Justice Eileen C. Moore
FOURTH DISTRICT COURT OF APPEAL, DIVISION THREE

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Boot camp for civil lawyers

DID YOUR CLIENT EVER SERVE IN THE MILITARY? A LOOK AT LAWS IMPACTING VETERANS

The areas of civil law vis-à-vis active duty military and veterans that have evolved in the past several years include sexual-assault cases, employment issues, toxic-water cases, class actions, and medical malpractice. In some instances, treble damages may be awarded to a veteran. In addition, when a party attempts to impeach a veteran, there are some specific considerations for counsel to ponder.

Approximately 10% of Californians served in the military at some point. The chances are great that if a veteran presents with a legal issue, he/she will likely not mention past military service. Thus, important issues will be missed unless lawyers add a question on their intake sheets about military service.

Sexual assaults

It is well known that sexual assaults in the military regularly occur. Due to underreporting, no one knows how many there are. The Veterans Justice Commission reported in 2022 that a meta-analysis of 69 studies indicated 38% of women and 4% of men reported experiencing military sexual trauma.

With such high numbers of sexual assaults, one might expect a lot of lawsuits as a result. The reason for a lack of lawsuits is something known as the *Feres Doctrine*. A little history is in order.

The Feres Doctrine

In 1945, the whole country became aware of what sovereign immunity was when a military B-25 Mitchell Bomber making its way through Manhattan fog swerved to avoid the Chrysler Building and crashed into the 78th floor of the Empire State Building. The resulting loss of lives and property was the impetus for the Federal Tort Claims Act, enacted and signed into law by President Harry Truman in 1946. (FTCA; 28 U.S.C.A. §§ 1346(b), 2674.)

Until that point, the federal government enjoyed sovereign immunity. That meant an injured person "cannot sue the king." However, with the passage of the FTCA, sovereign immunity was waived, and persons suffering tort injuries from government negligence *could* bring suit for injuries.

Thus, when a young active-duty Lt. Rudolph Feres died in a barracks fire due to military negligence, his family sued the

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government for wrongful death. 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.

The Court's holding is known as the *Feres Doctrine*. It prevents lawsuits for injuries such as military sexual trauma, 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 FTCA for torts causing injuries incident to military service.

For decades, there have been unsuccessful attempts to overturn the *Feres Doctrine*. (*United States v. Stanley* (1987) 483 U.S. 669; *Cioca v. Rumsfeld* (4th Cir. 2013) 720 F.3d 505; *Perez v. Puerto Rico Nat. Guard* (D. Puerto Rico 2013) 951 F.Supp. 2d 279; *United States v. Ritchie* (9th Cir. 2013) 733 F.3d 871; and *Daniel v. United States* (9th Cir. 2018) 889 F.3d 978.)

Chinks in the Feres Doctrine

When the plaintiff in *Daniel v. United States*, *supra*, petitioned for certiorari in the United States Supreme Court, the high court denied it. Justice Thomas, however, took the unusual step of writing a dissent to the Court's decision to deny cert. He wrote: "*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received." (*Id.*, 139 S.Ct. 1713 (2019).)

Not long after *Daniel*, Congress also took an unusual step. In December 2019, when it enacted the 2020 National Defense Authorization Act, it mandated that medical-malpractice cases could be filed by active-duty military personnel. (10 U.S.C. § 2733a.) That means that active-duty servicemembers may now make a claim against the government for medical malpractice. (Discussed more fully *infra*.)

Part of the August 2022 Pact Act (Pub.L. No. 117-168.), championed by celebrity Jon Stewart, carved out an exception to the *Feres Doctrine*. The Camp Lejeune Justice Act, a portion of the larger PACT Act, created a new federal cause of action for anyone exposed to contaminated water at the base for at least 30 days between 1953 and 1987. The Camp Lejeune Justice Act expressly forbids the government from asserting immunity under the Federal Tort Claims Act. (Discussed more fully *infra*.)

And then something really big happened – a sexual-assault claim that wasn't tossed.

