

LAW REVIEW 706
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Joint Employer Doctrine Revisited

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CATEGORY: USERRA—Enforcement

Q: I have enjoyed reading your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I was particularly interested in Law Review 0609, about the Reservist who was employed by an employment services firm and assigned to work at the premises of a major corporation. The first time this person needed a weekend off from work to attend his Reserve drill, the major corporation insisted that the employment services firm discharge the Reservist and not send any more Reservists—accommodating their military training schedules was “too much of a hassle.” The employment services firm went along with this unlawful demand, because the major corporation was its best customer.

You wrote that the major corporation and the employment services firm were the “joint employers” of this individual and that both corporations were responsible for complying with USERRA. You wrote that the individual could sue both employers and get a court to order remedies against both employers. You also wrote that “customer preference” is never a defense to a charge of violating USERRA or other employment laws.

My situation is similar to the situation you described in Law Review 0609, with one significant difference. I work for a government contractor we’ll call the ABC Corporation. Under a contract between the U.S. Department of Defense (DoD) and ABC, I work full-time at a DoD office for a DoD supervisor. When I need time off for military training or service, I notify both ABC and the DoD supervisor, in writing, as you recommended in Law Review 154. When I was mobilized last year, my DoD supervisor actually put in writing, in a memo to ABC, “please terminate Ms. Smith based on her extended military service.” ABC terminated me, as requested.

Is it possible for me to sue both ABC and DoD as my joint employers? Where would I bring such a suit?

A: I have described USERRA’s enforcement mechanism in detail in Law Reviews 12, 65, 67, 89, 93, 108, 148, 172, 189, 197, 200, 206, 0605, 0606, 0610, 0611, 0616, and 0623. There is an enforcement mechanism through the Merit Systems Protection Board (MSPB), a quasi-judicial federal agency, for cases against federal executive agencies who are the employers. There is a separate enforcement mechanism, through the appropriate federal district court, for cases against state and local governments and private employers. In a USERRA case in the MSPB, the Office of Special Counsel (OSC) can represent you, or you can be represented by a private

attorney that you retain to represent you. In a USERRA case against a local government or a private employer, you can be represented by the U.S. Department of Justice (DOJ) or by private counsel. (In a case against a state government, the suit must be brought by DOJ, in the name of the United States, because of the 11th Amendment to the U.S. Constitution—see Law Review 89.)

The ABC Corporation is a private employer, not a federal agency. The MSPB does not have jurisdiction over a USERRA claim against the ABC Corporation, but it does have jurisdiction of a claim against DoD, as a federal agency. I believe that the MSPB has jurisdiction here, with respect to DoD, even though you are not a federal employee in the traditional sense.

If you sue the ABC Corporation in federal district court, it is possible that ABC will implead DoD, seeking indemnity or contribution. If DOJ represents you in your USERRA action against ABC, DOJ might end up representing both the plaintiff and the third-party defendant in the same case. That is a weird situation with built-in ethics problems for DOJ, but working out the problems is DOJ's problem, not yours.

Because your situation involves some fascinating legal issues, and because you are not the first person to contact me concerning such a scenario, I contacted the Honorable Scott Bloch, the special counsel of the United States and head of OSC. As I described in Law Review 148, there has been a 1000 percent improvement at OSC since Mr. Bloch took over as the special counsel in January 2004. Unlike his predecessor, who never brought a single USERRA case to the MSPB, Mr. Bloch takes USERRA seriously and has made USERRA enforcement a priority of his office. As the father of an active duty Marine who has served three tours of duty in Iraq, Mr. Bloch honors military personnel with actions as well as words.

In an e-mail to me, Mr. Bloch acknowledged that this issue (mixed federal-private sector USERRA violation) has come up, and OSC has a good working relationship with DOJ and with the Veterans' Employment and Training Service, U.S. Department of Labor (DOL-VETS)—working together to resolve these cases as expeditiously as possible. If necessary, DOJ could bring an action against ABC in Federal District Court while OSC brings a simultaneous case against DoD in the MSPB.

Q: That's great, but it seems to me that all of this should be unnecessary, especially where one of the joint employers is DoD, the chief beneficiary of USERRA. What gives?

A: That is an excellent point. USERRA's first section expresses the "sense of Congress that the federal government should be a model employer in carrying out the provisions of this chapter." 38 U.S.C. 4301(b). What is true of the federal government in general should be triply true of DoD, as a direct employer or a joint employer.

I suggest that you contact the National Committee for Employer Support of the Guard and Reserve (ESGR), the DoD organization established in 1972 with the mission to "gain and maintain the support of all public and private employers for the men and women of the

National Guard and Reserve." The ESGR executive director should, in my view, get personally involved in bringing your situation to the attention of the supervisor of your DoD supervisor. How can DoD ask employers generally to support their employees who are members of the National Guard or Reserve, when DoD treats its own folks this way?

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