

# LAW REVIEW 14100<sup>1</sup>

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## Sometimes Arbitration Does Work for USERRA Plaintiffs

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1.4—USERRA enforcement

1.5—USERRA arbitration

1.8—Relationship between USERRA and other laws/policies

A panel of securities industry arbitrators has unanimously ordered investment giant Goldman Sachs to pay more than \$7.6 million for wrongful discharge and violating the Uniformed Services Employment and Reemployment Rights Act (USERRA), the federal law that protects military personnel from workplace harassment and retaliation and gives them the right to reemployment in their pre-service civilian jobs after voluntary or involuntary military service. The award by the Financial Industry Regulatory Authority (FINRA) on December 5 is believed to be the largest wrongful discharge arbitration award ever rendered against Goldman Sachs in favor of a financial advisor/broker.

Los Angeles residents Chris Barra<sup>3</sup> and Luis Sampedro<sup>4</sup> claimed that Goldman Sachs retaliated against them, created a hostile work environment, and unlawfully forfeited earned commissions. Both men worked for Goldman Sachs for nine years until the company fired them in 2007. When Barra and Sampedro quickly found jobs at UBS, Goldman forfeited all of their deferred compensation because they did not give 60 days' notice before starting work elsewhere.

Among the evidence heard by the panel was that Barra, a 47-year-old West Point graduate and Lieutenant Colonel in the Army Reserve, was chastised and retaliated against by Goldman Sachs' Los Angeles Branch Manager for going on reserve duty. Less than a year later they were both fired. After becoming a financial advisor for his current employer, UBS Financial Services, Barra was called to active duty and saw combat action in Iraq for 174 days in 2008. After this new tour of duty, Barra returned to his job at UBS without any problems.

While the two men were working at Goldman Sachs, the company restructured its compensation plan and began withholding a portion of financial advisors' commissions by converting them to restricted stock units that would pay out over time. The plan was described during the hearing as

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<sup>1</sup> We invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find almost 1,300 "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, and we add new articles each week.

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<sup>3</sup> Barra is not a member of ROA, although he is certainly eligible. We are trying to recruit him.

<sup>4</sup> Unlike Barra, Sampedro is not a service member.

an example of "golden handcuffs" designed to keep financial advisors from taking their business to other firms.

"This ruling establishes that my clients earned these commissions and their pay cannot be forfeited under California law," says employment law and FINRA attorney Rogge Dunn of Clouse Dunn LLP in Dallas, who represented the men. "It should also serve as a warning to companies that you cannot treat members of the military differently than other employees or discourage them from taking military leave."

The panel's ruling includes more than \$5.2 million in compensatory damages, \$2 million in punitive damages and \$100,000 in damages for violating USERRA, the federal Uniformed Services Employment and Reemployment Rights Act.

Barra and Sampedro currently are top producers in the Los Angeles office of UBS and are among the company's top 2 percent of financial advisors nationwide.

This is the third million-dollar award Dunn has won against Goldman Sachs for employment law violations. In 2006, an arbitration panel awarded \$2.6 million to a financial advisor who worked in the company's San Francisco office. In 2008, Dunn won a \$1 million award for a financial advisor who worked in its Los Angeles office.

Dunn regularly represents financial advisors and executives in the brokerage industry, in addition to handling other complex business and employment disputes.

The Barra-Sampedro case was filed and litigated before a board of arbitrators, rather than a judge and jury in federal district court, because (like all licensed financial advisors) Mr. Barra and Mr. Sampedro were required (as a condition of employment) to sign the standard FINRA agreement, and language in the agreement requires the financial advisor to submit to binding arbitration any dispute that he or she may thereafter have with his or her employer that is in any way related to his or her employment.

I believe that section 4302(b) of USERRA<sup>5</sup> precludes the enforcement of agreements (secured as a condition of employment) to submit future USERRA disputes to binding arbitration. Unfortunately, the 5<sup>th</sup> Circuit<sup>6</sup> and the 6<sup>th</sup> Circuit<sup>7</sup> have disagreed with my argument. In Law Reviews 149, 0619, and 0639, Colonel John S. Odom, Jr., USAF (Ret.) and I have discussed in detail the case of *Garrett v. Circuit City Stores Inc.*, 449 F.3d 672 (5th Cir. 2006).

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<sup>5</sup> Section 4302(b) 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." 38 U.S.C. 4302(b) (emphasis supplied).

<sup>6</sup> The 5<sup>th</sup> Circuit is the federal appellate court that sits in New Orleans and hears appeals from district courts in Louisiana, Mississippi, and Texas.

<sup>7</sup> The 6<sup>th</sup> Circuit is the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee.

LtCol Michael T. Garrett, USMCR, was employed by Circuit City from 1994 until 2003, when he was fired. He had difficulties with his employer related to his USMCR activities during his entire period of employment with the company. Beginning in late 2002, when it became clear that U.S. military action against Iraq might be imminent, he began to receive unjustified criticism and discipline from his Circuit City supervisors, culminating in his March 2003 firing, on the eve of the invasion of Iraq.

