

Number 12, November 1999 (updated March 2003): Enforcement of USERRA Rights

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Q: I have enjoyed your series of articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I am having difficulties with my civilian employer concerning time off for work for my Reserve training. Where should I go for advice and assistance?

A: First, contact the commanding officer of your Reserve unit. He or she can inform your employer that you really are in the unit and that you really do participate in training. That may be all that is necessary.

If the problem persists, you should contact the National Committee for Employer Support of the Guard and Reserve (NCESGR) at 1-800-336-4590. You may also wish to view NCESGR's Web site at www.esgr.org. When you call the toll-free number, a member of the NCESGR staff-perhaps National Ombudsman Cmdr. Sarah Rogers, USNR-will give you practical advice and, if appropriate, will put you in touch with one of NCESGR's 4,300 volunteers. If you request, that volunteer will contact your employer to explain your legal rights and to appeal, on behalf of the Department of Defense, for cooperation in making it possible for you to participate in military training and service.

Simply giving you a hard time is not necessarily unlawful, but if you have been denied a USERRA entitlement, you should complain. The legal authority to enforce USERRA has been assigned to the Veterans' Employment and Training Service (VETS), U.S. Department of Labor. See 38 U.S.C. 4321, 4322. In conducting an investigation of an alleged USERRA violation, VETS can, by subpoena, require the production of documents and the attendance of witnesses. See 38 U.S.C. 4326.

The best way to reach VETS is through NCESGR's toll-free number. Someone on the NCESGR staff can put you in touch with the appropriate VETS agent, without your having to incur a long-distance expense. In most cases, it is a good idea to give NCESGR the opportunity to work out the problem informally, through mediation by NCESGR volunteers, before you contact VETS.

If you want VETS to investigate your case, you must make a formal complaint against your employer, in writing. See 38 U.S.C. 4322(b). If you make such a complaint, VETS will investigate and determine if the complaint has probable merit, in which case VETS will attempt to get your employer to comply. See 38 U.S.C. 4322(d). If the VETS attempts to obtain compliance are unsuccessful, VETS will advise you in writing of the results of its investigation and of your rights to proceed further. See 38 U.S.C. 4322(e).

Upon receipt of that VETS notification, you may request that VETS refer your

complaint to the United States Attorney General (AG), if your complaint is against a state, a political subdivision of a state, or a private employer. See 38 U.S.C. 4323(a)(1). If your complaint is against a Federal agency, as employer, you may request that VETS refer your complaint to the Office of Special Counsel (OSC). See 38 U.S.C. 4324(a)(1).

If the AG is reasonably satisfied that you are entitled to the USERRA rights and benefits you seek, she may appear and act as your attorney and file the case in the appropriate U.S. District Court. See 38 U.S.C. 4323(a)(1). In most cases, the AG will assign this task to the United States Attorney for your part of the country. Similarly, if OSC is reasonably satisfied that you are entitled to the benefits you seek, it may appear for you and initiate an action before the Merit Systems Protection Board (MSPB). See 38 U.S.C. 4324(a)(2)(A).

Q: In an action brought in Federal District Court or the MSPB, who is the named plaintiff?

A: The individual veteran or Reservist, unless the defendant (employer) is a state. "In the case of such an action against a state (as an employer), the action shall be brought in the name of the United States as the plaintiff in the action." 38 U.S.C. 4323(a)(1)(final sentence). Please note that this final sentence was added by section 211 of Public Law 105-368, which was signed by President Clinton on 11 November 1998. This sentence was added because USERRA's authorization of suit against states, in the name of individual citizens, was of questionable constitutionality under the 11th Amendment. See generally *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). This constitutional problem does not apply to cases brought in the name of the United States.

Q: If the AG or OSC turns me down, or if I choose not to apply for their assistance, may I file suit directly through private counsel that I obtain?

A: Yes. See 38 U.S.C. 4323(a)(2), 4324(b). If you do this and prevail, the court or the MSPB may award you reasonable attorney fees, expert witness fees, and other litigation expenses. See 38 U.S.C. 4323(c)(2)(B), 4324(c)(4).

Q: Am I required to "exhaust remedies" through VETS before filing suit directly in Federal District Court or the MSPB?

