

LAW REVIEW 734

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CATEGORY: USERRA Enforcement

GAO Reports on USERRA Enforcement

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In [Law Review 0623](#) (“GAO Reports on USERRA Enforcement,” July-August 2006), I cited and summarized the 2005 Government Accountability Office (GAO) report titled “Federal Management of Servicemember Employment Rights Can Be Further Improved” (GAO-06-60). The GAO is the investigative arm of Congress. That report and all other GAO reports (except classified reports) can be found on GAO’s website, <http://www.gao.org/>.

In February, GAO issued a follow-up titled “Military Personnel: Additional Actions Needed to Improve Oversight of Reserve Employment Issues” (GAO-07-259), which reiterated the earlier report’s recommendation that one federal agency be given responsibility for enforcement of the Uniformed Services Employment and Reemployment Rights Act (USERRA).

The first GAO report, published in October 2005, outlined the responsibilities of the four federal agencies that have responsibilities regarding enforcement of USERRA.

_ The Department of Defense, through its National Committee for Employer Support of the Guard and Reserve (ESGR), is responsible for educating servicemembers and employers about their rights and responsibilities under USERRA. Through its network of trained, volunteer ombudsmen around the country, ESGR also assists individual Citizen Warriors in resolving problems with their civilian employers related to Reserve Component service.

_ The Department of Labor (DOL), through its Veterans’ Employment and Training Service (VETS), receives and investigates servicemember complaints of USERRA violations by any employer, whether federal, state, local, or private sector.

_ After an investigation by VETS and a legal review by DOL’s Office of the Solicitor, DOL refers USERRA cases that have not been resolved to the Department of Justice, which in appropriate cases files suit on behalf of individual claimants against state and local governments and private employers. Such suits are brought in the Federal District Court for any district in which the employer maintains a place of business.

_ If the complaint is against a federal agency as the employer, DOL refers the case to the Office of Special Counsel (OSC), which then can initiate an enforcement action against the agency in the Merit Systems Protection Board, a quasi-judicial federal agency created by the Civil Service Reform Act of 1978. Under a pilot project mandated by Congress in late 2004, USERRA complaints against federal agencies as employers are to be brought to OSC directly rather than through DOL, if the complainant has a Social Security number ending in an odd number or if the complainant has a closely related “prohibited personnel practice” complaint that is otherwise under the cognizance of the OSC. That pilot project began in February 2005 and runs through this September.

The pilot project is showing that complainants who bring their complaints to OSC directly receive much faster and more effective service than those who bring their complaints to DOL first. See [Law Review 0605](#).

GAO 06-60 recommends: “To encourage results rather than outputs, Congress should consider designating a single office to maintain visibility over the entire complaint process.” In the same report, GAO observed, “Agency abilities to efficiently and effectively address servicemember complaints are hampered by incompatible data systems, a reliance on paper files, and a segmented process that lacks visibility.”

Those words are echoed in GAO’s follow-up. “No one agency has total visibility over all the complaints, and only a small percentage of the complaints are reported to Congress,” the GAO reported. “[T]he information GAO obtained

on the approximately 16,000 Reservists' complaints filed between fiscal years 2004 and 2006 showed that the nature of those complaints has not been uniformly categorized to reveal trends in the kinds of problems some returning Reservists experience because the agencies use different complaint categories to characterize the complaints."

In the statutory mandate for this new GAO report, Congress expressed particular interest in USERRA cases pertaining to returning veterans with service-connected disabilities. GAO reported: "Agencies responsible for assisting Reservists with USERRA issues cannot systematically record and track disability-related complaints from others. Without the ability to track disabled Reservists' USERRA complaints, DoD may be unaware of the effect disabilities incurred while on active duty have on Reservists' employment and what additional assistance may be needed to help transition this population back into the workforce."

I am most pleased with this recent GAO report. If I have any criticism, it is of the "Reservists" terminology. Many of the returning servicemembers are in the National Guard. Moreover, as I have explained in [Law Review 104](#) and in other articles, the federal reemployment statute has always applied to the regular military as well as the National Guard and Reserve. USERRA applies to anyone who leaves a position of civilian employment to perform voluntary or involuntary service in the uniformed services, which can be anything from five hours to five years.