

No. 08-2806

United States Court of Appeals for the Seventh Circuit

CHARLES CARLOS MIDDLETON, Sr.,

Plaintiff - Appellant

v.

CITY OF CHICAGO,

Defendant – Appellee

On Appeal from the United States District Court for the Northern District of Illinois, No. 07 C 4206, Hon. James F. Holderman Presiding

Brief of Amicus Curiae National Employment Lawyers Association in Support of Appellant and in Favor of Reversal

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No. 08-2806

Middleton v. City of Chicago

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Appellate court No.: 08-2806

Short Caption: Middleton v. City of Chicago

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Dec. 3, 2008

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s/ Edward Still

Attorney's Signature

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Statement of Interest

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, and civil rights disputes. NELA and its 68 state and local affiliates have a membership of more than 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA has filed numerous amicus briefs before the United States Supreme Court and federal appellate courts, including the Seventh Circuit. *See, e.g., Meacham v. Knolls Atomic Power Laboratory*, 128 S.Ct. 2395 (2008); *CBOCS West, Inc. v. Humphries*, 128 S.Ct. 1951 (2008); *Federal Exp. Corp. v. Holowecki*, 128 S.Ct. 1147 (2008); *Sprint/United Management Co. v. Mendelsohn*, 128 S.Ct. 1140 (2008); *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); *Doe v. Oberweis Dairy*, 456 F.3d 704 (7th Cir. 2006); *Swaback v. American Information Technologies Corp.*, 103 F.3d 535 (7th Cir. 1996) (7th Cir. 1996).

NELA has a compelling interest in ensuring that the goals of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. § 4301 *et seq* are realized. NELA's interest in

USERRA has been shown by its submission to the Department of Labor of extensive comments on proposed regulations implementing USERRA, as well as its advocacy in Congress of improvements to USERRA. NELA has no financial interest in the outcome of this case.

Amicus Curiae's motion for leave to file its brief *instanter* is pending. NELA has timely notified counsel for Appellee of its intent to file this amicus brief, and Appellee has indicated that it will decide whether or not to consent after reviewing the Brief. Appellant has consented to the filing of this Brief. If Amicus Curiae's motion is granted, this Brief will be filed pursuant to the authority granted by the Seventh Circuit.

Argument

I. No Statute of Limitations Ever Applied to USERRA Claims

On October 10, 2008, during the pendency of this appeal, the Veterans' Benefits Improvement Act of 2008 ("VBIA") was enacted. Pub. L. No 110-389, 122 Stat. 4145 (2008). The VBIA, among other things, added a new section to USERRA, to be codified as 38 U.S.C. § 4327, subsection (b) of which forbids application of time limits to USERRA claims. *Id.* § 311(f)(1), 122 Stat. 4163-64. Moreover, even before enactment of § 4327(b), no time limitation applied to USERRA claims. Consequently, the district court erred in applying to Middleton's claim the catchall four-year limitations period contained in 28 U.S.C. § 1658(a).

A. Congress Originally Intended That No Statute of Limitations Apply to USERRA Claims

Absent from the text of USERRA is any time limit for filing claims seeking relief under the Act. Examination of USERRA's legislative history and that of the Act's predecessor legislation reveals that this is so because Congress intended that absolutely no statute of limitations be applied to USERRA claims.

USERRA is best understood not as an entirely new law but, rather, the latest in a series of veterans' employment and reemployment rights statutes

that originated with the Selective Service Act of 1940. *See Rogers v. City of San Antonio*, 392 F.3d 758, 762 (5th Cir. 2004); 20 C.F.R. § 1002.2. Enacted on October 13, 1994, USERRA replaced at Chapter 43 of Title 38 of the United States Code the entirety of employment and reemployment rights provisions that comprised what was known as the Veterans' Reemployment Rights Act (VRRRA).¹ *See* Pub. L. No. 103-353, § 2(a), 108 Stat 3149-69 (1994); 20 C.F.R. § 1002.2. Significantly, the heading of the section of USERRA that enacted USERRA's replacement of the VRRRA, was titled "Restatement and Improvement of Employment and Reemployment Rights." Pub. L. No. 103-353, § 2(a), 108 Stat 3149. It is clear, then, from the very language of the enacting legislation, that Congress viewed USERRA as restating and improving, rather than departing from, the rights under the VRRRA.

