

# LAW REVIEW 930

(SEPTEMBER 2009)

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## **Justice Serves: DOJ sues Nevada and a Nevada corporation to enforce USERRA**

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

On June 15 the Civil Rights Division of the U.S. Department of Justice (DOJ) filed suit against the state of Nevada in the U.S. District Court for Nevada to enforce the Uniformed Services Employment and Reemployment Rights Act (USERRA), in the case of COL Arthur Ingram, USAR. In announcing the lawsuit, Loretta King, acting assistant attorney general for DOJ's Civil Rights Division, said: "The Civil Rights Division is strongly committed to protecting the employment rights of the men and women who serve our country in uniform. The law is clear: unnecessary delays and reprisal will not be tolerated."

Mr. Ingram was Nevada's chief deputy controller when he was called to active duty in June 2003. He remained on active duty until April 2008. When he was released from active duty he promptly applied for reemployment. He met the USERRA eligibility criteria for reemployment: he left his position of employment for the purpose of performing service in the uniformed services, he gave the employer prior oral or written notice, he left active duty without having exceeded the five-year limit and without having received a punitive or other-than-honorable discharge, and he made a timely application for reemployment.

Because Mr. Ingram met the criteria, the state of Nevada was required to reemploy him promptly in the position he would have attained if he had remained continuously employed, or in another position for which he was qualified that was of like seniority, status, and pay. See 38 U.S.C. 4313(a). If Mr. Ingram had not left his state position for military service, there is every reason to believe he would have remained the chief deputy controller.

When Mr. Ingram applied for reemployment in April 2008, the state initially offered him a position of substantially less pay and status. When he complained to the U.S. Department of Labor's Veterans' Employment and Training Service (DOLVETS), the state controller fired him. Denying him prompt reemployment in the correct position violated section 4312 of USERRA, 38 U.S.C. 4312. Firing him for complaining about a USERRA violation violated section 4311(b), 38 U.S.C. 4311(b).

DOLVETS investigated Mr. Ingram's complaint and found it to have merit. After efforts to persuade the state of Nevada to come into compliance were unsuccessful, DOLVETS referred the case to DOJ, which agreed that the case had merit and filed suit. Mr. Ingram returned from active duty in April 2008, and DOJ filed this suit just 14 months later, in June 2009, indicating an improvement by DOLVETS and DOJ in timely investigation of USERRA cases and filing lawsuits. As I explained in Law Review 0810 Update (October 2008), the Veterans Benefits Improvement Act of 2008 amended USERRA by establishing specific timelines for USERRA enforcement actions by DOLVETS, DOJ, and the Office of Special Counsel (OSC). (You can find all previous Law Review articles at [www.roa.org](http://www.roa.org); click on "Servicemembers' Law Center" then "Law Review Library.") DOLVETS and DOJ seem to be making a good faith effort to comply with these new statutory deadlines.

Just two weeks after filing *Ingram*, DOJ filed a new USERRA lawsuit in the District of Nevada. On June 29, DOJ filed suit against Stonescape Pavers LLC of Las Vegas, on behalf of Matthew T. Denning, a former member of the Utah Army National Guard and now a member of the Air Force Reserve. Mr. Denning was called to active duty and deployed to Iraq in January 2006. He was released from active duty in June 2006. He made a timely application for reemployment and returned to work in June 2006. The company fired him without cause in August 2006.

Under section 4316(c) of USERRA, a person who meets the eligibility criteria for reemployment must not be

discharged, except for cause, during the special protection period. The special protection period in this case is 180 days, because Mr. Denning's period of service was more than 30 days but less than 181 days. Mr. Denning was fired well within that period.

Section 4316(c) is intended to protect the returning veteran from a bad faith or pro forma reinstatement and to give the veteran a reasonable time to get back "up to speed" in the civilian job. If the veteran is fired during the special protection period, the employer must prove that the firing was for cause. If the special protection period has expired, the veteran is still protected by section 4311, which makes it unlawful for an employer to deprive an employee of retention in employment because of the employee's performance of uniformed service or obligation to perform future service.

In its lawsuit, DOJ alleged that Stonescape Pavers violated USERRA willfully. If the court agrees that the violation was willful, the court will award Mr. Denning double damages. See 38 U.S.C. 4323(d)(1)(C).

In its press release announcing this lawsuit, DOJ announced that the Denning case is the 17th USERRA case that DOJ has filed so far in calendar year 2009. DOJ has never before filed as many as 17 USERRA cases in an entire calendar year, and this year is only half over. In calendar year 2008, DOJ filed 12 USERRA cases.

*Note: For the outcome of the DOJ lawsuit against the State of Nevada, please see [Law Review 13031](#) (February 2013).*