IP 05-0602-C T/K Nino v Hayes
Judge John D. Tinder Signed on 08/19/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LUIS J. NINO,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	1:05-cv-0602-JDT-TAB
	)	
HAYNES INTERNATIONAL, INC.,	)	
	)	
Defendant.	)	

ENTRY ON DEFENDANT'S MOTION TO DISMISS (Docket No. 14)[1]

Plaintiff Luis J. Nino ("Nino") brings a claim of discrimination under the Uniformed Services Employment and Reemployment Act of 1994, 38 U.S.C. §§ 4301-4333 ("USERRA"), against his former employer, Haynes International, Inc. ("Haynes"), for termination of his employment. This matter is presently before the court on Defendant's Motion to Dismiss (Docket No. 14) for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6).

I. BACKGROUND

Haynes employed Nino from September 14, 1998 until December 10, 1998. (Compl. ¶ 9, 21.) Throughout his employment with Haynes, Nino was an active member in the United States Marine Corps Indiana Ready Reserve (IRR) Marines. (Compl. ¶

[1] This Entry is a matter of public record and will be made available on the court's web site. However, the discussion contained herein is not sufficiently novel to justify commercial publication.

11.) On December 10, 1998, Haynes terminated Nino's employment. (Compl. ¶ 21.) Nino alleges that Haynes willfully and intentionally subjected him to unlawful discriminatory treatment by terminating his employment in violation of USERRA because of Nino's military commitments and duties. (Compl. ¶ 26.) Nino failed to commence this action until he filed the complaint on April 25, 2005, nearly six and a half years after the termination occurred.

II. DISCUSSION

Haynes contends that Nino's USERRA claim is subject to a four-year statute of limitations found in 28 U.S.C. § 1658(a) ("§ 1658(a)") and Nino's claim is consequently time-barred because Nino filed the complaint over six years after the alleged discriminatory termination occurred. Conversely, Nino argues that § 1658(a)'s statute of limitations is inapplicable to civil actions brought under USERRA. In fact, Nino maintains that no applicable statute of limitations applies to USERRA claims and his claim cannot be time-barred except through equitable measures such as the doctrine of laches. Thus, the issue before the court is whether 28 U.S.C. § 1658(a) applies to a cause of action brought under USERRA. For the reasons set forth below, this court holds that the four-year statute of limitations found in 28 U.S.C. §1658(a) applies to civil actions brought under USERRA.

A. Standard of Review

The purpose of a Rule 12(b)(6) motion to dismiss is to test the sufficiency of the complaint, not to resolve the case on the merits. *See* 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1356 (3d ed. 2004). When considering such motion, the court must accept as true all factual allegations in the complaint and draw all reasonable inferences in favor of the plaintiff. *Cole v. U.S. Capital*, 389 F.3d 719, 724 (7th Cir. 2004); *Hentosh v. Herman M. Finch Univ. of Health Sciences/The Chi. Med. Sch.*, 167 F.3d 1170, 1173 (7th Cir. 1999). Dismissal is appropriate only if "'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Ledford v. Sullivan*, 105 F.3d 354, 356 (7th Cir. 1997) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)). In this instance, the court will accept as true Nino's factual allegations. Thus, for purposes of ruling on Haynes's motion to dismiss, the court assumes that Haynes terminated Nino on December 10, 1988 because of Nino's military commitments.

B. Applicable Statute of Limitations

A dismissal under Rule 12(b)(6) is appropriate if, on the face of the complaint, a party's claims are barred by the statute of limitations. *Small v. Chao*, 398 F.3d 894, 898 (7th Cir. 2005) (citing *Perry v. Sullivan*, 207 F.3d 379, 382 (7th Cir. 2000)). Nino asserts a claim under USSERA, a federal statute that unfortunately fails to unambiguously identify a statute of limitations. While USERRA provides that "No State statute of limitations shall apply to any proceeding under this chapter," it neglects to address the

possibility of an applicable federal statute of limitations. 38 U.S.C. § 4323(i). Furthermore, Title 28 contains a general four-year statute of limitations that applies to all new civil causes of action "arising under an Act of Congress enacted after" December 1, 1990, unless the new law specifically provides otherwise. 28 U.S.C. § 1658(a). Congress enacted USERRA in 1994. Accordingly, the question remains whether § 1658(a)'s four-year statute of limitations applies to USERRA actions.