That Congress considered USERRA as having continuity with the prior legislation is evident as well in the Act's legislative history. The House Committee report said that "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, pt. 1, at 18 (1993), *reprinted in* 1994

¹ The VRRRA, which was enacted pursuant to the Vietnam Era Veterans' Readjustment Assistance Act of 1964, was originally codified at 38 U.S.C. §§ 2021 to 2026. Pub. L. 93-508, Title IV, § 404(a), Dec. 3, 1974. In 1992, the sections of the VRRRA, as amended, were renumbered as §§ 4301 to 4307. Pub. L. No. 102-568, Title V, § 506(a), Oct. 29, 1992, 106 Stat. 4340.

U.S.C.C.A.N. 2449, 2451. Likewise, the Senate Committee report explained that USERRA “contains amendments that would restructure, clarify, and improve chapter 43 of title 38, United States Code.” S. REP. No. 103-158, at 33 (1993), *available at* 1993 WL 432576 (Leg.Hist.), at *33. Moreover, the House and Senate committee reports expressed an intent that to the extent consistent with USERRA, court decisions under the previous veterans’ employment and reemployment rights statutes serve as precedents in cases under USERRA. *See* H.R. REP. No. 103-65, at 19 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2452 (“The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protection against employment-related discrimination, and the protection of certain other rights and benefits, have been eminently successful for over fifty years. Therefore, the Committee wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act, remains in full force and effect in interpreting these provisions.”); S. REP. No. 103-158, at 40 (1993), *available at* 1993 WL 432576 (Leg.Hist.), *40 (“Because the current VRR law has been so successful for so long, the Committee, as did the House Committee in its report, stresses its intention that the extensive body of case law that has evolved over the past five decades, to the extent that it is consistent with the provisions of the Committee bill, would remain in full force and effect.”).

Among the aspects of the prior legislation that USERRA preserved was omission of a statute of limitations from the text of the law. Indeed, none of the previous veterans' employment and reemployment rights statutes ever included a statute of limitations. *See Stevens v. Tennessee Valley Authority*, 712 F.2d 1047, 1054 (6th Cir. 1983).

Moreover, the history of the antecedent legislation reveals that Congress deliberately omitted a statute of limitations specifically because it intended that none be used. Before enactment of the VRRRA in 1974, the absence of a filing deadline in the veterans' employment and reemployment laws spawned controversy among the courts over whether and, if so, when state statutes of limitations could be borrowed in suits brought under those laws. *See id.* (collecting and discussing cases). The VRRRA laid to rest the debate by amending the statute to expressly prohibit application of state statutes of limitations in VRRRA proceedings. *See Stevens* at 1054-55. The amendment was intended to clarify Congress's original intent that no time-based defense, with the exception of the doctrine of laches, be used in veterans' employment and reemployment rights cases, regardless of whether the relief sought were legal or equitable. *See S. Rep. No. 93-907*, 93d Cong., 2d sess. 111 (1974); *Stevens*, 712 F.2d at 1055 (discussing legislative history of 1974 amendment). *See also Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 806 n.14 (8th Cir. 1979) (declining to apply federal statutes of limitations in VRRRA case);

Wallace v. Hardee's of Oxford, Inc., 874 F. Supp. 374, 376-77 (M.D. Ala. 1995) (same).

Congress included in USERRA the same ban on application of state statutes of limitations as that in the VRRRA. USERRA's no-state-statutes-of-limitations ban was enacted as 38 U.S.C. § 4323(c)(6) and later redesignated as 38 U.S.C. § 4323(i). Pub. L. No. 103-353, § 2(a), 108 Stat. 3165-66 (1994); Pub. L. No. 105-368, Title II, § 211(a), 112 Stat. 3330 (1998). On October 10, 2008, the VBIA removed the provision and replaced it with new 38 U.S.C. § 4327(b), which expressly prohibits application of any time limit to USERRA claims. Pub. L. No. 110-389, Title III, § 311(f), 122 Stat. 4163-64 (2008).

