

Law Review 1158

LAW REVIEW 1158

Letter to DOJ about USERRA Enforcement

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1.1.1.7--USERRA Applicability to State and Local Governments

1.1.1.8—USERRA Applicability to Federal Government

1.4—USERRA Enforcement

A person claiming that his or her rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) have been violated is permitted to file a formal complaint with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). See 38 U.S.C. 4322(a). DOL-VETS is required to investigate the complaint. If the agency concludes that the complaint has merit, it is to try to persuade the employer to come into compliance. See 38 U.S.C. 4322(d).

If the DOL-VETS investigation does not result in the resolution of the complaint, the claimant is permitted to request that DOL-VETS refer the claim to the Department of Justice (DOJ), and upon receipt of such a request DOL-VETS is required to refer the file to DOJ, if the claim is against a state or local government or private employer. See 38 U.S.C. 4323(a)(1). If the claim is against a federal agency, as employer, DOL-VETS is to refer the claim to the Office of Special Counsel (OSC). See 38 U.S.C. 4324(a)(1).

If DOJ is reasonably satisfied that the claimant is entitled to the benefits that he or she seeks, DOJ may appear and act as attorney for the claimant and file suit against the employer in the appropriate federal district court. In such a civil action, the named plaintiff will be the individual claimant, unless the employer is a state, in which case the named plaintiff will be the United States. See 38 U.S.C. 4323(a)(1).

Within DOJ, responsibility for enforcing USERRA, by filing and litigating cases that have been referred by DOL-VETS, is assigned to the Civil Rights Division, which is headed by Assistant Attorney General Thomas E. Perez. On August 18, 2011, I sent the below letter to Mr. Perez, with my suggestions about USERRA enforcement.

Dear Mr. Perez:

Thank you for the invitation to participate in the telephone conference call yesterday. I am writing you this letter with my input about enforcement of the Uniformed Services Employment and Reemployment Rights Act (USERRA).

Service Members Law Center and Law Review Library

I invite your attention to www.servicemembers-lawcenter.org. You will find more than 800 "Law Review" articles about USERRA, the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 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. I initiated this column in 1997, and we add one or two new articles each week. For your information, I am enclosing a copy of the new article that we added to the website yesterday.

I have made the reemployment statute the focus of my legal career for almost 30 years. In 1982, I left active duty (in the Navy Judge Advocate General's Corps) and took a job as an attorney for the United States Department of Labor (DOL). Together with one other DOL attorney (Susan M. Webman), I largely drafted the interagency task force work product that President George H.W. Bush presented to Congress, as his proposal, in February 1991. What Congress enacted in 1994 is about 85% the same as the Webman-Wright draft.

As you probably know, Congress enacted USERRA (Public Law 103-353) and President Clinton signed it on October 13, 1994. USERRA represents a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA). The STSA is the law that led to the drafting of millions of young men (including my late father) for World War II.

I have also dealt the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the National Committee for Employer Support of the Guard and Reserve (ESGR), an attorney for the United States Office of Special Counsel (OSC), and an attorney in private practice. In June 2009, I retired from private practice and joined the full-time staff of the Reserve Officers Association (ROA), as the first Director of the Service Members Law Center (SMLC).

Each month, I provide information to 400-500 service members, military family members, employers, attorneys, congressional staffers, reporters, and others about military-legal topics, mostly USERRA. Along with attorney Thomas G. Jarrard, I wrote and filed an *amicus* brief in the Supreme Court in the case of *Staub v. Proctor Hospital*, and we are very pleased with the 8-0 favorable decision.

I encourage you to make DOJ attorneys aware of the "Law Review Library" and of my availability to provide information and research assistance on USERRA. Also, I would be happy to conduct a CLE for DOJ attorneys.

ROA will be conducting its National Security Symposium (NSS) January 29 through February 1, at the Wardman Park Marriott here in Washington. We will likely be conducting a CLE on USERRA (and possibly the SCRA as well) in conjunction with the NSS. The CLE is tentatively scheduled for Sunday, January 29, but we could

move it to Monday, Tuesday, or Wednesday, if that would facilitate attendance by DOJ attorneys.

