

LAW REVIEW 755

(October 2007)

1.19: USERRA Enforcement

The Federal Case

A description of USERRA's enforcement mechanisms for complaints by federal government employees.

By CAPT Samuel F. Wright, JAGC, USN (Ret.)

The Uniformed Services Employment and Reemployment Rights Act (USERRA) applies to the federal government, to state and local governments, and to private employers. This article addresses the enforcement mechanism applicable to federal executive agencies, as employers. A different enforcement mechanism applies to cases against state and local governments and private employers.

Under section 4322(a) of USERRA, 38 U.S.C. 4322(a), a person claiming USERRA rights as a federal employee or applicant for federal employment is permitted to make a complaint in writing to the Department of Labor's Veterans' Employment and Training Service (DOL-VETS), which is required to investigate the complaint. 38 U.S.C. 4322(d)

If the efforts of DOL-VETS do not resolve the complaint, the agency is required to notify the complainant of the results of the investigation and of the complainant's rights under section 4324 of USERRA, 38 U.S.C. 4324. The complainant may request that DOL-VETS refer the case to the Office of Special Counsel (OSC). As explained in Law Review 197, DOL-VETS is *required* to refer the case to OSC, *even if DOL-VETS believes that the case has no merit*. DOL-VETS can refer the case with a negative recommendation, but it cannot refuse to refer the case. OSC, not DOL-VETS, gets to decide whether the U.S. government will provide free legal help to the complainant in asserting his or her USERRA rights.

The Special Counsel of the United States heads up OSC, an independent federal investigative and prosecutorial agency established pursuant to 5 U.S.C. 1211. The special counsel is appointed by the president and confirmed by the Senate for a five-year term. Unlike most presidential appointees, the special counsel ordinarily completes the five-year term even if a new president has been inaugurated before the special counsel's term ends.

Congress created the OSC in 1978 when it enacted the Civil Service Reform Act. The former Civil Service Commission (CSC) had been criticized for improperly consolidating administrative, prosecutorial, and adjudicative functions in a single agency. Accordingly, Congress split up the CSC into three agencies. The Office of Personnel Management took over the administrative functions as the personnel office for the executive branch. OSC took over the investigative and prosecutorial functions. The Merit Systems Protection Board (MSPB), a quasi-judicial agency, serves as the judge and jury in cases involving federal employees and merit principles. As described in Law Review 189, final MSPB decisions can be appealed to the U.S. Court of Appeals for the Federal Circuit, a specialized federal appellate court with a nationwide jurisdiction over certain kinds of cases.

Congress enacted USERRA (Public Law No. 103-353, 108 Stat. 3149) on Oct. 13, 1994, replacing the Veterans' Reemployment Rights law, which was originally enacted in 1940. USERRA did not create the OSC or the MSPB, but USERRA gave these agencies additional important powers and responsibilities. The MSPB has the clear jurisdiction and responsibility to adjudicate USERRA cases involving federal executive agencies as employers. See 38 U.S.C. 4324(c)(1). The OSC is charged with enforcing USERRA, with respect to federal executive agencies as employers, by initiating formal enforcement proceedings before the MSPB, against the agency, if DOL-VETS refers the case to the OSC and if the OSC is reasonably satisfied as to the merits. See 38 U.S.C. 4324(a)(2)(A).

Between October 1994, when Congress enacted USERRA, and January 2004, when Scott Bloch took office as the special counsel, the OSC *brought not one single USERRA enforcement action before the MSPB*. I invite your attention to Law Reviews 67 and 93. USERRA enforcement was not a priority for former Special Counsel Elaine Kaplan. Since taking office in January 2004, Special Counsel Bloch has turned USERRA enforcement from a stepchild into a major priority of the organization. As the father of a Marine who has served three tours of duty in

Iraq, Special Counsel Bloch understands the importance of military service to the nation, and the importance of protecting the civilian jobs of those who lay aside their civilian pursuits to serve our country in its hour of need.

In late 2004, Congress enacted the Veterans' Benefits Improvement Act (VBIA), Public Law No. 108-454, 118 Stat. 3508. Section 204 of that Act (38 U.S.C. 4301 note) provided for a demonstration project relating to USERRA enforcement against federal executive agencies. The demonstration project ran from Feb. 8, 2005 until Sept. 30, 2007. During that period, USERRA complainants with respect to federal executive agencies made their complaints *directly to the OSC* (not through DOL-VETS) in two instances: if the complainant's Social Security number ended in an odd digit, and if the USERRA complaint was closely related to a prohibited personnel practice (PPP) claim that was otherwise within the cognizance of the OSC. If the complainant's Social Security number ended in an even digit and the complainant did not have a closely related PPP complaint, the USERRA complaint was to be made to DOL-VETS.

Because the demonstration project period has now ended and Congress has not passed additional legislation, the law reverts to what it was before Congress enacted the VBIA in late 2004. USERRA complaints are now brought to DOL-VETS for investigation, regardless of the complainant's Social Security number. On July 20, 2007, the Government Accountability Office (GAO) issued GAO-07-907, entitled "Improved Quality Controls Needed over Servicemembers' Employment Rights Claims at DOL." This report and all GAO reports (except classified reports) are available on GAO's website, www.gao.gov. GAO is the investigative arm of Congress—it was formerly known as the General Accounting Office.

The GAO report is critical of the DOL-VETS processes and procedures in enforcing USERRA, but unfortunately the report does not address the central question which the demonstration project was designed to answer: does giving federal sector USERRA complainants the opportunity to make their complaints directly to the OSC, rather than DOL-VETS, lead to faster and better results?

In a letter dated July 6, 2007, addressed to the GAO (and reprinted in Appendix III of the GAO report), Special Counsel Bloch wrote: "The demonstration project has highlighted the benefits to servicemembers in eliminating the inefficiencies associated with the inter-agency bifurcation of the investigation and prosecution aspects of USERRA claims. OSC's involvement with a USERRA claim at the moment the claim is filed has streamlined the processing of claims, as illustrated by the charts accompanying this letter. ... The [OSC] USERRA unit's timely resolution of claims, the correctness of its legal determinations, and the beneficial results it obtained for servicemembers prove that OSC is well suited for investigating *all* federal sector USERRA claims, which comprise only about 10 percent of the total number of USERRA claims that DOL receives each fiscal year. Indeed, should OSC be given investigative responsibility for all federal sector claims, I firmly believe DOL will be able to redirect its full investigative capabilities and resources to its non-federal sector claims." (Emphasis in original)

I strongly agree with Mr. Bloch's assessment. Readers, please contact your U.S. representative and your two U.S. senators and ask them to support legislation giving the OSC responsibility to investigate as well as prosecute claims of USERRA violations by federal executive agencies.