While prior to the 2008 amendment USERRA's time-limit prohibition mentioned only state statutes of limitations, that fact should not be construed as authorization to apply 28 U.S.C. § 1658(a) or any other federal statute of limitations. USERRA's provision banning application of state statutes of limitations was simply a continuation of the identical provision included in the VRRRA, which, as discussed above, was in response to court decisions applying state statutes of limitations to veterans' employment and reemployment rights claims. Before enactment of the VRRRA, there evidently was no case law applying federal statutes of limitation to such claims, and, thus, "there would have been no reason for Congress to enact a statute on that subject" in 1974. *Wallace*, 874 F. Supp. at 376. Nor did courts apply federal statutes of limitations to veterans' claims brought under the VRRRA.

In fact, to the contrary, courts declined to apply federal time limits in VRRRA cases. *See Goodman*, 606 F.2d at 806 & n.14; *Blake v. City of Columbus*, 605 F. Supp. 567, 569 (S.D. Ohio 1984). Consequently, at the time of USERRA's enactment, there was no need to include an express prohibition on application of federal statutes of limitations to cases brought under the Act.

Furthermore, the legislative history of USERRA's no-state-statute-of-limitations provision makes it clear that by including the same provision as that which appeared in the VRRRA, Congress intended that USERRA's provision be accorded the same construction as that which Congress intended for the VRRRA's provision: that claims be subject to no time-based affirmative defense other than the doctrine of laches. *See S. REP. No. 103-158*, at 70, *available at* 1993 WL 432576 (Leg.Hist.), at *70 ("New section 4322(c)(6) would provide, as does present section 4302, that no State statute of limitations would apply to any proceeding under chapter 43. The Committee recognizes the applicability of the equitable doctrine of laches to bar relief in a case in which an employer has proven both inexcusable delay by the claimant and prejudice to the employer."); *H.R. REP. No. 103-65*, pt. 1, at 39 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2472 ("Section 4322(d)(7) would reaffirm the 1974 amendment to chapter 43 that no State statute of limitation shall apply to any action under this chapter. . . . Moreover, the Committee reaffirms, as was 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.") (quoting S. REP. No. 93-907, 111-12).

The arguments made in the following sections of this brief further point to the conclusion that Congress never intended any time limitation to apply to USERRA claims.

B. The "Otherwise Provided by Law" Exception to 28 U.S.C. § 1658(a) Applied to USERRA

USERRA, of course, was enacted after December 1, 1990. Although prior to enactment of 38 U.S.C. § 4327(b), USERRA did not explicitly state that no time limit applies to USERRA claims, USERRA still fell within the "otherwise provided by law" exception of § 1658(a). That is so for several reasons. First, USERRA preserved the VRRRA's prohibition on applying state statutes of limitations. As noted above, the ban on use of state limitations periods originated in response to courts' borrowing state time limits in veterans' employment and reemployment rights cases and was intended to clarify that the doctrine of laches was the only permissible time-based defense in such cases.

Second, because USERRA expressly prohibited application of state limitations periods, "it is not the type of statute Congress had in mind when it enacted section 1658." Department of Labor, PREAMBLE TO USERRA

REGULATIONS, 70 Fed. Reg. 75,246, 75,288 (Dec. 19, 2005), *available at* 2005 WL 3451172, at *75288 (F.R.). The legislative history of § 1658 shows that “a central purpose of section 1658 was to minimize the occasions for [the] practice” of borrowing state statutes of limitations. *Jones v. R.R. Donnelly & Sons*, 541 U.S. 369, 380 (2004). Application of § 1658(a) to USERRA would not have served such purpose, as USERRA included its own ban on use of state statutes of limitations.

Third, in light of the population protected by and granted rights under USERRA—civilian employees and job applicants with past, current, or future obligations to serve in the military—application of § 1658(a)’s four-year time limit to USERRA claims potentially would interfere with enforcement of the Act. Such persons may be unavailable to file a USERRA claim within a four-year period because they are away performing military service, have been taken captive as prisoners of war, or are hospitalized or recovering from a service-related illness or injury. Indeed, the statute reflects Congress’s cognizance of and intention to accommodate the exigencies that potentially cause unavailability of military service members from civilian life. *See, e.g.*, 38 U.S.C. §§ 4301(a); 4312(c), (e).

