New York Law Journal

dU PERIODICAL SPECIAL

Iraq Veterans' Action Proceeds After Trim

By Daniel Wise
October 3, 2006

Nine veterans who claim they were injured by exposure to spent uranium while in Iraq can sue the government but only for poor medical treatment they allegedly received after their discharges, a Southern District judge ruled last week.

Judge John G. Koeltl, in Matthew v. U.S., 05 Civ. 8045, substantially narrowed the lawsuit, dismissing claims against the government for negligence in permitting the veterans to be exposed to depleted uranium and for negligent medical treatment while they remained in the military.

The decision will be published tomorrow.

Judge Koeltl likewise dismissed a claim that a veteran's daughter had a birth defect caused by her father's exposure to spent uranium.

The veterans' lawyer, George Zelma, said he is considering appealing the dismissal of claims arising while the soldiers were on active duty because Congress did not intend to protect the government "when it betrayed our troops by putting them in harm's way for no strategic reason."

With respect to the claim that Judge Koeltl's ruling kept alive, the former soldiers contend Veterans Administration doctors misdiagnosed and mistreated ailments cause by exposure to uranium as stress-related symptoms such as battle fatigue, Mr. Zelma said. But, he added, they have had breathing problems, skin disorders, blurred vision, sleep difficulties, serious diarrhea and memory loss because of their exposure to uranium while in Iraq.

The rule specifying what types of cases soldiers may bring against the government was set in 1950 by the U.S. Supreme Court in Feres v. United States, 340 U.S. 135, which held that soldiers are barred from suing for damages for injuries that "arise out of or are in the course of activity incident to service."

The Supreme Court in Feres applied the doctrine of sovereign immunity to bar soldiers from suing the government except to the extent that the doctrine had been waived by the Federal Tort Claims Act, 28 USC §2671 et seq.

While the line drawn by the Court in Feres was a broad one, it did not encompass claims of negligence "taking place wholly after the soldier-plaintiffs' respective discharges from service," Judge Koeltl concluded.

To the extent that the former soldiers are suing for injuries caused by alleged medical malpractice at Veterans Administration hospitals, those claims survive, he ruled.

But the bright-line test barring suits for most injuries incurred while on active duty, Judge Koeltl found, required the dismissal of claims related to the soldiers exposure to radioactive uranium and their treatment for ailments stemming from that exposure prior to discharge without regard to whether the treatment was received abroad or within the United States.

In addition, Judge Koeltl ruled that the case law required the dismissal of a claim raised by serviceman Gerard Darren Matthew that his daughter, Claudette, was born with a malformed hand because of his exposure to uranium in Iraq.

Judge Koeltl wrote that Feres bars recovery for derivative injuries resulting to others as a result of something that happened to a soldier while in the military.

Even the veterans' malpractice claims for treatment after they had left the military had to be narrowed to the extent they alleged that the Armed Forces had failed to warn them about the dangers of exposure to uranium, Judge Koeltl ruled.

That allegation had to be dismissed, the judge reasoned, because it related to a time period while the soldiers were on active duty.

Several important policy considerations have driven the case law toward a broad definition of "activity incident to service," Judge Koeltl noted in citing precedents from the U.S. Court of Appeals for the Second Circuit.

Among those policy considerations is "the need to preserve the military disciplinary structure." Another is to "prevent judicial involvement in sensitive military matters."

The government was represented by Assistant U.S. Attorney John P. Cronan.

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