In promoting USERRA compliance, please start within DOJ.

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 the department that is responsible for enforcing USERRA against state and local governments and private employers, DOJ should, I respectfully submit, especially strive for "model employer" status in dealing with its own employees, but some of the worst USERRA violators are in DOJ. I am thinking particularly of the Bureau of Prisons and the United States Marshals Service.

Tuesday evening, I spoke at length with an Army Reservist who is being harassed and discriminated against by his civilian supervisor, concerning his military duty and the occasional absences from work necessitated by that military duty. He works for the Executive Office of United States Attorneys.

Yes, I realize that USERRA cases against federal agencies, as employers, go to OSC and the Merit Systems Protection Board (MSPB), not DOJ and federal district courts. But DOJ's status as USERRA violator must necessarily detract from DOJ's effectiveness as an advocate for the enforcement of USERRA. "Do as I say and not as I do" has always been a losing argument.

"And why beholdest thou the mote that is in thy brother's eye, but considerest not the beam that is in thine own eye?" *Matthew 7:7 (King James Bible)*.

Please give priority to cases against state government employers.

As enacted in 1994, USERRA authorized the individual USERRA claimant to sue a state, as employer, in federal court, but the 7th Circuit held this provision to be unconstitutional under the 11th Amendment. *See Velasquez v. Frapwell*, 160 F.3d 389 (7th Cir. 1998). Later in 1998, Congress amended USERRA to address the 11th Amendment issue.

Under the 1998 amendment, the Attorney General can file suit against a state (as employer) *in the name of the United States, as plaintiff*. *See* 38 U.S.C. 4323(b)(1). This solves the 11th Amendment problem, because the 11th Amendment does not forbid a suit against a state by the United States.

Alternatively, the individual USERRA claimant can file suit against a state in a state court of competent jurisdiction, "*in accordance with the laws of the State*." 38 U.S.C. 4323(b)(2) (emphasis supplied). The problem is that in many states sovereign immunity is still the rule, and the state is not amenable to suit in state court. Alabama, Delaware, Georgia, North Carolina, Pennsylvania, and Wisconsin are among the states where sovereign immunity is an apparently insuperable barrier to relief, unless DOJ brings the suit in the name of the United States.

If DOJ turns down the claimant's request for representation in a case against a private employer (and political subdivisions of states are treated as private employers, in accordance with 38 U.S.C. 4323(i)), there is at least a possibility that the claimant can find private counsel and prevail. When the employer is a state, DOJ's declination will often be fatal to the claimant's possibility of prevailing. Accordingly, please give priority to cases against states.

Please don't farm out USERRA cases to the United States Attorneys.

In 2004, responsibility for USERRA enforcement, within DOJ, was transferred from the Commercial Litigation Branch (CLB) of the Civil Division to the Employment Litigation Section (ELS) of the Civil Rights Division. This transfer was a big improvement, and I applauded it at the time.

The CLB should never have had a role in enforcement of USERRA or the VRRRA, but that Branch had that responsibility for many decades. Among other responsibilities, the CLB is responsible for *defending* federal agencies accused of violating USERRA as employers. The same attorneys cannot effectively argue for a liberal interpretation of USERRA, with respect to state and local governments and private employers, while arguing for a stingy interpretation of this law, with respect to federal agencies as employers.

Under the CLB, DOJ headquarters was merely a conduit for USERRA and VRRRA cases, which were referred to the 93 United States Attorneys. Leaving it to the United States Attorney to decide whether DOJ will provide representation necessarily means that representation will not be provided, in most cases. The United States Attorney will always have "higher priorities" in his or her own mind.

Under the ELS, after the 2004 transfer, the United States Attorneys have been largely cut out of this process, and I think that is a big improvement. I am concerned that in recent months there has been backsliding—USERRA cases are again being delegated to the United States Attorneys. I respectfully urge you to reconsider this policy.

Conclusion

I hope that my comments and suggestions are useful to you. If you or your staff has questions, please call me at (202) 646-7730. I would welcome the opportunity to meet with you or an appropriate member of your staff.