Fourth, and relatedly, application § 1658(a) to USERRA claims would be a procedural roadblock to realizing USERRA’s stated purposes, 38 U.S.C. § 4301. One of those purposes is “to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to

civilian careers and employment which can result from such service.” 38 U.S.C. § 4301(a)(1). Given the fortuities of military service that can cause lengthy and unexpected absences from civilian life, subjecting USERRA claims to § 1658(a)’s four-year statute of limitations would raise the specter of a barrier to vindication of rights under the Act and, as a consequence, discourage noncareer service in the uniformed services. In the same vein, application of § 1658(a) would disserve the Act’s purposes of ensuring prompt reemployment to returning servicemembers and prohibiting discrimination against employees and job applicants because of their military service, 38 U.S.C. § 4301(a)(2)-(3), by time-barring meritorious reemployment rights and discrimination claims.

Fifth, USERRA sets no deadline for filing complaints with the Department of Labor; requires the Department of Labor to investigate all complaints submitted to it; and specifically states that “a person may commence an action for relief” if (among other circumstances) the person has received notice from the Department of an unsuccessful effort to resolve the complaint and has not requested referral of the complaint to the Attorney General. *See* 38 U.S.C. §§ 4322(a), (d); 4323(a)(2)(B) (2006). The absence of a time limit for filing USERRA complaints with the Department and express authorization to file lawsuits when the Department has concluded processing of the complaint are further evidence that Congress did not intend § 1658(a) to apply to USERRA claims. To apply § 1658(a) to persons who have filed

complaints with the Department of Labor would penalize them for exercising their right under USERRA to seek relief from the Department before resorting to judicial action.

Sixth, and also arising in the context of complaints filed with the government, is the fact that prior to enactment of the VBIA, USERRA imposed no deadlines for pre-suit processing of USERRA complaints filed with the government.² *See* 38 U.S.C. §§ 4322, 4323(a), 4324(a) (2006). Consequently, there was nothing in the statute to prevent the agencies from taking many years to complete their responsibilities with respect to USERRA complaints. Given that government processing of a USERRA complaint potentially could extend beyond four years after the date of violation of the Act alleged in the complaint, Congress could not have intended § 1658(a) to apply. Otherwise, claimants would be penalized not only for exercising their right to seek government assistance but also for delay of the government, over which they would have no control.

Last, but not least, USERRA places an affirmative duty upon employers to post notices that notify employees of the rights and benefits available under the Act. 38 U.S.C. § 4334. USERRA thus presumes that without such

² The VBIA amended §§ 4322, 4323 and 4234 of USERRA to include deadlines for the Department of Labor, Attorney General, and Special Counsel to complete their respective duties with respect to processing of USERRA complaints. Pub. L. No. 110-389, Title III, § 311(a) to (e), 122 Stat. 4162-63 (2008).

notice, employees may be oblivious to and thus not seek to vindicate their rights under the Act. Indeed, § 4334 was enacted in 2004³ to remedy lack of awareness of USERRA’s rights. *See* H.R. REP. No. 108-683 (2004) (“According to testimony received by the Committee, many problems emerge because employers and employees do not know the legal rights and duties associated with USERRA. This section is intended to raise awareness among employers and employees[.]”), *available at* 2004 WL 3044785, at *17 (Leg. Hist.). That being so, it would be illogical to presume Congress intended to subject to § 1658 claims brought by plaintiffs who previously were ignorant of their USERRA rights.

C. Middleton’s Claim Did Not “Arise Under” a Post-1990 Enactment Within the Meaning of 28 U.S.C. § 1658(a)

In *Jones*, the Supreme 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 4-year statute of limitations—if the plaintiff’s claim against the defendant was made possible by a post-1990 enactment.” *Jones*, 541 U.S. at 382. Under this test, Middleton’s hiring discrimination claim was not “made possible” by USERRA because had USERRA not been enacted, Middleton

³ Section 4334 was enacted on December 10, 2004, and became on effective March 10, 2005. Pub. L. No. 108-454, § 203(c), 118 Stat. 3606 (2004).

could have brought his claim under the anti-discrimination provision of the VRRRA, 38 U.S.C. § 4301(b)(3) (Supp. IV 1993).

Mr. Middleton was a member of the inactive reserve of the U.S. Air Force at the time of his application to the City (Fourth Amended Complaint ¶ 10; App't Br. at 6). The VRRRA provided protection against discrimination for members of the Reserve components, as follows:

Any person who seeks or holds a position described in clause (A) or (B) of subsection (a) of this section *shall not be 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) (Supp. IV 1993) (italics added).⁴ USERRA amended this provision to state the following:

A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service *shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.*

38 U.S.C. § 4311(a) (italics added).

⁴ Clause (B) referenced in the quoted language refers to employment by political subdivisions of States.

