

LAW REVIEW 0610

Where Do I Go for USERRA Assistance?

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Q: I was called to active duty and have returned. I have read your Law Review articles, and I carefully complied with all the eligibility criteria for reemployment rights. Before I left the job, I gave oral notice to my direct supervisor, and I also sent a certified letter to the employer's human relations director. After completing my service, I promptly visited the employer's location, with a copy of my DD-214 in hand, and I also sent a certified letter, applying for reemployment, to the HR director. I used the format of your attachment to Law Review 77.

Several weeks have gone by, and nothing has happened. The HR director has not responded to my certified letter, or to any of my telephone calls. Where do I go from here?

A: I suggest that you call the National Committee for Employer Support of the Guard and Reserve (ESGR) at 1-800-336-4590. The Department of Defense established the organization in 1972 to assist National Guard and Reserve personnel with problems exactly like yours.

The best time to call ESGR is between 8 a.m. and 5 p.m. Central time, when ESGR's customer service center (located in Millington, Tenn.) is operating. The customer service center will enter your case into ESGR's management information center and will refer you to an ESGR volunteer in your state. That volunteer will contact the employer and explain the employer's obligations under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

It may be that the employer is simply not aware of this law, and that an informal and non-confrontational contact from an ESGR volunteer is all that is required. If not, your next step is to file a formal complaint with the Veterans' Employment and Training Service of the U.S. Department of Labor (DOL-VETS). To file a complaint, go to <https://vets1010.dol.gov/> or call toll free 1-866-487-2365. Online, you will need to assign yourself a user name and password. You must provide all the requested information and as many details as possible.

After you have submitted the DOL-VETS E-1010 form, the agency will assign your case to an investigator, who will contact you for further information and documentation. Upon investigating and finding merit, DOL-VETS will attempt to convince the employer to comply and make you whole (by way of back pay) for the delay in reemploying you. If DOL-VETS is unable to obtain employer compliance, DOL-VETS will refer your case to the Solicitor of Labor and then to the U.S. Department of Justice for a possible federally filed lawsuit against the employer in the appropriate federal district court. If your case is against a Federal executive agency, DOL will refer your case to the Office of Special

Counsel (OSC), which can then initiate an enforcement action on your behalf, in the Merit Systems Protection Board (MSPB). If you have an odd Social Security Number, and if your case is against a Federal executive agency, you should make your complaint directly to OSC, not through DOL-VETS.

Alternatively, you can obtain private counsel and initiate a legal action against the employer in the appropriate federal district court or the MSPB, as appropriate. If you proceed with private counsel and prevail, the court or the MSPB may award you reasonable attorneys' fees and litigation expenses.

Please note that special rules apply if your employer is a state. As I explain in Law Review 89, under the 11th Amendment to the U.S. Constitution states generally are immune from federal lawsuits initiated by individuals. If you file suit against a State directly, with your own lawyer, your case will be dismissed under the 11th Amendment, without consideration of the merits. The Attorney General of the United States must initiate suits against states, in the name of the United States as plaintiff. So, if your employer is a state, you do not have the option of proceeding with private counsel; you must rely on DOL-VETS and DOJ.

There are advantages and disadvantages of using the government system. The chief advantage is that it is free to you, and the employer is more likely to be impressed by a lawsuit initiated by the federal government than by a lawsuit you initiate through private counsel. The big disadvantage is that DOL-VETS can sometimes take an inordinate time to complete an investigation, but there has been progress on that front.

The chief advantage of private counsel is that your own lawyer can look at various potential causes of action, not just USERRA, and the lawyer represents you, not the government. But there is not a ready supply of private lawyers around the country familiar with USERRA and who are ready, willing, and able to take on USERRA cases on a contingent fee basis.

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, the Department of Labor, the Office of Special Counsel, or the U.S. Government. The best way to reach Captain Wright is by e-mail, at samwright50@yahoo.com.