WHAT'S NEW IN VETERANS' LAW

by JUSTICE EILEEN C. MOORE and ANTOINETTE NADDOUR

Significant legal issues involving veterans and service members are on the front lines today. The Orange County Bar Association's Veteran and Military Committee presents a report on some of what has occurred recently.

CIVIL LAW

***Torres v. Texas Department of Public Safety*, 42 S.Ct. 2455 (2022)**

This case concerns Le Roy Torres's ten-year battle over getting his job back after serving in Iraq. While serving in Iraq, he was exposed to toxic burn pits that left him with constrictive bronchitis, a condition that narrowed his airways and made breathing difficult. When he returned to his job as a Texas state trooper, he requested an accommodation for his condition. Texas refused. Torres sued Texas under USERRA, the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301 et seq. He lost all the way through the Texas courts.

The state of Texas argued it did not have to comply with a federal statute. The United States Supreme Court rejected the argument that Texas could invoke sovereign immunity under the Eleventh Amendment as a legal defense to USERRA. The high court explained: "Upon entering the Union, the states implicitly agreed that their sovereignty would yield to federal policy to build and keep a national military."

With his Supreme Court victory in hand, Torres was able to take his case to a Texas jury. A few months ago, the jury awarded him $2.49 million against Texas and its officials for violating USERRA.

***Spletstoser v. United States*, 44 F.4th 938 (2022)**

In the 1950 case of *Feres v. United States*, 340 U.S. 135, the United States Supreme Court held that the government could not be sued for injuries incident to military service. This is the holding known as the *Feres Doctrine*. It prevents lawsuits for injuries such as military sexual trauma, or respiratory conditions resulting from burn pits or any other actions directly against the military or the government by present or former members of the military. In short, the *Feres Doctrine* allows the federal government to exempt itself from the Federal Tort Claims Act, FTCA, 28 U.S.C.A. §§ 1346(b), for torts causing injuries incident to military service.

Nevertheless, Army Colonel Kathryn Spletstoser brought an action against Air Force General John E. Hyten, alleging sexual harassment and sexual assault. After she began serving under the General on a joint-branch assignment, he allegedly began his advances. A court document states that after the Colonel's repeated opposition to his sexual advancements and assaults, the General undertook to retaliate against her. He initiated proceedings and she was removed from her position. The General moved to dismiss the Colonel's action under the *Feres Doctrine*. A federal judge in California denied the motion in *Spletstoser v. United States*, 2020 WL 6586308 (2020).

After it was announced the General was nominated to become the Vice Chairman of the Joint Chiefs of Staff, the Colonel disclosed the General's conduct to the Air Force Office of Special Investigation. She was denied her request to testify at General Hyten's Senate confirmation hearing. The General was confirmed as the second most senior officer in the United States military.

The Ninth Circuit Court of Appeals affirmed denial of the motion to dismiss, stating: "[C]onsidering the totality of the circumstances, we are confident in our determination that this act of alleged sexual assault was not incident to military service."

The Department of Justice notified the federal court that, pursuant to the Westfall Act, the United States was substituted for General Hyten as the sole defendant in this action. Under the Westfall Act, 28 U.S.C. 2679(b(1), federal employees, such as the General, have absolute immunity from common law torts arising out of negligent and wrongful acts or omissions when acting "within the scope of his office or employment." Thus, for some reason, the Attorney General took General Hyten off the hook.

On July 13, 2023, the United States of America entered into a settlement agreement with Colonel Spletstoser for $975,000. The settling parties are the Colonel and the United States of America. The General's name is not in the settlement document. It is signed by the Colonel and a trial attorney with the Department of Justice.

California Civil Code § 3345

A 2023 amendment to California Civil Code § 3345 provides veterans may be awarded as much as three times what would otherwise be awarded as damages to redress unfair or deceptive acts or practices or unfair methods of competition. There are many definitions of the word "veteran" in California law. The one that applies in the context of Civil Code § 3345 is the definition in Government Code § 18540.4: "Veteran" means: "Any person who has served full time in the armed forces in time of national emergency or state military emergency or during any expedition of the armed forces and who has been discharged or released under conditions other than dishonorable."

