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Does USERRA Apply to TSA Screeners?

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Vincent C. Conyers applied for a position as a screener for the Transportation Security Administration (TSA) but was not selected. Congress created TSA shortly after September 11, 2001. TSA was originally part of the Department of Transportation and was transferred to the Department of Homeland Security when that department came into being.

Conyers appealed his non-selection to the Merit Systems Protection Board (MSPB), claiming that the non-selection violated the Uniformed Services Employment and Reemployment Rights Act (USERRA), as well as other statutes. The MSPB held that it did not have jurisdiction to hear Mr. Conyers' appeal because section 111(d) of the Aviation Transportation Security Act, 49 U.S.C. 44935 note, gives TSA the authority to appoint screeners "notwithstanding any other provision of law."

The MSPB held, and the United States Court of Appeals for the Federal Circuit agreed, that the "notwithstanding" clause precluded the MSPB from exercising jurisdiction over Mr. Conyers' appeal. *Conyers v. Merit Systems Protection Board*, 388 F.3d 1380 (Fed. Cir. 2004). See also *Spain v. Department of Homeland Security*, 99 M.S.P.R. 529 (2005).

The bottom line is that TSA screeners and persons seeking such positions have no enforceable USERRA rights, and only a statutory amendment can give them an effective remedy. This state of affairs runs contrary to section 4301(b) of USERRA, which expresses the "sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter." TSA screeners should enjoy the same USERRA rights enjoyed by almost all other employees in this country, including federal employees, state and local government employees, and employees in the private sector.

Note: In 2012, Congress fixed this statutory glitch. TSA screeners now have enforceable USERRA rights. Thank you, Representative Tim Walz (Minnesota). Please see Law Review 1286 (August 2012).

* Military title shown for purpose of identification only. CAPT Wright is a regular contributor to ROA's Law Reviews. The views expressed are the personal views of the author, and not necessarily the views of the Department of the Navy, Department of Defense, or the U.S. government

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