An army colonel sued an air force general for sexual assaults

Army Colonel Kathryn Spletstoser sued Air Force General John E. Hyten in his personal capacity for sexual assaults he inflicted upon her while she was serving in the Army in a joint-branch assignment. On July 13, 2023, the United States of America entered into a settlement agreement with Colonel Spletstoser for $975,000.

But what about the *Feres Doctrine*? The doctrine that is supposed to prevent such actions by military personnel.

Here's what happened. In 2019, it was announced General Hyten 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 a 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.

Colonel Spletstoser thereafter sued General Hyten in federal court in California, alleging seven state-law claims. The general moved to dismiss the action under the *Feres Doctrine*. The district court denied the motion. (*Spletstoser v. United States* (C.D. Cal 2020) 2020 WL 6586308.)

On August 11, 2022, 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 . . ." (*Spletstoser v. United States* (9th Cir. 2022) 44 F.4th 938, 958.)

Court documents show the Attorney General of the United States certified that General Hyten was acting within the scope of his employment when he committed the acts alleged by Colonel Spletstoser. The Department of Justice's appellant's brief in the Circuit Court case states: "[T]he Department of Justice certified that General Hyten was acting within the scope of his office or employment at the time of the incidents from which Colonel Spletstoser's claims arose." The decision brought forth a settlement.

The settling parties were the colonel and the United States of America. The general's name is not in the settlement document. The document states the United States agrees to pay the colonel $975,000 to resolve her claims. It is signed by the colonel and a trial attorney with the Department of Justice. The settlement document can be found at: https://www.fedemploylaw.com/documents/Dt.-No.-70-Fully-Executed-Settlement-Agreement-_Spletstoser-v.-Hyten-US.pdf

Whether the settlement of the case resulted just because the general was so high up the command ladder is up for debate. In other words, does this settlement indicate a change in direction, or did the *Feres Doctrine* just take a day off?

Employment law and veterans – California law

Fair Employment and Housing Act: The Fair Employment and Housing Act, FEHA, prohibits discrimination in employment on account of military or veteran status: "The opportunity to seek, obtain, and hold employment without discrimination because of . . . veteran or military status is hereby recognized as and declared to be a civil right." (Gov. Code, § 12921.)

It is also an unlawful employment practice for an employer to refuse to select a person for a training program leading to employment or to bar or to discharge the person from employment or a training program leading to employment, or to discriminate against

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the person in compensation or in terms, conditions or privileges of employment because of veteran or military status. (Gov. Code, § 12940.)

Job benefits and disabled veterans: Benefits due a veteran may be different from those due other employees. For example, suppose a veteran works as a state officer or employee and has a service-connected disability rated at 30% or more by the Department of Veterans Affairs. In that case, credit for additional sick leave is given immediately after the veteran is given a disability rating or on the first day of employment, whichever is later. (Gov. Code, § 19859.)

It is possible post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), military sexual trauma (MST) or some other military-related malady may rear its ugly head while a veteran is employed. Under FEHA, in addition to the fact that it is against public policy to discriminate in employment based on military or veteran status, an employer must not discriminate based on physical disability, mental disability, or medical condition. (Gov. Code, § 12920.) Reasonable accommodations might be in order if a veteran is experiencing a military-related disability. (Gov. Code, §§ 12926, 12926.1, 12940, 12940.3.)

Employee is associated with a veteran: Suppose an employee has a family member who was in the military and that family member has a disability. Suppose further the veteran sometimes suffers from anxiety episodes in the form of nightmares as a result of PTSD that require the employee to provide comfort or care in the mornings and be late for work. Lastly, suppose the employee is still able to perform the required job duties, but sometimes might need to work through lunch to make up for work time missed in the morning. Would that employee be entitled to an accommodation for the disability of the family member who is a veteran? Maybe.

