include adjudicating claims in an administrative tribunal, the Merit Systems Protection Board ("MSPB"). This is significant, because in *Gilmer*, the Court phrased the relevant inquiry as whether Congress had precluded "arbitration or other nonjudicial resolution" of claims. *Gilmer,* 500 U.S. at 28. The MSPB option evidences an intent to allow alternative means of dispute resolution for employees protected by USERRA. Thus, a federal judicial forum is not guaranteed to all employees under USERRA; rather, a federal judicial forum is available to some employees

and can be claimed or waived, just as in other antidiscrimination statutes.Garrett emphasizes, as did the district court, that a portion of the 1994 legislative history of section 4302 confirms Congressional intent to forbid resort to binding arbitration. The House Committee Report states:

> Section 4302(b) would reaffirm a general preemption as to State and local laws and ordinances, as well as to employer practices and agreements, which provide fewer rights or otherwise limit rights provided under amended chapter 43 or put additional conditions on those rights. *See Peel v. Florida Department of Transportation,* 600 F.2d 1070 (5th Cir. 1979); *Cronin v. Police Department,* 675 F. Supp. 847 (S.D.N.Y. 1987); and *Fishgold, supra,* 328 U.S. 275, 285 (1946) , which provide that no employer practice or agreement can reduce, limit, or eliminate any right under chapter 43. Moreover, this section would reaffirm that additional resort to mechanisms such as grievance procedures or arbitration or similar administrative appeals is not required. *See McKinney v. Missouri-K-T R. Co.,* 357 U.S. 265, 270 (1958). It is the Committee's intent that, even if a person protected under the Act resorts to arbitration, any arbitration decision shall not be binding as a matter of law. *See .Kidder v. Eastern Air Lines, Inc.,* 469 F. Supp. 1060, 1064-65 (S.D. Fla. 1978).

*as reprinted in*We disagree that this snippet of legislative history should affect our interpretation of section 4302(b). First, a powerful line of Supreme Court authority suggests that legislative history should rarely be used in statutory interpretation, because only the text of the law has been passed by Congress, not the often-contrived history. *See, e.g.*, *Exxon Mobil Corp. v. Allapattah Services, Inc.,* 545 U.S. 546 (2005). Even if legislative history may be consulted to resolve statutory ambiguity, *id.*, we have found no ambiguity in this provision. Second, laying aside these controlling preliminary objections, the House Committee Report

appears to be the only pertinent legislative history concerning section 4302(b); no comparable Senate Report has been identified. Such a scant record, unless explicit and on point, hardly proves Congress's intention toward all cases involving arbitration. Moreover, what was left out of the legislative history is noteworthy. There is no recognition in the report of *Gilmer*'s then-recent endorsement of individual agreements to arbitrate. In any event, the totality of the quoted language, along with its imbedded citations, strongly suggests that Congress intended section 4302(b) only to prohibit the limiting of USERRA's substantive rights by union contracts and collective bargaining agreements, and that Congress did not refer to arbitration agreements between an employer and individual employee.

> Finally, this court has rejected reliance on cases involving collective bargaining arbitration as a basis for avoiding arbitration of statutory claims under the FAA. *Carter v. Countrywide Credit Indus., Inc.,* 362 F.3d 294, 298 (5th Cir. 2004). This is because, as noted *supra*, the Supreme Court explicitly distinguished between cases involving collective bargaining arbitration agreements and individually executed pre-dispute arbitration agreements. .*Gilmer,* 500 U.S. at 33-34. The Supreme Court "ultimately conclud[ed] that the former may not be subject to arbitration while the latter are." *Carter,* 362 F.3d at 298. While earlier arbitration cases arose during a time of judicial skepticism regarding arbitration, *Gilmer,* 500 U.S. at 34, the "mistrust of the arbitral process" expressed in such cases had been "undermined by [the Supreme Court's] recent arbitration decisions." *Id.* at 34, n. 5 ; *see also Mitsubishi,* 473 U.S. at 626-27.
>
> Accordingly, we do not conclude from this one piece of legislative history concerning section 4302(b) that Congress intended to exclude all arbitration under USERRA.[31]

[31] *Garrett,* 449 F.3d at 674-80.

Landis and *Ziober*

In 2008, the 6th Circuit followed the 5th Circuit's *Garrett* decision (*Landis)*[32], and in 2016 the 9th Circuit followed suit (*Ziober).*[33] The other circuits have not addressed the specific question of the enforceability of predispute binding arbitration agreements with respect to USERRA claims. When the other circuits are called upon to address this question, they will likely follow the path that the 5th, 6th, and 9th Circuits have already trod.

It is unlikely that the Supreme Court will grant certiorari on this question[34] because there is no conflict among the circuits. If this problem is to be solved, it will probably have to be solved by Congress, not the Supreme Court.

Q: How will making the United States, rather than the individual service member or veteran, the named plaintiff in all USERRA cases filed by DOJ address this forced arbitration problem?

A: Here is how I envision that this provision will work. Senior Airman Smith of the Air Force Reserve left his job at Daddy Warbucks Industries (DWI) to serve on active duty for one year, after giving proper notice to his DWI supervisor and the DWI personnel office. He served honorably and was released from active duty on 9/30/2024. He applied for reemployment the very next day, well within the 90-day deadline for doing so.

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[32] *Landis v. Pinnacle Eye Care, LLC,* 537 F.3d 559 (6th Cir. 2008).

[33] *Ziober v. BLB Resources, Inc.,* 839 F.3d 814 (9th Cir. 2016), *cert. denied,* 137 S. Ct. 2274 (2017).

[34] The final step in the federal appellate process is to apply to the Supreme Court for a writ of certiorari. At least four of the nine justices must vote for certiorari at a conference to consider certiorari petitions, or certiorari is denied, and the decision of the Court of Appeals is final. Certiorari is denied in more than 99% of the cases where it is sought.

Smith is entitled to prompt reemployment, because he meets the five USERRA conditions, but DWI refused to reemploy him because Mary Jones, the new employee who was hired when Smith departed for military service, is doing a fine job and the employer does not want to displace her.

Smith made a formal written USERRA complaint to DOL-VETS, and that agency contacted DWI. The company refused to cooperate with the DOL-VETS investigation, citing the forced arbitration agreement that Smith signed as a condition of being hired. DOL-VETS investigated Smith's complaint and found it to have merit and so advised Smith. Smith requested that DOL-VETS refer his case file to DOJ, and DOL-VETS promptly complied with that request. DOJ reviewed the case file and agreed that the case had merit, and DOJ sued DWI in the appropriate United States District Court.

DWI filed a motion to compel arbitration. DOJ responded, saying: "The plaintiff here is Uncle Sam (the United States of America), and Uncle Sam did not sign any forced arbitration contract." I predict that the court will deny the motion to compel arbitration on this basis.

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[35] *See* https://crsreports.congress.gov/product/pdf/IF/IF10540/. These are the authorized figures as of 9/30/2022.

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