Judicial Council Form MIL-020

There is a new court form that relates to active-duty military personnel. Military & Veterans Code Section 409.3 permits service members, at any time during their most current period of military service or within six months thereafter, to petition a court for relief in respect of any obligation or liability incurred by the service member before the effective date of the orders for their most current period of military service or in respect of any tax or assessment whether falling due before or during their most current period of military service. The statute prohibits a court from charging a filing fee or court costs to ask for this relief. The Judicial Council created a new form that is for optional use when seeking relief under Section 409.3, MIL-020.

FAMILY LAW

***In re the Marriage of Lisa and Jeremiah J. Sullivan*, 89 Cal. App. 5th 585 (2023)**

The family court found it lacked jurisdiction to divide a wife's military pension under the Federal Uniformed Services Former Spouse's Protection Act (FUSFSPA), 10 U.S.C. § 1408. In a writ petition, the court of appeal rejected the family court's ruling that a service member must explicitly and specifically consent to the court's authority to divide her military retirement under the FUSFSPA. In granting extraordinary relief, the appellate court stated: "Lisa did consent to the jurisdiction of the court within the meaning of the FUSFSPA by voluntarily filing her dissolution petition in California, seeking a judicial confirmation of 'all' her separate property acquired before marriage, asking the court to determine 'any' community property assets, and requesting the appointment of an expert under Evidence Code section 730 to determine a proposed division of the parties' retirement accounts."

***Martin v. Martin*, 520 P.3d 813 (2022)**
***Martin v. Martin*, United States Supreme Court (2023 WL 6377712)**

Under the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408(c)(1), courts are authorized to treat veterans' "disposable retired pay" as community property upon divorce. But in 1989, the U.S. Supreme Court held in *Mansell v. Mansell*, 490 U.S. 581, that the USFSPA does not grant state courts the power to treat as property divisible upon divorce military retirement pay that was waived to receive veteran disability benefits. In the instant case, the husband is a veteran who is 100% disabled. When the husband and wife dissolved their marriage, they stipulated the wife would receive half of his retirement benefits, and that "Erich shall reimburse Raina for any reduction in that amount if he elects to receive disability pay instead of retirement pay." A year later, the veteran husband opted to receive disability benefits in lieu of retirement benefits. In *Martin v. Martin*, the Nevada Supreme Court held the parties divorce decree was enforceable under contract principles and that the USFSPA did not preempt enforcement of that decree. The veteran husband thereafter attempted to proceed in the United States Supreme Court without paying the required fees and costs, providing proof that he is a disabled veteran. The United States Supreme Court denied his petition to proceed as a veteran without prepayment of fees and costs.

Family Code § 211.5

Family Code section 211.5 took effect on January 1, 2024. It requires family courts to provide self-identified veterans with a list of resources and contacts for veterans' services. Thus, family law lawyers and judges will be utilizing the MIL-100 form to identify veterans. Note that the Judicial Council is presently revising the form, so look for an amended MIL-100 form in the near future. Also note the new statute uses the term Department of Veterans Affairs. Be

alert that we usually assume that means the VA, but because the statute directs what the Department of Veterans Affairs should do, and because a state legislature does not have the authority to direct a federal agency to do anything, that means the statute refers to the California Department of Veterans Affairs, also known as CalVet.

CRIMINAL LAW

***People v. Harrell*, 95 Cal. App. 5th 161 (2023)**

Penal Code section 1170.91 is the statute that requires sentencing judges to consider post-traumatic stress disorder, traumatic brain injury, military sexual trauma, substance misuse, and mental health issues resulting from military service as mitigating factors when sentencing a veteran. The statute also permits incarcerated veterans to return to court to ask for a lower sentence if the sentencing judge did not consider those conditions as mitigating factors during the original sentencing.

Prior to the latest amendment to section 1170.91 that became effective January 1, 2023, courts were finding veterans were not permitted to request a lower sentence if they were originally sentenced pursuant to a plea agreement. But this year, in *People v. Harrell*, an appellate court determined the statute's language now permits courts to reduce a conviction of a veteran regardless of whether the original sentence was imposed pursuant to trial or a plea.

