

## **LAW REVIEW 0606**

### **CAN I REQUEST DOJ ASSISTANCE AFTER I RUN OUT OF MONEY TO PAY MY LAWYER?**

**By CAPT Samuel F. Wright, JAGC, USN**

**Q: My employer fired me because I take “military vacations,” as the employer calls my military service periods. I hired a lawyer and filed suit against the employer, contending that the firing violates the Uniformed Services Employment and Reemployment Rights Act (USERRA). I have been paying the lawyer by the hour, and it is not cheap. I paid him for a couple of hundred hours of research and study time, and then I pointed out to him your “Law Review” columns on ROA’s Web site, [www.roa.org](http://www.roa.org). He said he wished he had known about your articles when he started his research, because it would have saved him a lot of time and me a lot of money.**

**The employer filed a motion for summary judgment, and the court granted the motion. I asked my lawyer to appeal. He told me that my retainer deposit has been exhausted, and he wants another \$10,000 before he will initiate an appeal. I cannot afford to throw any more money down this rat hole. I have been unemployed since this employer fired me, more than a year ago, despite diligent efforts to find another job.**

**I have read in your “Law Review” columns that the U.S. Department of Justice (DOJ) is supposed to represent National Guard and Reserve personnel in USERRA cases. I want to ask DOJ to take over my case at this point. Is that feasible?**

**A:** Your request would be declined. USERRA provides for DOJ representation *only* for those persons who have made formal written USERRA complaints to the Department of Labor (DOL), and only after DOL has unsuccessfully attempted to resolve the matter.

Section 4323(a)(1) of USERRA states: “A person who receives from the Secretary [of Labor] a notification pursuant to section 4322(e) of this title of an unsuccessful effort to resolve a complaint relating to a State (as an employer) or a private employer may request that the Secretary refer the complaint to the Attorney General. If the Attorney General is reasonably satisfied that the person on whose behalf the complaint is referred is entitled to the rights and benefits sought, the Attorney General may appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action for relief under this chapter for such person.” 38 U.S.C. 4323(a)(1).

The bottom line is that you had the right to free legal representation by DOJ, but you gave up that right when you retained a private lawyer and filed suit. I regret to inform you that you are stuck with the decision that you made.

**Q: That's not fair! Nobody told me that filing suit with my own lawyer would mean I was foregoing forever the right to representation by the U.S. Government. What do you have to say about that?**

**A:** You have probably heard the old saw that “ignorance of the law is no excuse.” Not all legal aphorisms are correct, but that one is. I initiated this “Law Review” column, way back in 1997, to bring information of this kind to the attention of National Guard and Reserve personnel. You need correct and timely information in order to make intelligent decisions.

**Q: In at least one of your “Law Review” articles, you asserted there is no exhaustion of remedies requirement under USERRA. Is there any inconsistency between what you have written before and what you are writing now?**

**A:** There is no inconsistency on this point. You are not required to exhaust remedies through DOL and DOJ before filing suit in Federal District Court. *See* 38 U.S.C. 4323(a)(2)(A). But if you want free legal help from DOJ, you must go through DOL—no exceptions.

**Q: How about if I dismiss my USERRA lawsuit in federal court, fire the lawyer, and then go to DOL. Will that work?**

**A:** Probably not at this point. You would have to get the court to dismiss the suit *without prejudice*. It is exceedingly unlikely that the judge would do that after granting the employer's motion for summary judgment.

If the court dismisses the lawsuit *with prejudice*, or if you allow the very limited appeal time to expire, your case is over, finished, *kaput*, under the doctrine of *res judicata*. That is Latin for “The thing has been adjudicated.” In a civil lawsuit, you only get one bite of the apple, no matter how many different lawyers you have, and even if one of the lawyers is provided by the federal government.

**Q: I have read in your “Law Review” column that USERRA provides for attorneys' fees for prevailing plaintiffs. Maybe I should ask my lawyer, or some other lawyer, to take the case from here forward on the contingency of sticking the employer for the attorneys' fees. Will that work?**

**A:** “In any action or proceeding to enforce a provision of this chapter by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses.” 38 U.S.C. 4323(h)(2).