In *Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1028, an employee's son required daily dialysis, and the employee was the only person in the family who could administer it. For several years, his supervisors scheduled him so that he could be home at night for his son's dialysis. When a new supervisor took over, the plaintiff was terminated for refusing to work a shift that did not permit him to be home on time for his son's dialysis. The employee sued his employer under FEHA, and the trial court granted the employer's motion for summary judgment.

Under FEHA, the definition of disability includes a person who is associated with a person who has a protected characteristic, such as a disability. (Gov. Code, § 12926, subd. (0).) In *Castro Ramirez,* the court of appeal reversed summary judgment in favor of the employer with regard to the FEHA claim of disability discrimination. The court reasoned the disability the employee suffered was his association with his disabled son.

Employment law and veterans – Federal law

In the 1960s and '70s, there was so much opposition to the Vietnam War that when Vietnam vets returned home, many of their former employers wouldn't take them back. As a result, Congress enacted the Uniformed Services Employment and Reemployment Rights Act, USERRA. (38 U. S. C. § 4301 et seq.)

USERRA guarantees returning veterans a right to employment after military service. It prevents employers from discriminating against returning veterans because of their military service, or from firing veterans without cause within one year of reemployment. A person reemployed under USERRA is entitled to seniority and other rights and benefits that he or she had on the date of commencement of the service, coverage under employer health plans, and accrual of credit for up to five years on employee pension plans.

Le Roy Torres returned from serving in both Iraq and Afghanistan with a respiratory condition that restricted his airways as a result of exposure to burn pits. His former employer refused to re-employ him with accommodation for his condition. He sued under USERRA and lost all the way through Texas courts.

In *Torres v. Texas Department of Public Safety* (2022) 597 U.S. 58, the United States Supreme Court held that Texas was bound by the federal statute, stating: "Upon entering the Union, the states implicitly agreed that their sovereignty would yield to federal policy to build and keep a national military. States thus gave up their immunity from congressionally authorized suits pursuant to the plan of the Convention, as part of the structure of the original Constitution itself."

With his Supreme Court decision in hand, Torres was able to proceed with his case before a jury. The jury returned a verdict of $2,490,662.89.

The Camp Lejeune Justice Act of 2022

Camp Lejeune was built in a sandy pine forest along the North Carolina coast in the early 1940s. The Marine Corps exposed personnel and families to potentially contaminated waterways on the base. In 1984, testing revealed benzene contamination in a drinking well, which led to the closure of that well and to the review and closure of several other wells on base. By 1985, all identified contaminated wells from the supplier were shut down due to the presence of volatile organic compounds in the network. A monitoring report described a 15-foot layer of fuel floating atop the water table three years later. Significant levels of benzene were found in nearby water wells.

Before the wells were shut down, contaminated water was piped to barracks, offices, housing for enlisted families, schools, and the base hospital. Military personnel and families drank it, cooked with it, and bathed in it.

The Camp Lejeune Justice Act of 2022 (Pub. Law 117-168.), passed on August 10, 2022, has numerous specific provisions. One is that the United States District Court for the Eastern District of North Carolina has exclusive jurisdiction and shall be the exclusive venue.

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Only those who lived or worked at Camp Lejeune for at least 30 days from 1953 to 1987 may make claims under the act. Another provision, as is usual when suing the government, no punitive damages may be awarded in any action brought under the act. Also, anyone who brings an action under the act may not thereafter bring a tort action against the United States for such harm pursuant to any other law.

The statute of limitations is *two years after the date of the enactment of the Act, or 180 days after an administrative remedy is denied*. The federal administrative remedy pursuant to 28 U.S.C.A. § 2675 is required. There are also mandatory offsets for any recovery by the Department of Veterans Affairs, Medicare, and Medicaid to ensure that claimants cannot recover the costs of their medical expenses twice.

The most significant provision under the act is that the government may not claim immunity from suit under the Federal Torts Claims Act. Thus, the *Feres Doctrine* does not apply to actions under the act.

Class actions against the Department of Veterans Affairs (VA)

The Court of Appeals for Veterans Claims, CAVC, has exclusive jurisdiction to hear appeals from the Board of Veterans Appeals, the highest administrative tribunal within the VA. Until a few years ago, no class action was allowed against the VA after it denied a veteran's claim for benefits.

