

LAW REVIEW 1134

Protection against Discharge after Reemployment

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Q: I am a Commander in the Navy Reserve Nurse Corps and a member of ROA. I was working as a nurse at a state hospital when I was called to active duty for 20 months, from mid 2008 to early 2010. Instead of seeking reemployment in my state job, I took a federal job as a nurse for the United States Department of Veterans Affairs (VA). This was my first federal civilian job.

While employed as a VA nurse, I got a lot of hassle from my direct supervisor about my Navy Reserve drill weekends and annual training and about the possibility that I might again be called to active duty for a year or more. After I was on the job for only 11 months, I was summarily fired. I was told that I have no appeal rights because I had not worked for the Federal Government for at least a year at the time of the firing.

I read somewhere that the Uniformed Services Employment and Reemployment Rights Act (USERRA) provides that a person returning from active duty cannot be fired, except for cause, within one year after starting the job. Is that correct? Does USERRA apply to a person like me? Where do I go from here?

A: Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act, which goes back to 1940. USERRA is codified in title 38 of the United States Code, sections 4301 through 4335 (38 U.S.C. 4301-4335). USERRA applies to essentially all employers in this country, including the Federal Government, the states and their political subdivisions, and private employers, regardless of size. Only religious institutions, Indian tribes, foreign embassies, and international organizations (United Nations, World Bank, etc.) are exempt from USERRA within the United States.

As I explained in [Law Review 0766](#) and other articles, USERRA gives you the right to reemployment with your pre-service employer if you meet five eligibility criteria:

1. You must have left a position of civilian employment for the purpose of performing voluntary or involuntary uniformed service.
2. You must have given the employer prior oral or written notice.
3. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years. All involuntary service and some voluntary service are exempted from the computation of your five-year limit.
4. You must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge.
5. You must have made a timely application for reemployment with the pre-service employer, after release from the period of service. After a period of more than 180 days of service, you have 90 days to apply for reemployment. *See 38 U.S.C. 4312(e)(1)(D).* Shorter deadlines apply after shorter periods of service.

When you were released from active duty in early 2010, you could have applied for reemployment in your state job, and if you had made a timely application you would have had the right to reemployment. It appears that you already

met the first four criteria, and you had it in your power to meet the fifth, but instead of applying for reemployment with the state you chose to apply for and accept a federal civilian job.

Here is the USERRA provision about protection against discharge after reemployment: “A person *who is reemployed by an employer under this chapter* shall not be discharged from such employment, except for cause—(1) within one year after the date of such *reemployment*, if the person’s period of service before the reemployment was more than 180 days; or (2) within 180 days after the date of such *reemployment*, if the person’s period of service was more than 30 days but less than 180 days.” 38 U.S.C. 4316(c) (emphasis supplied).

Section 4316(c) did not apply to your VA employment, because you were not *reemployed* by the VA after leaving a VA job for service and then returning to the VA following service. If you had sought reemployment in the state job after leaving active duty in 2010, you would have had the protection of section 4316(c) in the state job.

Section 4316(c) does not apply to your situation with the VA, but you do have rights under section 4311(a), which provides: “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).

Firing you at least arguably violated section 4311(a). The VA denied you *retention in employment* on the basis of your performance of service (drill weekends, annual training, etc.) and your obligation to perform future service (a possible second recall to active duty).

Q: What is the forum for adjudicating a claim of this nature? Am I permitted to sue the VA in federal court?

A: Because the employer against which you seek to bring a USERRA complaint is a federal agency (the VA), the Merit Systems Protection Board (MSPB) has exclusive jurisdiction here. *See* 38 U.S.C. 4324. You cannot sue the VA in federal court.

Q: What is the MSPB? How are MSPB cases adjudicated? Can the MSPB decision be appealed?

A: The MSPB is a quasi-judicial federal agency that was created by the Civil Service Reform Act of 1978 (CSRA). The MSPB has three members, each of whom is appointed by the President with Senate confirmation. The MSPB adjudicates cases involving federal employees and federal agencies (as employers) under many different laws, not just USERRA.

When Congress enacted USERRA in 1994, it expanded the jurisdiction of the MSPB in a significant way, with respect to USERRA. A federal employee, former federal employee, or unsuccessful applicant for federal employment who non-frivolously alleges a USERRA violation is entitled to MSPB adjudication of the USERRA issue, under section 4324 of USERRA.

An Administrative Judge (AJ) of the MSPB initially hears the case. The AJ conducts a hearing, which is much like a trial in federal court. The AJ makes findings of fact and conclusions of law, much as a federal judge would do. If neither party appeals from the AJ’s determination, the AJ decision becomes the decision of the MSPB. An appeal from an AJ decision is heard by the MSPB itself, here in Washington. 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 our nation’s capital.

Q: How do I get my case to the MSPB?

A: USERRA provides two ways for your case to get to the MSPB. Under section 4322 (38 U.S.C. 4322), you can file a formal complaint against the VA, in writing, with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). That agency will conduct an investigation of your complaint. If the DOL-VETS investigation seems to indicate that your complaint has merit, the agency will attempt to persuade the VA to come into compliance with USERRA. Upon completion of the investigation, DOL-VETS will advise you of the results of its investigation and about your right to request referral of the case to the United States Office of Special Counsel (OSC).[\[1\]](#)

Upon your request, DOL-VETS must refer your case to OSC, even if DOL-VETS believes that your case lacks merit. *See* 38 U.S.C. 4324(a)(1). DOL-VETS can refer your case with a negative recommendation, but it cannot refuse to refer the case.[\[2\]](#) If OSC is reasonably satisfied that your claim has merit, OSC can initiate the case in the MSPB, on your behalf, and at no cost to you. *See* 38 U.S.C. 4324(a)(2)(A). If OSC decides not to represent you in the MSPB, it will notify you in writing of that decision, within 60 days after receiving the referral from DOL-VETS. *See* 38 U.S.C. 4324(a)(2)(B). If OSC notifies you that it will not represent you, you can initiate the MSPB action yourself. *See* 38 U.S.C. 4324(b)(4).

