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Federal Agency Employer Cannot Make You Quit the Reserves

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1.1.1.8-USERRA Application to Federal Government
1.4—USERRA Enforcement

***Baker v. Department of Homeland Security,* 2009 MSPB 83 (Merit Systems Protection Board May 18, 2009).**

Navy Reserve Lieutenant (junior grade) and ROA member David M. Baker has won a significant victory in a case arising under the Uniformed Services Employment and Reemployment Rights Act (USERRA). This case involves important legal principles, and it is likely that other National Guard and Reserve personnel will benefit.

David M. Baker joined the Navy Reserve as an enlisted member in 2001. He was a member of the Selected Reserve, meaning that he participated in inactive duty training (drills) for pay as well as retirement points. Also in 2001, he enrolled in the Montgomery Reserve GI Bill and began studies toward his master's degree**.** In 2003, he applied for and was accepted for a position as a special agent for the United States Secret Service. As a condition precedent to his employment, the Secret Service required him to disaffiliate from the Selected Reserve. As a result, he was transferred to the Individual Ready Reserve (IRR), a status that did not require periodic military training and from which mobilization was much less likely.

Mr. Baker was placed in the untenable position of having one federal agency (the Defense Finance and Accounting Service or DFAS) threaten him with dire consequences for having disaffiliated from the Selected Reserve and another federal agency (the Secret Service) threaten him with loss of employment if he tried to reaffiliate. DFAS sought to recoup $800 in Montgomery Reserve GI Bill benefits that Mr. Baker had received before he disaffiliated, and he also lost the drill pay, annual training pay, and retirement benefits that he would have received if he had not been forced out of the Selected Reserve.

Moreover, as a result of the Secret Service's forcing him to separate from the Selected Reserve, he was also in default of his enlistment contract, which required him to participate satisfactorily in the Selected Reserve for at least six years. This untenable position left Mr. Baker facing the specter of an other-than-honorable characterization of service.

In 2006, Mr. Baker filed a claim with the United States Office of Special Counsel (OSC), a small independent federal agency created by the Civil Service Reform Act (CSRA) of 1978. USERRA, enacted in 1994, gave OSC the important new responsibility of enforcing USERRA against federal agencies, as employers, by initiating and prosecuting actions in the Merit Systems

Protection Board (MSPB) on behalf of federal employees and applicants for federal employment claiming USERRA rights.

In accordance with sections 4322 and 4324 of USERRA (38 U.S.C. 4322 and 4324), USERRA cases against federal agencies as employers normally go first to the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS) and to OSC only after DOL has conducted an investigation and has failed to resolve the matter. The Veterans' Benefits Improvement Act of 2004 mandated a demonstration project that was in effect from Feb. 2005 to Dec. 2007. During that time period, a USERRA complaint against a federal agency was referred to OSC directly, rather than DOL-VETS, if the claimant had an odd Social Security Number, as Mr. Baker did.

With regard to the demonstration project, I invite the reader's attention to Law Review 0605 (Feb. 2006). You can find more than 600 articles, and a detailed Subject Index, at http://www.roa.org/lawcenter.

OSC contacted the Secret Service on Mr. Baker's behalf, and the Secret Service agreed to allow him to reaffiliate with the Navy Reserve, although the Secret Service never admitted that forcing him to disaffiliate violated USERRA. Mr. Baker finally reaffiliated with the Selected Reserve, this time being commissioned as an Ensign, thereby rectifying his enlistment contract violation. He has since been promoted to Lieutenant (junior grade). OSC wrote to Mr. Baker and informed him that in OSC's view these actions "fully remedied the adverse consequences of the erroneous transfer request at the start of [Baker's] employment" and OSC then closed its file.

OSC made no effort to recover Mr. Baker's lost inactive duty pay, annual training pay, and retirement points caused by his wrongful and forced disaffiliation from the Selected Reserve. The OSC attorney who investigated the case was apparently of the impression that the MSPB had no authority to order a federal agency to compensate a claimant for lost *military* pay and benefits. The attorney apparently had not read *Kolkhorst v. Tilghman,* 897 F.2d 1282 (4th Cir. 1990), *cert. denied,* 502 U.S. 1029 (1992).

The MSPB is a quasi-judicial federal agency, also created by the CSRA. The 1994 enactment of USERRA, and specifically section 4324 of USERRA, clarified and strengthened the authority of the MSPB to adjudicate USERRA cases, without regard to whether the claimant has another basis for invoking MSPB jurisdiction. Prior to 1994, the MSPB's authority to enforce the reemployment statute was incomplete and uncertain.

An MSPB case is tried before an Administrative Judge (AJ) of the MSPB, who conducts a trial, makes findings of fact and conclusions of law, and directs the federal agency to provide appropriate relief, including back pay and other money damages, if a violation is found. Either party (claimant or employing agency) can appeal the AJ's decision to the MSPB itself. The MSPB has three members, each of whom is appointed by the President with Senate

confirmation. The MSPB's decision can be appealed to the United States Court of Appeals for the Federal Circuit, a specialized federal appellate court here in Washington.

After the OSC declined to represent Mr. Baker in seeking financial compensation for what he lost due to the unlawful order that he disaffiliate from the Selected Reserve, he obtained private counsel and initiated an action in the MSPB. He lost at the AJ level—the AJ held that the MSPB lacks the authority to order relief of this kind. Mr. Baker appealed to the MSPB itself, which reversed the AJ and remanded the case back to the AJ. (Interestingly, the MSPB decision does not mention *Kolkhorst,* which is a federal appellate court decision directly on point.) After the remand, Mr. Baker and the Secret Service agreed to a settlement under which Mr. Baker received $28,840.59 in compensation for his claimed damages and attorney fees.

Some federal agencies seem to think that they can override USERRA simply by designating a position as "emergency essential." In fact, the "emergency essential" instruction says nothing about service in the National Guard or Reserve while holding an "emergency essential" civilian position. Even if the instruction expressly addressed this issue, a federal regulation cannot override a federal statute like USERRA.

I congratulate LTJG Baker and his attorney, Scott E. Schermerhorn of Scranton, Pennsylvania.

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

UPDATE--June 2018

Please see Law Review 18052 (June 2018) for further information on this issue.

UPDATE—October 2019

It is unlawful for a federal agency, as employer, to force you to quit a Reserve Component, but if your federal civilian position has been designated a "key employee" position your Reserve Component will likely screen you out of active participation. Please see Law Review 19095 (October 2019).