It is possible that your attorney, or another attorney, would be willing to take your case on this basis. Raising this suggestion *at the outset* would have made a lot more sense.

**Q: Where does the National Committee for Employer Support of the Guard and Reserve (ESGR) fit into this process?**

**A:** ESGR is the Department of Defense organization established to assist National Guard and Reserve personnel with problems with their civilian employers concerning military training and service. ESGR offers *informal* mediation and education services on matters related to USERRA. Once you retain a lawyer and file suit, or once you file a written USERRA complaint with DOL, ESGR is precluded from any involvement with your case. It would have made sense for you to contact ESGR when you first started having problems with your employer about taking time off from work for your military activities. Contacting ESGR at this point would serve no useful purpose.

ESGR's toll-free number is 1-800-336-4590. ESGR's Web site is [www.esgr.mil](http://www.esgr.mil).

**Q: What is a motion for summary judgment?**

**A:** In a motion for summary judgment, the moving party (usually but not always the defendant) is saying, "Your Honor, let's stop wasting any more time on this lawsuit. Please review the discovery [depositions, interrogatories and responses to interrogatories, requests for admission, etc.] that has already taken place. You will see, Your Honor, that there is *no material issue of fact* remaining in this case. Your Honor, we should win right now. We should not waste any more of the court's precious time on a trial, when it is clear that my opponent (the non-moving party) cannot possibly win."

Overturning a summary judgment is generally easy, *if you have a case*. To overturn a grant of a motion for summary judgment, you only need to show the Court of Appeals that there was a remaining material issue of fact and that the District Court should not have granted summary judgment. But if the Court of Appeals affirms the summary judgment, or if you fail to file a timely appeal with the Court of Appeals, your case is over, finished, *kaput* and cannot be relitigated, under the doctrine of *res judicata*.

It should also be noted that getting the Court of Appeals to overturn a summary judgment for the employer (defendant) *does not mean you have won*. It only means that the case will go back to the District Court for a trial on the merits. You still have to win the trial.

I have written this "Law Review" article because I have seen multiple cases where the individual made the mistake discussed here. When you seek to challenge an employer action under USERRA, or any other law for that matter, you have some important decisions to make at the outset, and you will be stuck with the consequences of the decisions you make.

There are advantages and disadvantages of proceeding with private counsel and of utilizing DOL and DOJ. The chief advantage of DOL-DOJ is that it is *free to you*. Also, it is possible that your employer or former employer will be more fearful of DOL-DOJ and more likely to come to the table with a reasonable settlement offer. If you proceed with private counsel, your employer may figure: "That lawyer doesn't scare me. We can string

this case out for months or years, and the plaintiff will ultimately run out of money to pay the lawyer, and then the case will be over.”

The chief advantage of proceeding with private counsel is that it is faster. DOL is overwhelmed with USERRA cases, and it may be some months before DOL even gets started on investigating your case. And some DOL USERRA investigations take forever (I am aware of one case recently resolved after 5 1/2 years, with the veteran getting a job and a very substantial amount of back pay). Another advantage of going with private counsel is that your private lawyer can consider several potential legal theories for recovery, not just USERRA. Maybe you were fired because of your age (a violation of the Age Discrimination in Employment Act) or because of your race (a violation of Title VII of the Civil Rights Act of 1964). DOL and DOJ are limited to looking at your case under USERRA.

If you are going to proceed with private counsel, it is most important that you have a clear, written agreement with your attorney, up front, as to what you will be expected to pay and what you can expect for those payments. And look at what the total cost to you may be—consider the worst-case scenario. Do not start down this road if you do not have the resources to see the case through to conclusion. Learn from the mistakes of those who have gone before, so that you don’t have to relearn these lessons at your own expense. That is my advice.

*The views expressed herein are the personal views of the author, and not necessarily the views of the Department of the Navy, the Department of Defense, or the U.S. Government.*