INCARCERATED VETERANS

Plans are in effect for incarcerated veterans to be sent to three HUBs California prisons. Presently, one full yard at Soledad prison has only veterans and a second yard is being filled with only veterans. No official decision has yet been made for the second and third HUBs, but one will be in northern and the other in southern California.

VETERAN BENEFITS

***Arellano v. Secretary of Veterans Affairs*, 143 S.Ct. 543 (2023)**

A veteran served in the Navy from 1977 until his honorable discharge in 1981. Approximately thirty years later, the VA received the veteran's application for disability compensation based on his psychiatric disorders. A VA regional office found that the veteran's disorders resulted from trauma that he suffered while serving on an aircraft carrier that collided with another ship. The regional office granted the veteran benefits for his service-connected disabilities—schizoaffective disorder bipolar type with post-traumatic stress disorder. It assigned an effective date of June 3, 2011, the day that the VA received his claim. The veteran wanted his claim to be as of his date of discharge. The United States Supreme Court denied his request, stating: "The governing statute [38 U. S. C. §§1110, 1131] provides that the effective date of the award 'shall not be earlier' than the day on which the Department of Veterans Affairs (VA) receives the veteran's application for benefits. But the statute specifies sixteen exceptions, one of which is relevant here: If the VA receives the application within a year of the veteran's discharge, the effective date is the day after the veteran's discharge. We must decide whether this exception is subject to equitable tolling, a doctrine that would allow some applications filed outside the one-year period to qualify for the 'day after discharge' effective date. We hold that the provision cannot be equitably tolled."

***Rudisill v. McDonough*, No. 20-1637 (Fed. Cir. 2021)**

Rudisill presents the issue of whether a veteran with two separate and qualifying periods of service under the Montgomery GI Bill and the Post-9/11 GI Bill is entitled to receive a combined total of forty-eight months of education benefits between both programs without first having to utilize her entire Montgomery GI Bill benefit prior to accessing the more generous Post-9/11 benefit. A veteran having multiple periods of qualifying service is effectively penalized over those who have an individual qualifying period of service to access the more enhanced Post-9/11 GI Bill. The Supreme Court granted certiorari on June 26, 2023, and oral arguments were given on November 8, 2023. The court will have to decide if it favors a stricter reading of the statute penalizing those who volunteered for multiple periods of qualifying service, which is contrary to the intent of Congress to reward service members and recruit potential service members, or interpret with a pro-veteran canon ultimately to the benefit of those who serve.

MILITARY LAW

***Singh v. Berger*, 56 F.4th 88 (2022)**

Congress enacted the Religious Freedom Restoration Act in 1993, 10 U.S.C. § 774. That statute prohibits the government from substantially burdening a person's exercise of religion unless the government can demonstrate the burden is in furtherance of a compelling governmental interest. Following its enactment, the Army, Navy, Air Force, and Coast Guard issued directives to accommodate Sikh religious practices during both initial recruit training and military service. But the Marines did not.

The Marine Corps maintained that exceptions for recruits would make it harder to instill in them a spirit of uniformity. The Marines refused to make a religious exception to its uniform and grooming requirements during boot camp, insisting that men needed to be clean-shaven and not wear religious articles. Every week, recruits had to have their entire hair length clipped to the scalp. After boot camp, however, the Marine Corps has been willing to grant religious accommodations, such as for turbans, unshorn hair, and religious articles.

Three young Sikh men who wanted to serve in the Marine Corps and also abide by their religious tenets sued the Marines. The court of appeals for the District of Columbia Circuit reversed a lower court's denial of a preliminary injunction to require the Marine Corps to cease its refusal to accommodate the Sikh religion during boot camp. The appeals court found the Sikh plaintiffs had shown an overwhelming likelihood of success on the merits.

In August 2023, a member of the Sikh community graduated from Marine Corps recruit training boot camp while wearing a turban and other articles of faith intrinsic to his South Asian religion.

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