Q: Am I required to “exhaust remedies” through DOL-VETS and OSC before initiating my action in the MSPB?

A: No. If you want free legal representation by OSC, you must go through DOL-VETS. If you choose not to complain to DOL-VETS, you can initiate your action in the MSPB directly. *See* 38 U.S.C. 4324(b)(1). You do not need a “right to sue” letter from DOL-VETS or OSC before initiating your action in the MSPB.

Q: Am I permitted to represent myself in an MSPB case?

A: Yes, but I do not recommend that course of action. Abraham Lincoln said, “A man who represents himself has a fool for a client.” And the law is much more complicated today than it was in Lincoln’s lifetime. An MSPB hearing is almost as formal as a trial in federal court. If you do not know how to prove facts, you will probably mess this up. Proving facts is a complex skill that requires years of legal experience to do well. You only get one chance to prove the facts for which you have the burden of proof, and that is in the hearing before the AJ. In the appeal to the MSPB or the Federal Circuit, you do not get a new opportunity to prove facts, except in the most unusual circumstances.

Q: How do I find a lawyer to represent me? I don’t have a lot of money to pay up front for legal representation.

A: If you proceed with private counsel and prevail, the MSPB may, in its discretion, award you attorney fees, expert witness fees, and other litigation expenses. *See* 38 U.S.C. 4324(c)(4).

There are only a handful of attorneys around the country who know much about USERRA. Contact me, and I will refer you to one of them. My e-mail is SWright@roa.org.

Q: The VA personnel office insists that my firing is unreviewable by the MSPB because I had not worked for the Federal Government for at least a year at the time of the firing. Is the personnel office correct?

A: The personnel office is wrong. As a general rule, a fired federal employee cannot appeal the firing to the MSPB unless the employee has more than one year of federal civilian service, but your case is different, because of section 4324 of USERRA. If you are claiming that you were fired *because of your performance of uniformed service and obligation to perform service*, in violation of USERRA, you have the right to take your case to the MSPB and get the MSPB to adjudicate your USERRA claim, although you have less than a year of federal employment. *See Jasper v. United States Postal Service*, 73 MSPR 367 (1997) and *Petersen v. Department of Interior*, 71 MSPR 227 (1996).

I discuss this issue in detail in [Law Review 108](#) (January 2004). I invite your attention to www.roa.org/law_review. You will find more than 700 articles about USERRA and other laws that are particularly pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

Q: Is there a time limit as to when I can bring such a complaint to DOL-VETS or such an action in the MSPB?

A: No. There is *no statute of limitations under USERRA*. See 38 U.S.C. 4327(b).

But I strongly recommend *don't sleep on your rights*. You have the burden of proof under section 4311(a). The longer you wait, the more difficult it will become to make your case. Memories will dim and potential witnesses will die or otherwise become unavailable. Records will be lost. It serves your interest to bring your complaint sooner rather than later.

Q: In my MSPB action, will I need to prove that the VA fired me *solely* because of my Navy Reserve obligations? Or is it sufficient for me to prove that the Navy Reserve was *one of the reasons* why the VA fired me?

A: The latter. “An employer shall be considered to have engaged in actions prohibited—(1) under subsection (a), if the person’s membership, application for membership, service, application for service, or obligation for service in the uniformed services is *a motivating factor* in the employer’s action, unless the employer can *prove* that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service.” 38 U.S.C. 4311(c)(1) (emphasis supplied).

Q: The personnel office concedes that my direct supervisor, during my VA employment, made numerous statements expressing annoyance at me because of my Navy Reserve obligations. The personnel office says that the supervisor should not have made these statements, but the statements are irrelevant because my direct supervisor did not make the decision to fire me. According to the personnel office, the director of the VA regional medical center (a member of the Senior Executive Service) made the firing decision, and there is no evidence that he ever made anti-military statements. What do you think about this?

A: The United States Supreme Court very recently (March 1, 2011) decided a USERRA case that is very relevant to this discussion. I invite your attention to *Staub v. Proctor Hospital*, 562 U.S. ____ (2011). I discuss the implications of *Staub* in detail in [Law Review 1122](#).

As a result of that decision, you have a strong claim of discrimination under USERRA, as your direct supervisor no doubt started the process that led to your firing. During your 11 months of VA employment, your direct supervisor probably put negative notes about your performance in your personnel record. Those negative reports may be tainted by the supervisor’s anti-military animus against you. The director probably relied on the supervisor’s reports about your performance when he decided to endorse the recommendation to fire you. Thus, the personnel office is wrong when it says that the immediate supervisor’s anti-military statements are irrelevant.

[1] OSC is a small federal agency created by the CSRA in 1978.

[2] I am aware of at least two cases wherein DOL-VETS referred a case to OSC with a negative recommendation. OSC conducted its own investigation and determined the case had merit. OSC proceeded in the face of the negative DOL-VETS recommendation and obtained relief in the MSPB.