# LAW REVIEW 1017

**DLA Violates USERRA**

**By Captain Samuel F. Wright, JAGC, USN (Ret.)**

**1.1.1.8—USERRA Applicability to Federal Government as Employer**
**1.2—USERRA-Discrimination Prohibited**
**1.4—USERRA Enforcement**
**1.8—USERRA-Relationship Between USERRA and other Laws/Policies**

SSGT Joe Smith (not his real name), Army National Guard, lives in a state with one of the highest unemployment rates. He is scraping by, with only a part-time job. He lost his full-time job some years ago when the plant closed. He has been diligently seeking other employment, but the job market is very tough in his state.

He applied for a federal civilian position with the Defense Logistics Agency (DLA). He received a letter from DLA informing him that he had been selected, pending two issues. The first issue involves a security clearance. He has a security clearance with his Army National Guard unit, and the unit will be mobilized and deployed to Afghanistan in the summer of 2010.

The security clearance issue was recently resolved. The only issue standing in the way of his starting the DLA job is that DLA informed Smith, in writing, that as a condition precedent to his hiring he must secure the signature of his state's Adjutant General, assuring DLA that Smith will not be mobilized in the next three years. Not surprisingly, the Adjutant General refused to sign, because Smith will likely be mobilized this year.

Refusing to hire Smith because of his scheduled mobilization and because he cannot or will not exempt himself from it amounts to a clear and egregious violation of section 4311(a) of the Uniformed Services Employment and Reemployment Rights Act (USERRA), which is codified at title 38, United States Code, sections 4301 through 4335 (38 U.S.C. 4301-4335). "A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied *initial employment,* reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation." 38 U.S.C. 4311(a) (emphasis supplied).

Section 4311(c) provides that if a claimant like Smith can establish that his membership in a uniformed service (or one of the other protected factors) was *a motivating factor* in the employer's decision to deny the claimant initial employment, the decision was unlawful, unless the employer can *prove* (not just say) that it *would have* (not just could have) decided not to hire the claimant even if none of the protected factors were present in the case. This burden-shifting provision is most helpful in many cases but appears to be unnecessary in this case. It is clear beyond dispute that Mr. Smith is being refused the job *solely* because of his National Guard membership and scheduled mobilization.

USERRA's legislative history makes it clear that it is unlawful for a prospective employer to demand, as a condition of employment, that the prospective employee waive future reemployment rights. "An express waiver of future statutory rights, such as one that an employer might wish to require as a condition of employment, would be contrary to the public policy embodied in the Committee bill and would be void." House Rep. No.103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2453.

USERRA's very 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). As a component of the Department of Defense (DOD), DLA should especially strive for "model employer" status, because DOD is the principal beneficiary of USERRA.

Through its National Committee for Employer Support of the Guard and Reserve (ESGR), DOD is the principal proponent of employer support—that civilian employers (federal, state, local, and private sector) should go above and beyond the requirements of USERRA in supporting employees who are National Guard or Reserve members. It is essential that all DOD organizations, including DLA, comply with USERRA willingly and cheerfully.

A case against DLA would be brought in the Merit Systems Protection Board (MSPB), a quasi-judicial federal agency that adjudicates cases involving federal employees (or prospective federal employees) and federal agencies as employers, under USERRA and many other laws. Mr. Smith can retain private counsel and bring the MSPB action in his own name, or he can file a formal written complaint with the Veterans' Employment and Training Service, United States Department of Labor (DOL-VETS).

If Mr. Smith files with DOL-VETS, that agency will investigate his complaint and attempt to persuade the employer to comply with USERRA. If the DOL-VETS resolution attempt is not successful, Mr. Smith can then request that DOL-VETS refer the case to the United States Office of Special Counsel (OSC). If OSC agrees that the case has merit, it will initiate an MSPB proceeding against DLA, in Mr. Smith's name, at no cost to him.

I believe that this is a case that can move very quickly, both at the investigative stage and the adjudicative stage (at the MSPB). This is a summary judgment case, in that there are no *factual* issues in dispute. Through the letters that it has sent, DLA has essentially admitted that it selected Mr. Smith for the position and that the only thing standing in the way of his hiring is his National Guard membership and impending mobilization.

If you have questions, suggestions, or comments, please contact Captain Samuel F. Wright, JAGC, USN (Ret.) (Director of the Servicemembers' Law Center) at swright@roa.org or 800-809-9448, ext. 730.