

**Number 67, March/April 2003:
Enforcement of USERRA against Executive Agencies**

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Q: I am a federal civilian employee and a captain in the Army Reserve. My federal civilian supervisor continually gives me a hard time about the time I am away from work for Army Reserve training and service. Last year, I applied for a vacancy in the office. That would have been a promotion for me, from GS-9 to GS-11, with a substantial increase in pay. The deciding official on the promotion was the same supervisor who gives me a hard time about my Army Reserve service. The rating panel found me to be the best qualified among the candidates, but the supervisor chose another candidate. When I asked her about this, she told me that I should not expect to be promoted so long as I insist on "playing soldier" in the Army Reserve.

I followed your advice, as contained in Law Review Number 12 (which I read on ROA's Web site). I contacted the National Committee for Employer Support of the Guard and Reserve (ESGR). An ESGR volunteer contacted the supervisor to explain the Uniformed Services Employment and Reemployment Rights Act (USERRA) and to appeal for her compliance and cooperation, but she told him to "pound sand."

I then contacted the Veterans' Employment and Training Service (VETS), in the United States Department of Labor. VETS conducted an investigation and agreed with my claim that my USERRA rights had been violated, but VETS also advised me that the federal agency that employs me did not agree and would not offer me the promotion. VETS advised me that I could request that the case be referred to the Office of Special Counsel, for consideration of litigation in the Merit Systems Protection Board (MSPB). I made such a request, in writing. The OSC sat on the case for almost a year and then advised me that it did not have time to help me. Where do I go from here?

A: Unfortunately, the scenario you describe is by no means unusual. As part of our research for this article, we did a computer search of the 55 reported (published) federal employee USERRA cases decided by the MSPB and the United States Court of Appeals for the Federal Circuit during 2001 and 2002. In not one single case among those 55 cases was the federal employee veteran or Reservist represented by the OSC. In every case, the veteran or Reservist either had a private attorney or was acting as his or her own attorney.

Section 4324(a)(2)(A) of USERRA [38 U.S.C. 4324(a)(2)(A)] provides as follows: "If the Special Counsel is reasonably satisfied that the person on

whose behalf a complaint is filed under paragraph (1) is entitled to the rights or benefits sought, the Special Counsel (upon request of the person submitting the complaint) may appear on behalf of, and act as attorney for, the person and initiate an action regarding such complaint before the Merit Systems Protection Board." This language has been in the law since USERRA was enacted in October 1994. The Office of Special Counsel has made very little effort to assist federal employees by representing them before the MSPB or the Federal Circuit Court of Appeals to enforce USERRA against federal agencies, as it is supposed to do by direction of Congress.

As to where you go from here, you can file a complaint against your agency directly in the MSPB. See 38 U.S.C. 4324(b)(4). A private lawyer whom you retain can represent you, or you can act as your own attorney. We do not recommend that you try to be your own lawyer. (As Abraham Lincoln said, "A man who represents himself has a fool for a client.")

If you proceed with private counsel and prevail, the MSPB may (in its discretion) award you reasonable attorney fees, expert witness fees, and other litigation expenses. See 38 U.S.C. 4324(c)(4). The prospect of getting the MSPB to force the employing agency to pay the attorney's fee may make it easier for you to find a lawyer to represent you.

Q: If I bring a complaint in the MSPB and win, what kind of remedy can I expect?

A: If the MSPB agrees that your USERRA rights have been violated, the MSPB will order the agency to promote you to the position that you were unlawfully denied and to compensate you for the salary you lost (difference between GS-9 and GS-11) because of the employer's violation. See 38 U.S.C. 4324(c)(1). You are also entitled to prejudgment interest on the back pay award. See *Hanna v. American Motors Corp.*, 724 F.2d 1300, 1310-12 (7th Cir.), cert. denied, 467 U.S. 1241 (1984); *Hembree v. Georgia Power Co.*, 637 F.2d 423, 429-30 (5th Cir. 1981).

Q: I think that my employer violated USERRA willfully. I have heard that USERRA provides for "liquidated" or double damages in cases of willful violations. Am I entitled to double damages?

A: USERRA's provision for liquidated or double damages applies to cases against states, political subdivisions of states, and private employers, but not to cases against the federal government. See 38 U.S.C. 4323(d)(1)(C).

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