A: No. However, if you want free legal representation through the AG or OSC, you must go through VETS. In most cases, you are better off going to VETS. Let that agency conduct its investigation and attempt to get your employer to comply. After VETS notifies you of the results of its investigation and its attempts to obtain compliance, you can then decide if you want a private lawyer or the AG/OSC.

Q: The rank-and-file employees (myself included) of my employer are

represented by a union, and the collective bargaining agreement (CBA) between the union and the employer contains a clause giving me the right to time off from work for my Reserve training. That clause has a lot of limitations and exclusions in it that may be inconsistent with USERRA. I have a dispute with my employer about a period of active duty for training that I performed recently. Both the employer's personnel office and the union have told me that I must "exhaust remedies" through the union before complaining to any outside agency. Are they correct?

A: To the extent that the CBA grants you rights not granted by USERRA, this federal law does not supersede the CBA. See 38 U.S.C. 4302(a). For example, the CBA could grant you a limited period of paid military leave, and USERRA does not require your employer to pay you while you are away from work for military training or service. If you are claiming rights under the CBA, you must use the remedy provided by the CBA, through the union.

On the other hand, to the extent that the CBA purports to limit your USERRA rights, or to impose additional eligibility criteria upon your exercise of those rights, the CBA is superseded by USERRA. See 38 U.S.C. 4302(b). See also *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) ("No practice of employers or agreements between employers and unions can cut down the service adjustment benefits that Congress has secured the veteran under the Act.") If you are claiming rights under USERRA, not the CBA, you are not required to exhaust your remedies through the union before complaining to VETS or filing suit. See *McKinney v. Missouri-Kansas-Texas Railroad Co.*, 357 U.S. 265, 268 (1958); *Kidder v. Eastern Airlines, Inc.*, 469 F. Supp. 1060, 1063 (S.D. Fla. 1978).

Q: Is there a deadline for my complaint to VETS or my filing of suit?

A: No. USERRA contains no statute of limitations, and it expressly precludes the application of state statutes of limitations. See 38 U.S.C. 4323(c)(6). If the employer can show the court that your inexcusable delay (probably of many years) has prejudiced the employer in its defense of your claim, the court can dismiss your case under the equitable doctrine of laches. See *Gruca v. United States Steel Corp.*, 495 F.2d 1252, 1258 (3rd Cir. 1974). It has been held that the doctrine of laches is to be employed sparingly in re-employment rights cases, in view of the Supreme Court's command to construe the law liberally for the benefit of veterans. See *Alber v. Norfolk & Western Railway Co.*, 654 F.2d 1271, 1275 (8th Cir. 1981).

On the other hand, it should be pointed out that you have the burden of proof to establish that you meet USERRA's eligibility criteria. If you delay in asserting your rights, proving that you meet those criteria becomes more difficult. If you believe that you may have rights under USERRA, you should assert your rights and seek assistance as soon as possible.

Q: What remedies are available through the court or the MSPB?

A: If the court or the MSPB finds that your employer violated USERRA, the court or MSPB shall order the employer to comply and to compensate you for any loss of wages or benefits caused by the employer's violation. See 38 U.S.C. 4323(c)(1)(A), 4324(c)(2).

Q: I think that my employer violated the law willfully. Is there any provision for punitive damages?

A: If the court finds that the violation was willful, the court shall require your employer to pay you "liquidated damages" in the amount of the lost wages or benefits. See 38 U.S.C. 4323(c)(1)(A)(iii). For example, if you proved \$20,000 in lost wages and that the violation was willful, the court would award you \$40,000. The provision for liquidated damages applies to cases against states, political subdivisions of states, and private employers, but it does not apply to cases against federal agencies as employers.

If you have questions concerning your rights under USERRA and other laws pertaining to your civilian employment, or if you need my assistance, you can reach Captain Wright by e-mail at samwright50@yahoo.com or by mail at P.O. box 6129 Tampa, FL 33608. Before contacting him, please contact the National Committee for Employer Support of the Guard and Reserve (NCESGR) at 1-800-336-4590. Please Contact Captain Wright only if NCESGR is unable to help you.