LtCol Garrett retained private counsel (Robert E. Goodman, Esq., of Dallas) and sued Circuit City in the U.S. District Court for the Northern District of Texas. The employer responded with a motion to compel arbitration, and that is where I came in. As requested by Mr. Goodman and LtCol Garrett, I filed on behalf of ROA an *amicus curiae* brief (“friend of the court”), arguing that section 4302(b) of USERRA supersedes the agreement to submit future disputes to binding arbitration. Colonel Odom participated, on behalf of ROA, in the district court oral argument on the motion to compel arbitration.

In 1995, a few months after LtCol Garrett went to work for Circuit City, the employer adopted its Associate Issue Resolution Program (AIRP), a nationwide policy for resolving employee disputes through binding arbitration rather than litigation in court. The employer sent each employee (including LtCol Garrett) a letter about the AIRP, including an “opt-out” form. Each employee was given 30 days after receipt of the AIRP package to opt out of the agreement. As with most Circuit City employees, LtCol Garrett failed to respond.

Circuit City asserted that the failure to respond amounted to an agreement to submit future claims to arbitration, and that the District Court should order LtCol Garrett to submit his USERRA claim to arbitration. U.S. District Judge Barbara Lynn, however, agreed with the plaintiff and declined to order binding arbitration. *Garrett v. Circuit City Stores Inc.*, 338 F. Supp. 2d 717 (N.D. Tex. 2004). I have also found two other District Court decisions holding that USERRA overrides arbitration agreements. See *Breletic v. CACI Inc.*, 2006 U.S. Dist. Lexis 4916 (N.D. Ga. January 24, 2006) and *Lopez v. Dillard’s Inc.*, 382 F. Supp. 2d 1245 (D. Kansas 2005).

Circuit City appealed to the United States Court of Appeals for the Fifth Circuit. ROA filed an *amicus curiae* brief in the 5<sup>th</sup> Circuit, but that court rejected the argument advanced by LtCol Garrett’s counsel and ROA that section 4302(b) of USERRA overrides agreements to submit future USERRA disputes to binding arbitration. *Garrett v. Circuit City Stores Inc.*, 449 F.3d 672 (5th Cir. 2006). One other federal appellate court has addressed this question and has agreed with the 5<sup>th</sup> Circuit that section 4302(b) of USERRA does not preclude enforcement of agreements to submit future disputes to binding arbitration. *Landis v. Pinnacle Eye Care LLC*, 537 F.3d 559 (6<sup>th</sup> Cir. 2008).

In a case like *Garrett*, the person claiming that his or her USERRA rights have been violated is put at a distinct disadvantage in arbitration, as opposed to a trial in federal court. In an arbitration, there is only a very limited opportunity (if any opportunity at all) to obtain documents and witnesses from the employer-defendant, in order to prove one’s case. In court, there is a detailed discovery process for this purpose.

In court, the district judge will apply the terms of USERRA and the relevant case law, and on appeal there is a *de novo* (as of new) reconsideration of the district court’s conclusions of law. An

arbitrator is supposed to apply the relevant substantive law, but if he or she fails to do so there is no remedy, as no court will review the arbitrator's findings of fact or conclusions of law.

For the arbitrator, the employer is likely a good repeat customer, while for the individual employee arbitration is a once in a lifetime experience. There is a strong economic incentive for the arbitrator to rule for the employer, to set up the possibility of repeat business with that employer.

We need to overturn *Garrett* either by case law development or by statutory amendment. If another Court of Appeals in another part of the country reaches a result on this issue that is contrary to the result reached by the Fifth Circuit and the Sixth Circuit, the Supreme Court likely will grant *certiorari* (discretionary review) in order to resolve the conflict among the circuits. Presently, there is no conflict among the circuits. Now that the Sixth Circuit has followed the Fifth Circuit, it seems less likely that another circuit will come to the opposite conclusion.

If we are to overturn *Garrett*, it is likely to be through a statutory amendment, not case law development. During the 110<sup>th</sup> Congress (2007-08), S. 3432, the proposed Servicemembers Access to Justice Act (SAJA), would have made many helpful amendments to USERRA. Section 3 of SAJA would have added a new section 4327. That section would have provided, "Notwithstanding any other provision of law, any clause of any agreement between an employer and an employee that requires arbitration of a dispute under this chapter shall not be enforceable." I strongly support this approach.

SAJA was not enacted during the 110<sup>th</sup> Congress, but some individual pieces of it were enacted during the 110<sup>th</sup> and 111<sup>th</sup> Congresses. Congress has not yet addressed the arbitration issue in the context of USERRA.

This problem can be solved by legislation specifically related to USERRA, or it can be solved by broader legislation to restore fairness to the arbitration process. During the 112<sup>th</sup> Congress (2011-12), H.R. 1873 and S. 987 would have prohibited pre-dispute forced arbitration of employment and consumer claims. I support that approach as well, but unfortunately no such legislation was enacted during the 112<sup>th</sup> Congress or the 113<sup>th</sup> Congress. The 114<sup>th</sup> Congress is about to begin, and we will continue our efforts to improve USERRA.

I continue to maintain that USERRA should be amended to preclude the application of these unfair binding arbitration agreements, but in the meantime it is good to see that at least some arbitrators do take seriously their obligation to apply federal laws like USERRA. I congratulate attorney Rogge Dunn for his great accomplishment.

I am informed that it is likely that Goldman Sachs will appeal. We will keep the readers advised of developments in this important case.