

**LAW REVIEW 722**  
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## **Federal Circuit Reverses the MSPB, Again**

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CATEGORY: USERRA—Enforcement

As I explained in Law Review 189, the Merit Systems Protection Board (MSPB) is a quasi-judicial federal agency that adjudicates certain kinds of disputes between federal agencies, as employers, and federal employees. The Civil Service Reform Act of 1978 created the MSPB. The Uniformed Services Employment and Reemployment Rights Act (USERRA), enacted in 1994, gave the MSPB the authority to adjudicate USERRA cases involving federal agencies.

The U.S. of Appeals for the Federal Circuit, created by Congress in 1982, is on the same level as the 11 numbered circuit courts and the U.S. Court of Appeals for the D.C. Circuit, but the Federal Circuit is different in an important way. Instead of having a geographical jurisdiction, like these other federal appellate courts, the Federal Circuit has nationwide jurisdiction, but only as to certain kinds of cases, including appeals from final decisions of the MSPB.

As I explained in Law Review 189, the Federal Circuit has a strong tradition of reversing the MSPB when that board does not construe USERRA liberally for the benefit of the veteran, as the Supreme Court has commanded. “The [reemployment] law is to be liberally construed for he who has laid aside his civilian pursuits to serve his country in its hour of need.” *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

I have found another case showing this favorable trend in the Federal Circuit. The case is *Patterson v. Department of Interior*, 424 F.3d 1151 (Fed. Cir. 2005). Guy Patterson was on active duty in the Navy from 1989 to 1992. In 2002, he applied to the Department of Interior (DOI) for an attorney position, but he was not selected. He filed a USERRA complaint against DOI in the MSPB, alleging that the DOI decision to hire another candidate was motivated, at least in part, by Mr. Patterson’s military service.

The MSPB Administrative Judge refused to grant Mr. Patterson a hearing on that issue, and the MSPB affirmed. The Federal Circuit reversed, saying “...the Board did err in dismissing Mr. Patterson’s USERRA claim. Under the liberal pleading standard applied to such claims, Mr. Patterson asserted a non-frivolous allegation of discrimination on the basis of his prior service in the military. We therefore reverse the Board’s dismissal of Mr. Patterson’s USERRA claim and remand the case to the Board for further proceedings on the merits of that claim.”

This case serves as a reminder of three important points. First, section 4311 of USERRA, 38 U.S.C. 4311, forbids discrimination *in hiring* as well as discrimination against those already employed (see Law Reviews 11, 64, and 122). Second, USERRA is not limited to members of the

National Guard and Reserve. Section 4311 of USERRA forbids discrimination based on past or present membership in a uniformed service, performance of uniformed service, or application or obligation to perform uniformed services. Third, the Supreme Court commandment to construe this law liberally for the veteran is still good law, and a tribunal ignores that commandment on peril of being reversed.