1. Reemployment Rights Enacted by Congress

In order to apply § 1658(a)'s four-year statute of limitations, the court must first show how USERRA "aris[es] under an Act of Congress" enacted after 1990. 28 U.S.C. § 1658(a). In order to do so, it is helpful to first provide a brief history of veterans' reemployment rights. USERRA is not Congress's first attempt to protect the employment rights of those who serve our country in the military. In fact, prior to World War II, Congress passed the Selective Training and Service Act of 1940, Chapter 720, 54 Stat. 885, which, among other purposes, insured that persons who left their private employment to serve in the military had the right to reemployment upon their return with comparable position, pay, and status. § 8(b), 54 Stat. at 890. Section 8(e) of the 1940 Act created a federal cause of action permitting military personnel to seek injunctive relief and lost wages against non-complying employers. In 1974, Congress strengthened the rights established under the 1940 Act when it passed the Veterans' Reemployment Rights Act ("VRRA").[2] The VRRA prohibited military reservists from

[2] 38 U.S.C. § 2021, *et seq*. (1991) (recodified at 38 U.S.C. §4301 *et seq.* by Pub. (continued...)

being "denied hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces." 38 U.S.C. § 4301(b)(3) (amended 1994 by USERRA). Like the 1940 Act, the VRRA provided only injunctive relief and lost wages and benefits. 38 U.S.C. § 4302 (amended 1994 by USERRA).

In 1994, Congress replaced the VRRA with USERRA to "clarify, simplify, and, where necessary, strengthen the existing veterans' employment and reemployment rights provisions." H.R. Rep. No. 103-65, at 18 (1993). As will be explained further below, USERRA materially changed the existing VRRA law by allowing liquidated damages, a relief that was not previously available to a plaintiff under VRRA. This change increased the rights available to the plaintiff, and the possible liabilities of the defendant. This important change requires the application of § 1658(a)'s four-year statute of limitations.

2. The Supreme Court's reasoning in Jones *suggests that § 1658(a) applies to USERRA*

Section 1658(a) mandates the use of the four-year federal statute of limitations for all civil actions "arising under an Act of Congress enacted after" December 1, 1990. 28 U.S.C. § 1658(a). USERRA was enacted after December 1, 1990. Nonetheless,

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[2](...continued)
L. No. 102-568, Title V, § 506(a), 106 Stat. 4340 (1992)), *amended by* USERRA, Pub. L. No. 103-353, 108 Stat. 3149 (1994).

Nino contends that USERRA should be construed as an amendment to the VRRA and that his cause of action arises out of rights that existed prior to 1990 under the VRRA.

The Supreme Court recently addressed the applicability of 28 U.S.C. § 1658(a) to amendments of prior law. *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004). *Jones* involved a defendant's motion to dismiss the plaintiff's racial harassment case brought under 42 U.S.C. § 1981. As first enacted in 1866, § 1981 guaranteed all persons the right to make and enforce contracts. In 1989, the Supreme Court clarified that the § 1981 right "to make and enforce contracts" did not protect against harassing conduct that occurred after the formation of the contract. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Accordingly, § 1981 did not protect a plaintiff against discriminatory conduct occurring after the formation of the contract, such as a hostile work environment or a wrongful discharge. In 1991, two years after the *Patterson* decision, Congress overruled *Patterson* by amending § 1981 and adding a new subsection that defines the term "make and enforce contracts" to include the "termination of contracts and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship," which extended § 1981 protection beyond the mere formation of contracts. 42 U.S.C. § 1981(b). In *Jones*, the plaintiff's racial harassment claim included the type of allegations that would not have violated § 1981 if the claim had been brought prior to the 1991 amendment. The defendant moved to dismiss the claim as barred by the statute of limitations. Prior to the § 1658(a)'s enactment, the statute of limitations for a § 1981 case was borrowed from the applicable state law. The issue before the Supreme Court was whether § 1658(a)'s four-year

statute of limitations or the borrowed state two-year statute of limitations should apply. Plaintiffs argued that the 1991 amendment to § 1981 constituted an enactment of Congress that occurred after § 1658's enactment; thus, any case arising under the amended § 1981 would be subject to § 1658(a)'s four-year statute of limitations.

In considering the matter, the Court found that § 1658(a) was to have a broad reach. *Jones*, 541 U.S. at 380-81. The distinction between an amendment and a completely new statute is not dispositive. Instead, "what matters is the substantive effect of an enactment—the creation of new *rights of action* and corresponding *liabilities*—not the format in which it appears in the Code." *Id.* at 381(emphasis added). The Court held that "a cause of action 'aris[es] under an Act of Congress enacted' after December 1, 1990—and therefore is governed by § 1658's four-year statute of limitations—if the plaintiff's claim against the defendant was made possible by a post-1990 enactment." *Id.* at 382. Following the Supreme Court's guidance in *Jones*, the court must determine whether the plaintiff's claim "was made possible by" the enactment of USERRA. *Id.* Or, as *Jones* states, whether the plaintiff's claim contains "new rights of action and corresponding liabilities." *Id.* at 381.

