

**Number 65, March/April 2003:
Letter to the Department of Justice Regarding USERRA**

The Honorable John Ashcroft
Attorney General of the United States Washington, DC

Dear General Ashcroft:

The Reserve Officers Association (ROA), founded in 1922 and chartered by Congress in 1950, is the principal professional association for officers in the Reserve components of the uniformed services. Many of our members have been called to active duty, or have volunteered to return to active duty, or were already on active duty, and are participating in our nation's response to the September 11 atrocities and in the likely upcoming operation against Iraq. Because many of our members have left civilian jobs for voluntary or involuntary service in the uniformed services, we are very concerned about effective enforcement of the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301-4333.

We have a Law Review column in The Officer, the organization's magazine, and most of those articles have been about USERRA. The back issues are available to everyone (not just ROA members) on our Web site, www.roat.org. Click on "legislative affairs" and then on "law review archive" at the bottom of the menu.

USERRA's enforcement mechanism for states, political subdivisions of states, and private employers involves the U.S. Department of Labor (DoL) as well as the Department of Justice (DoJ). The person claiming that his or her USERRA rights have been violated files a complaint with DoL's Veterans' Employment and Training Service (VETS), which conducts an investigation. See 38 U.S.C. 4321, 4322. If VETS is unable to obtain voluntary compliance, the complainant can request that the case be referred to the attorney general. See 38 U.S.C. 4323(a)(1). It is my understanding that these cases are referred to the Commercial Litigation Branch of DoJ's Civil Division.

I am writing because it has come to my attention that in the vast majority of USERRA cases filed in court, the plaintiff has been represented by private counsel or (worse) has proceeded pro se, and in only a very small minority of cases has DoJ acted as attorney for the plaintiff, as Congress intended (details available upon request). I realize that you have limited resources and that there are many demands on your department, but I respectfully suggest that enforcement of USERRA should be given high priority. These Reserve and National Guard members are serving our country, often at a substantial loss of income and under circumstances involving significant personal danger. The least that we can do, as a grateful nation, is to ensure that they not lose their civilian job rights because of their service to our country.

It is particularly important that DoJ act as attorney in those cases where the

defendant (employer) is a state, because in those cases there is literally no remedy if your department does not get involved. It has been held that USERRA is unconstitutional, under the 11th Amendment, insofar as it authorizes a private individual to bring suit, in his or her own name, in Federal District Court, against a state. See *Velasquez v. Frapwell*, 160 F.3d 389 (7th Cir. 1998), citing *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). Congress solved the 11th Amendment problem by amending USERRA in 1998. Congress added the following sentence: "In the case of such an action [to enforce USERRA] 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). Only DoJ can bring an action in the name of the United States. When the employer is a state, there can be no enforcement of USERRA unless your department brings the suit.

Please instruct the Civil Division and the 94 U.S. attorneys to give USERRA a high priority and to ensure that meritorious USERRA cases are litigated in a timely and diligent manner. Our association stands ready to assist. It may be possible to get Reserve and National Guard judge advocates involved as special assistant United States attorneys, if that would be helpful.

Very respectfully,

(Signed)

Jayson L. Spiegel
Executive Director

NOTE: ROA's Executive Director sent a similar letter to the Department of Justice about the need for the Department of Justice to enforce the Soldiers' and Sailors' Civil Relief Act. See "Law Review Number 66" on the ROA Web site.