Congress intended that USERRA would continue the protections provided by VRRRA to members of the Reserve components and others. *See* S. REP. No. 103-158, at 45 (“This subsection would recodify the current prohibition, in section 4301(b)(3) of title 38, against employment discrimination ‘because of any obligation as a member of a Reserve component of the Armed Forces.’”), *available at* 1993 WL 432576 (Leg. Hist.), at *45; H.R. REP. No. 103-65, at 23 (“Section 4311(a) would reenact the current prohibition against discrimination which includes discrimination against applicants for employment, current employees who are active or inactive members of Reserve or National Guard units, current employees who seek to join Reserve or National Guard units, or employees who have a military obligation in the future such as a person who enlists in the Delayed Entry Program which does not require leaving the job for several months.”) (internal citations omitted), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2456. Thus, under either the VRRRA or USERRA, the City of Chicago would have had the same obligation: to not deny “hiring” or “initial employment” to Middleton on the basis of his status as a reservist.

Furthermore, Middleton’s claim would have been decided under the same substantive rules if brought under the VRRRA instead of USERRA. *See* Joint Explanatory Statement, 140 Cong. Rec. H9142-43 (daily ed. Sept. 13, 1994); H.R. REP. No. 103-65, at 24, *reprinted in* 1994 U.S.C.C.A.N. 2449, 2457; S. REP. No. 103-158, at 45, *available at* 1993 WL 432576 (Leg.Hist.), at *45.

D. The Department of Labor's Interpretation that No Federal Time Limit Applies to USERRA Claims Should Be Accorded Deference

The Department of Labor “has long taken the position that no Federal statute of limitations applied to actions under USERRA.” U.S. DEP'T OF LABOR, PREAMBLE TO USERRA REGULATIONS, 70 Fed. Reg. 75,246, 75,287 (Dec. 19, 2005), *available at* 2005 WL 3451172, at *75288 (F.R.). According to the Department, “USERRA’s provision that State statutes of limitations are inapplicable, together with USERRA’s legislative history, show that the Congress intended that the only time-related defense that may be asserted in defending against a USERRA claim is the equitable doctrine of laches.” *Id.* Further, the Department is of the view that the Supreme Court’s decision in *Jones* “is not dispositive because USERRA ‘otherwise provides by law’ that no statute of limitations applies, and because, with respect to some USERRA claims, the cause of action previously existed under the VRRRA and consequently predates the effective date of 28 U.S.C. § 1658.” *Id.*

The Court should defer to the Department’s position. Congress intended that the Department’s interpretations of the Act be authoritative. *See* 38 U.S.C. § 4331(a) (authorizing the Secretary of Labor to prescribe regulations implementing USERRA). Moreover, the courts, including this Court, give

weight to the Department's interpretations of the employment and reemployment rights of veterans. *See, e.g., Leonard v. United Air Lines, Inc.*, 972 F.2d 155, 158 (7th Cir. 1992) (“[T]he Department of Labor’s construction of the Act is entitled to some measure of deference.”) (VRRRA case); *Rogers v. City of San Antonio*, 392 F.3d 758, 762 n.7 (5th Cir. 2004) (citing Department of Labor’s proposed USERRA regulations “for their persuasive authority”); *Jopson v. Maguire*, 810 N.Y.S.2d 302, 306 (N.Y. Supp. 2006) (relying in part on Department of Labor’s interpretation in holding that 28 U.S.C. § 1658(a) did not apply to USERRA suit) (citing 70 Fed. Reg. 75,246, 75,287).

II. Newly-Enacted Section 4327(b) of USERRA Prohibits Application of 28 U.S.C. § 1658(a) to Middleton’s Claim

A. Middleton’s Claim Falls Within the Scope of § 4327(b)

Although enacted after issuance of the district court’s judgment against Middleton and during Middleton’s appeal of that judgment to this Court, § 4327(b) applies to Middleton’s USERRA claim. Section 4327(b) states as follows:

INAPPLICABILITY OF STATUTES OF LIMITATIONS.--If *any* person seeks to file a complaint or claim with the Secretary, the Merit Systems Protection Board, or a Federal or State court under this chapter alleging a violation of this chapter, there shall be no limit on the period for filing the complaint or claim.