Class actions came to the CAVC just as the word on the street claimed the VA was engaging in a sort of catch-and-kill dynamic that prevented the development of the law. A veteran would go through all the VA's lengthy internal processes, then wait in line for a few more years to come onto the CAVC calendar. Shortly before the matter was heard, the VA would settle the case, dooming the prospect of the CAVC setting a precedent.

In *Monk v. Shulkin* (Fed. Cir. 2017) 855 F.3d 1312, the United States Court of Appeals for the Federal Circuit held that under the All Writs Act, its enabling statutes, and by its inherent powers, the CAVC can establish its own rules and procedures, including the certification and adjudication of class actions. The CAVC acknowledged its authority to certify class actions against the VA in appropriate cases. (See *Monk v. Wilkie* (2018) 30 Vet.App. 167.)

The CAVC enacted class-action rules providing a mechanism for class actions by veterans who had been denied VA benefits. Those rules can be found at https://www.uscourts.cavc.gov/rules_of_practice.php?fullsite=yes

Two California lawyers were successful in certifying a class action against the VA when the agency was not following the mandate of 38 U.S.C. § 1720G, a statute enacted to provide support for caregivers of veterans injured in war. (See *Beaudette v. McDonough* (2021) 34 Vet.App. 95.)

Medical malpractice

The 2020 National Defense Authorization Act authorized members of the uniformed services to file claims for personal injury or death caused by Department of Defense (DOD), healthcare providers. In 2021, the Pentagon issued regulations for that claims process. (10 U.S.C. 2733a; 32 CFR 45; 86 Fed.Reg. 32194-01 (June 17, 2021).)

Some of the notable regulations:

- DOD personnel and contractors acting within the scope of their employment or duties must have caused the negligent treatment. (32 CFR 45.5.)
- The alleged malpractice must have occurred in a "medical treatment facility" – i.e., a DOD medical center, inpatient hospital, or ambulatory care center. Fixed dental clinics are also included. A claim may not be based on healthcare services provided by DOD health-care providers in any other location, such as in the field, battalion aid stations, ships, planes, deployed settings, or any other place that is not a covered military treatment facility. (32 CFR 45.5.)
- Third-party claims are not allowed. Only a uniformed service member or an authorized representative may file a claim on behalf of a member who is deceased or otherwise unable to file the claim due to incapacitation. (32 CFR 45.3.)
- The injury or illness for which the service member received medical treatment when the alleged malpractice happened must have been incident to service. Generally, this means while on active duty. (32 CFR 45.1, 45.3.)
- A written claim must be presented to the DOD, within two years after the claim accrues. Claims must be submitted to the military department of the service member. (32 CFR 45.2 (c).)
- There is no discovery process. The claimant is not entitled to pre-decisional material considered by the DOD. However, the claimant may obtain copies of records in the DOD's possession that are part of the claimant's personnel and medical records. Also, the claimant is required to identify healthcare providers and provide medical releases if the DOD requests them. (32 CFR 45.4.)
- The claimant has the burden to substantiate the claim by a preponderance of the evidence that a negligent or wrongful act or omission by one or more DOD health-care providers was the proximate cause of the harm suffered by the service member. (32 CFR 45.4. 45.6, 45.7, 45.9.)
- In calculating damages, the military will use its own disability rating for fitness for duty. The DOD Disability Evaluation System is purportedly found under DOD Instruction 1332.18: https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/133218p.pdf (32 CFR 45.8 (a).)
- Damages for non-economic injuries or losses may not exceed a cap amount. The current cap is $500,000. Updates on the amount of the cap will be published periodically. (32 CFR 45.10 (c).)
- Both economic and non-economic damages will be reduced by offsetting most of the compensation otherwise provided by DOD or the VA for the same harm that is the subject of the malpractice claim. (32 CFR 45.11.)
- "No attorney may charge, demand, receive, or collect fees for services

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rendered in excess of 20 percent of any claim amount under this part." (32 CFR 45.14.)