3. The liquidated damages provision materially changes the cause of action

Perhaps Nino would have had a claim against Haynes under the VRRA if the Act was still current law. However, the VRRA has been replaced by USERRA. Unfortunately for Nino, the nature of the USERRA claim materially differs from a VRRA

claim because the USERRA claim contains additional rights and liabilities. USERRA permits the plaintiff to seek liquidated damages, a relief that was not previously available to a plaintiff under the VRRA. 38 U.S.C. § 4323(d)(1)(c)). Because liquidated damages would not have been available to Nino under the VRRA, Nino's cause of action under USERRA, which includes the right to seek liquidated damages, was made possible only through the enactment of USERRA. Thus, § 1658(a) must apply and the cause of action is subject to the four-year statute of limitations.

When Congress included the liquidated damages provision in USERRA, it transformed what was historically a claim for equitable relief into a claim for legal relief. As one district court noted, "the enforcement section of the USERRA relating to private employers, 39 U.S.C. § 4323, is materially different from the enforcement provision of the VRRA because it requires an employer to pay liquidated damages if its violation of the USERRA is found to be willful." *Spratt v. Guardian Auto. Prods. Inc.*, 997 F. Supp. 1138, 1140 (N.D. Ind. 1998). This additional right for the plaintiff, and additional liability of the defendant, did not exist prior to USERRA's enactment. The right to liquidated damages effects a material change in the type of claim a plaintiff may bring. Prior to USERRA, actions under the VRRA were considered actions in equity and not entitled to a jury trial. *See Troy v. Hampton*, 756 F.2d 1000, 1003 (4th Cir. 1985) (claims under the VRRA are equitable in nature and not entitled to a jury trial); *Novak v. Mackintosh*, 937 F. Supp. 873, 879 (D.S.D. 1996) (allowing the doctrine of laches to apply because the VRRA provides an equitable remedy). The Seventh Circuit has ruled that "actions seeking liquidated damages provided by statute are 'suits at common law' for

constitutional purposes." *Calderon v. Witvoet*, 999 F.2d 1101, 1109 (7th Cir. 1993) (citing *Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1014-17(7th Cir. 1991)). Accordingly, USERRA's additional right to liquidated damages transfers the action from one in equity to one at law, requiring the Seventh Amendment right to a jury.

USERRA's liquidated damages provision is comparable to those reviewed by the Seventh Circuit in *Calderon* (Migrant and Seasonal Agricultural Workers Protection Act of 1983 ("AWPA")) and *Video Views* (Copyright Act of 1976). Like USERRA's provision, both the AWPA and the Copyright Act include provisions allowing liquidated damages after a showing of willful misconduct on the defendant's part. 29 U.S.C. § 1854(c)(1); 17 U.S.C. § 504(c)(2)(2004). A jury must make the requisite willfulness finding. *Calderon*, 999 F.2d at 1109; *Video Views*, 925 F.2d at 1016; *see also Duarte v. Agilent Techs., Inc.*, 366 F. Supp. 2d 1036, 1038 (D. Colo. 2005) (persuasively comparing USERRA's liquidated damages provision to ADEA's liquidated damages provision, which was ruled by the Supreme Court to be punitive in nature, entitling the plaintiff to a jury trial); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125 (1985)); *Spratt*, 997 F. Supp. at 1142. Thus, the liquidated damages provision converts a USERRA action into an action at law, not equity. Indeed, Nino's own complaint asks the court to award liquidated damages and attorney fees and is accompanied with a demand for a jury trial. (Compl. at 5-6). The rights to liquidated damages and a jury trial are not only rights not available to Nino prior to USERRA, but likewise the possibility of liquidated damages constitutes additional liability that did not exist to Haynes under the VRRA. Under the

Jones reasoning, such a claim would not be possible prior to § 1658(a)'s enactment; thus, the statute of limitations must apply.

Nino notes that the only other court to address the issue presently before this court, whether § 1658(a) applies to USERRA claims, ruled that "there is no statute of limitations that applies" to a USERRA claim. *Akhdary v. City of Chattanooga*, No. 1:01-CV-106, 2002 WL 32060140, at *6 (E.D. Tenn. May 22, 2002). The *Akhdary* holding is less than persuasive for two reasons. First, the *Akdary* opinion fails to provide adequate explanation or reasoning for its holding. Instead, it summarily states that "USSERA does not establish a new cause of action; instead, it amends the preexisting law of the VRRA. Thus, there is no statute of limitations that applies." *Id.* Second, the *Akdary* court did not have the guidance subsequently provided by the Supreme Court in *Jones*. *Akdary* apparently relies on the amendment/new law distinction. *Jones* convincingly dismisses the importance of such distinction: "An amendment to an existing statute is no less an 'Act of Congress' than a new, stand-alone statute. What matters is the substantive effect of an enactment—the creation of new rights of action and corresponding liabilities—not the format in which it appears in the Code." *Jones*, 541 U.S. at 381. As previously noted, the enactment of USERRA created new rights and liabilities that were not available prior to its enactment.