Pub. L. No. 110-389, § 311(f)(1), 122 Stat. 4164 (emphasis added.)

The broad, inclusive language of the § 4327(b) gives rise to the ineluctable conclusion that absolutely no one may be time-barred from pursuing a USERRA claim. Application of the provision is not limited in scope to those USERRA plaintiffs who may claims post-dating § 4327(b)'s enactment. Rather, by its terms, it applies to “*any person*” who seeks to file a USERRA claim.

B. Section 4327(b) Applies to Pending Cases Because It Clarifies, Rather Than Changes, the Law

Section 4327(b) makes express what was always the case—that no statute of limitations may be applied to USERRA claims. It thus clarifies, rather than changes, the law. Because § 4327(b) is a clarification of the law, it may be applied to cases pending on the date of the measure's enactment, without having an unconstitutional retroactive effect. *See Clay v. Johnson*, 264 F.3d 744, 749 (7th Cir. 2001) (“A clarifying rule . . . can be applied to the case at hand just as a judicial determination construing a statute can be applied to the case at hand.”); *Brown v. Thompson*, 374 F.3d 253, 258-61 & n. 6 (4th Cir. 2004) (because amendments merely clarified meaning of statute as it existed prior to amendments, no need to consider whether retroactive application would pose any constitutional problems arose); *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 689 (9th Cir. 2000) (“We have long recognized that clarifying legislation is not subject to any presumption against retroactivity and is applied to all cases pending as of the date of its enactment.”); *Piamba*

Cortes v. American Airlines, Inc., 177 F.3d 1272, 1283 (11th Cir.1999)
 (“[C]oncerns about retroactive application are not implicated when an amendment that takes effect after the initiation of a lawsuit is deemed to clarify relevant law rather than effect a substantive change in the law”);
Liquilux Gas Corp. v. Martin Gas Sales, 979 F.2d 887, 890 (1st Cir.1992)
 (“Clarification, effective *ab initio*, is a well recognized principle”). Several considerations establish that § 4327(b) is a clarification of, rather than departure from, prior law. First, there is “the fit in language,”

Liquilux, 979 F.2d at 890. The absence of a statute of limitations in the text of USERRA is entirely consistent with § 4327(b) proscription on application of time limits to USERRA claims. Section 4327(b) makes it clear that Congress had previously included no statute of limitations in USERRA for the simple reason that it intended none to apply.

Second, “a conflict or ambiguity existed with respect to the interpretation of the relevant provision when the amendment was enacted,” *Cortes*, 177 F.3d at 1283. Prior to the VBIA amendments, ambiguity as to whether or not 28 U.S.C. § 1658 applied to USERRA claims arose because on the one hand, USERRA was a post-1990 enactment that expressly prohibited use of only state time limitations, whereas on the other, USERRA’s no-state-time-limitations provision was carried over from a pre-1990 statute that had been enacted to clarify that statutes of limitations were inapplicable veterans’ employment and reemployment rights claims. Inconsistent interpretations

resulted. *See Miller v. City of Indianapolis*, 281 F.3d 648, 653-54 (7th Cir. 2002) (holding doctrine of laches barred claims under USERRA; 28 U.S.C. § 1658 not mentioned); *McLain v. City of Somerville*, 424 F.Supp.2d 329, 336-37 (D. Mass. 2006) (holding no limitations period applicable to USERRA suit; timeliness governed by doctrine of laches); *Akhdary v. City of Chattanooga*, No. 1:01-CV-106, 2002 WL 32060140 (E.D. Tenn. 2002) (holding 28 U.S.C. § 1658 inapplicable to USERRA because “USERRA does not establish a new cause of action; instead, it amends the preexisting law of the VRRRA”); *Jopson*, 810 N.Y.S.2d at 305-06 (holding 28 U.S.C. § 1658(a) inapplicable to USERRA suit); U.S. DEP’T OF LABOR, PREAMBLE TO USERRA REGULATIONS, 70 Fed. Reg. 75,246, 75,287-88 (Dec. 19, 2005) (taking position that irrespective of *Jones*, 28 U.S.C. § 1658 does not apply to USERRA); *Wagner v. Novartis Pharm. Corp.*, 565 F.Supp.2d 940, 945 (E.D.Tenn. 2008) (*Jones* compels conclusion that 28 U.S.C. § 1658(a) applies to USERRA claims); *Aull v. McKeon-Grano Assocs., Inc.*, No. CIV.A. 06-2752 (HAA), 2007 WL 655484, at *4 (D. N.J. Feb. 26, 2007) (same); *Nino v. Haynes Int’l, Inc.*, No. 05-0602, 2005 WL 4889258, at *3-5 (S.D. Ind. 2005) (same); *O’Neil v. Putnam Retail Management, LLP*, 407 F.Supp.2d 310, 313-16 (D. Mass. 2005) (same). *See also Rogers*, 392 F.3d at 773 (affirming lower court’s use of 28 U.S.C. § 1658 but declining to decide whether no time limit applies to USERRA because plaintiffs asserted below that § 1658 applied and failed to raise no-statute-of-limitations argument until appeal).