- No costs will be awarded. (32 CFR 45.2.)
- The claims process does not involve any adversarial proceeding. (32 CFR 45.2, 45.12.)

Treble damages

AARP reports: The legislative history of Civil Code section 3345 contains a study by the American Association of Retired Persons (AARP). It revealed that con artists significantly target veterans, members of the military, and their families, and they are losing money more than non-military/non-veterans when approached about scams. Some con artists pretend to be from the Department of Defense or the Department of Veterans Affairs to gain the confidence of veterans. The scammers use specific military jargon or veteran-related information to prey on veterans.

A February 2022 article by Aaron Kassraie in an AARP online newsletter reports that fraud attacks against veterans, military members, and their spouses jumped 69% compared to the previous year, resulting in financial losses of $267 million. They are nearly 40% more likely than non-military/non-veterans to lose money to scams and fraud. Complaints were against credit bureaus, bankers, lenders, and others.

Civil Code section 3345 provides that an action on behalf of or for the benefit of a veteran to redress unfair or deceptive acts or practices or unfair methods of competition may allow for increased damages. The statute allows the increase to be as much as three times what would otherwise be awarded.

Veteran defined: There are many definitions of the word "veteran" in California law. The one that applies in the context of Civil Code section 3345 is the definition in Gov. Code section 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."

Impeachment

Having a client who has been convicted of a felony can be like a nightmare at trial. However, if the client is a veteran with a conviction, the chances are pretty good that he or she went through one of California's 48 Veterans Treatment Courts, VTCs. (In order to qualify for a VTC under Penal Code section 1170.9, the veteran must either plead or be found guilty of the charged crime.)

Restoration: Nonetheless, if the veteran goes on to graduate from a VTC, the trial court has the power to restore the veteran to the law-abiding community. And the court usually does just that. As part of that restoration process, Penal Code section 1170.9 (h)(4)(C) provides: "The defendant is not obligated to disclose the arrest on the dismissed action, the dismissed action, or the conviction that was set aside when information concerning prior arrests or convictions is requested to be given under oath, affirmation or otherwise."

Conclusion

Sometimes veterans are not sure they are veterans, thinking their length of service, arrest, conviction, or other variables impact their right to call themselves veterans. It would be best to ask, "Did you ever serve in the military?" rather than ask, "Are you a veteran?" Another suggestion concerns an optional Judicial Council form created by the Veterans and Military Families subcommittee, which I founded in 2008 and still chair. The form, MIL-100 states: "This form can be filed in any case type." The form can be downloaded from: https://www.courts.ca.gov/documents/mil100.pdf

Counsel might consider filing the MIL-100 whenever the client is on active duty or is a veteran. California judges are becoming more and more aware of veterans' rights and the court's duties regarding veterans, so filing the form will alert the court about the issue.

A personal note from the author

Although I never practiced veterans' law before I took the bench, for almost 30 years I have been trying to prevent our current veterans from being recipients of the same despicable treatment received by Vietnam veterans. Thus, in addition to my day job as an appellate justice, I have been involved with court processes that mainly implicate veterans in criminal and, to some extent, family law courts.

Through my involvement with veteran issues, I noticed numerous areas of civil law regarding veterans have been developing. And I thought that some time I should write an article nudging civil lawyers to peek out of their silos and consider issues concerning those who serve or have served in our armed forces. That time is now.

Justice Eileen C. Moore sits on the Fourth District Court of Appeal, Division Three. She is a former combat nurse who served in the Army Nurse Corps in Vietnam. Justice Moore received many awards and honors from courts, legal organizations, civic and educational groups, CalVet, the VA, Daughters of the American Revolution, Justice For Vets, and the California Judges Association's Humanitarian Award. Justice Moore serves on the Veterans Justice Commission, headed by two former Secretaries of Defense, Chuck Hagel and Leon Panetta. The Commission has only 15 members nationwide and reports to Congress.