In addition, Nino contends that the congressional intent behind USERRA demonstrates that there is to be no statute of limitations.[3] This argument is

[3] Nino provided the following two excerpts from the Congressional Committee (continued...)

unpersuasive. Aside from the ordinary lack of utility of congressional reports in assessing congressional intent,[4] the committee reports quoted by Nino illustrate nothing more than Congress's intent to exclude the borrowing of state statutes of limitations. This court recognizes that both the VRRA and USERRA expressly prohibit the borrowing of state statute of limitations. Likewise, this court admittedly recognizes that

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[3](...continued)
reviewing the revisions contained in USERRA:

> The Veterans' Reemployment Rights (VRR) provisions of Federal law, which safeguard employment and reemployment rights in civilian employment of members of the uniformed services, have been in effect for over fifty years. Although the law has effectively served the interests of veterans, members of the Reserve Components, the Armed Forces and employers, the current statute is complex and sometimes ambiguous, thereby allowing for misinterpretation...Accordingly, the primary goals of the Committee, in undertaking the revision of chapter 43, were to clarify, simplify, and, where necessary, strengthen the existing veterans' employment and reemployment rights provisions.

H.R. Rep. No. 103-65(1), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2451.

> Section 4322(d)(7) would reaffirm the 1974 amendment to chapter 43 that no State statute of limitations shall apply to any action under this chapter. It is also intended that state statutes of limitations not be used even by analogy. *See Stevens v. Tennessee Valley Authority*, 712 F.2d 1047, 1057 (6th Cir. 1983). Moreover, the Committee reaffirms, as we made clear in the 1974 legislative history, "that the time spent by the government agencies charged with the administration and enforcement of this Act in investigation, negotiation, and preparation for suit shall [not] be charged against the veteran in any consideration of a time-barred defense," i.e., laches, Senate Report No. 93-907, 93rd Cong., 2d Sess. at 111-112 (June 10, 1974).

Id. at 2472.

[4] *See*, *e.g.*, *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators.").

there is no case law applying a federal statute of limitations to a VRRA claim. Such a result would be expected, since at the time the VRRA was enacted no general federal statute of limitations act similar to § 1658(a) existed. The same cannot be said of the USERRA. Congress, less than four years prior to passing USERRA, enacted § 1658(a) and established a general federal statute of limitations applicable to all federal civil actions enacted after December 1, 1990. If Congress intended § 1658(a) not to apply to USERRA, then it could have expressly done so. But while Congress took the measure to expressly reject the application of state statutes of limitations, it knew of § 1658(a)'s statute of limitations and chose not to expressly exclude the possible use of such statute of limitations. While Congress's failure to expressly exclude the applicability of § 1658(a) is not, by itself, determinative, it provides sufficient persuasive evidence to dismiss Nino's arguments concerning congressional intent.

Because the USERRA claim contains additional rights and liabilities that did not exist under the VRRA, this court holds that, for purposes of § 1658(a), USERRA is a "civil action arising under an Act of Congress enacted after" December 1, 1990, and is therefore subject to § 1658(a)'s four-year statute of limitations. Nino alleges that the discriminatory termination occurred on December 10, 1998. Nino filed his complaint with this court well outside the applicable four-year statute of limitations. Accordingly, Haynes's Motion to Dismiss will be **GRANTED**.

III. Conclusion

For all the foregoing reasons, Defendant Haynes's Motion to Dismiss for failure to state a cause upon relief can be granted will be **GRANTED**.[5]

ALL OF WHICH IS ORDERED this _____ day of November 2005.

John Daniel Tinder, Judge
United States District Court

Copies to:

Jeffrey B. Halbert
Haskin Lauter Larue & Gibbons
jhalbert@hlllaw.com

Kenneth E. Lauter
Haskin Lauter Larue & Gibbons
klauter@hlllaw.com

Robert P. Lombardi
The Kullman Firm
rpl@kullmanlaw.com

Stephen L. Scott
The Kullman Firm
sls@kullmanlaw.com

[5] The Defendant's Second Motion to Dismiss (Docket No. 22) appears to be well taken also. However, because of the resolution of the instant motion to dismiss, the Second Motion does not need to be addressed.