Third, enactment of § 4327(b) “follow[ed] fast upon the ambiguity’s discovery.” *Liquilux*, 979 F.2d at 890 (internal citations omitted). In February 2008, in a belated report to Congress for fiscal year 2006, the Department of Labor recommended that USERRA be amended to clarify that no statute of limitations applies to the Act. U.S. DEP’T OF LABOR, USERRA FY 2006 ANN. REP. TO CONGRESS, at 7 (February 2008), *available at* <http://bit.ly/f17j> (last visited Dec. 1, 2008). The report notified Congress that “[a]t least one court ... has held that the four-year general Federal statute of limitations, 28 U.S.C. 1658, applies to actions under USERRA.” *Id.* (citing *Rogers v. City of San Antonio*, 2003 WL 1566502 (W.D. Texas), *rev’d on other grounds*, 392 F.3d 758 (5th Cir. 2004)). Congress swiftly responded by amending USERRA to expressly state that no time limit may be applied to bar USERRA claims. The VBIA’s legislative history reflects that the no-time-limit amendment was adopted to implement the Department of Labor’s recommendation. *See* S. REP. No. 110-449, at 26 (2008) (“This section of the Committee bill would implement the Department of Labor’s recommendation that Congress ‘consider amending USERRA to clarify that no statute of limitations may apply to USERRA.’”).

Finally, the legislative history of the VBIA states that the purpose of the amendment was to “clarify that the original intent of Congress was that USERRA would not be subject to a federal or state statute of limitations period.” S. REP. No. 110-449, at 26 (2008), *available at* <http://bit.ly/xYs1> (last

visited Dec. 1, 2008). Although a statement in a committee report is less weighty than one in the amending statute itself, such a statement still may be relevant to Congress's original intent, "especially if the legislative history is consistent with a reasonable interpretation of the prior enactment and its legislative history." *Cortes*, 177 F.3d at 1284. The pronouncement in the committee report that the VBIA's no-time-limit amendment would clarify Congress's original intent that no time limit may be applied to USERRA claims is indeed consistent with a reasonable interpretation of USERRA as originally enacted and its legislative history. As fully explained in Part I of this brief, the text and legislative history of USERRA as originally enacted show that Congress never intended any time limitation to apply to USERRA claims.

Because § 4327(b) is a clarification of the law as it existed prior to enactment of the measure, § 4327(b) may be applied to Middleton's claim.

Conclusion

For the foregoing reasons, NELA respectfully requests that this Court reverse the district court's determination that 28 U.S.C. § 1658(a) bars Middleton's USERRA claim.

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Certificate of Compliance with Rule 32(a)(7)

The undersigned, counsel of record for the Amicus Curiae National
Employment Lawyers Association furnishes the following in compliance with
Federal Rule of Appellate Procedure 32(a)(7):

I hereby certify that this brief conforms to the rules contained in Federal Rule of Appellate Procedure 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 4,581 words.

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Proof of Service

The undersigned, counsel for the Amicus Curiae National Employment Lawyers Association, hereby certifies that on _____, two copies of the Brief as well as a digital version containing the brief, were delivered by _____ to counsel for CHARLES C. MIDDLETON, SR., Plaintiff-Appellant, and to counsel for the CITY OF CHICAGO, Defendant-Appellee.

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