

# Law Review 12114

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## **USERRA Does Not Apply to PHS Selection of PHS Officers**

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- 1.1.1.8—USERRA applies to Federal Government
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**Q: I am a Major in the Army National Guard and a life member of ROA. For several years, I have read with great interest your “Law Review” articles in the ROA magazine and on the ROA website.[\[1\]](#)**

**I was called to active duty in 2005 and deployed to Iraq for almost a year, and I served there as a behavioral health officer. As a civilian, I work for the Department of the Army, as a clinical social worker assisting wounded warriors in a warrior transition unit.**

**While in Iraq, I suffered both physical and psychological wounds, but I have largely recovered. I am not currently on a profile in the Army National Guard—I take and pass the standard physical readiness test, and I am not currently taking and do not need any medication.**

**I applied for a commission in the United States Public Health Service (PHS), a commissioned corps in the United States Department of Health and Human Services (HHS). The selection process seemed to go well, and I was tentatively slated for a position in the Indian Health Service (an agency within HHS) as part of the mental health team at an Indian reservation.**

**The final step in the PHS selection process is to be interviewed and considered by the Medical Evaluations Officer (MEO), a senior Captain (O-6) in the PHS commissioned corps. During my interview, she told me that “there are other PHS officers similar to you that we are concerned about.” I took that to mean that other military members suffering from Post-Traumatic Stress (PTS) had applied for and been accepted as PHS officers and had had problems while serving in the PHS. Even assuming that this is the case, I think that it is fundamentally unfair for PHS to assume that issues for others who have served in the military necessarily apply to me. This is sort of like an employer saying, “We hired a black employee once, and he did not work out, so now we will never hire a black employee again.”**

**I think that I have been treated most unfairly, and I filed an Equal Employment Opportunity (EEO) complaint against PHS. A “contract EEO counselor” was appointed, and he did a cursory investigation, which I consider to be a whitewash.**

**I think that my rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) have been violated by PHS. What recourse, if any, is available to me?**

**A:** First, you made a tactical error by filing an EEO complaint. The EEO process that you invoked is the proper process for persons alleging violations of Title VII of the Civil Rights Act of 1964 (discrimination in employment on the basis of race, color, national origin, religion, or sex), the Age Discrimination in Employment Act (discrimination on the basis of age, with respect to persons aged 40 or above), and the Americans with Disabilities Act (discrimination based on or failure to accommodate disability). The EEO process is also the appropriate forum for complaints that an individual has suffered retaliation for having filed a prior EEO complaint.

The EEO process is *not* the appropriate forum for a complaint that your USERRA rights have been violated by an employer or prospective employer. If you are alleging that a federal agency has violated USERRA, the appropriate forum is the Merit Systems Protection Board (MSPB), a quasi-judicial federal agency created by the Civil Service Reform Act of 1978.<sup>[2]</sup>

There are two ways to initiate an enforcement action in the MSPB. First, you can complain to the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). That agency will investigate your complaint and try to persuade the complained of federal agency to come into compliance, if the DOL-VETS investigation shows probable merit to your complaint. If the agency does not come into compliance, you can request that DOL-VETS refer the case to the United States Office of Special Counsel (OSC). If OSC agrees that your case has merit, it will initiate the MSPB action on your behalf, at no cost to you.

Alternatively, you can retain private counsel and bring an action in the MSPB in your own name. USERRA has no "exhaustion of remedies" requirement, and you do not need a "right to sue" letter from DOL-VETS, OSC, or anybody else. If you proceed with private counsel and prevail, the MSPB is authorized to order the federal agency defendant to pay your attorney fees, as well as other relief, including reinstatement and back pay. *See* 38 U.S.C. 4324(c).

You can also bring your action in the MSPB on a *pro se* basis, acting as your own attorney. 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 today is so much more complex than it was during Abraham Lincoln's lifetime.

Section 4311(a) of USERRA 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 the uniformed services 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).

If this were a USERRA case (which unfortunately it is not), the reported statement by the PHS MEO to the effect that you will not be selected because other military veterans who suffered traumatic stress in combat and who have been selected for the PHS Corps have had problems would constitute "smoking gun" evidence of a violation of section 4311(a). USERRA does not apply to this situation, because you were not applying to PHS for *initial employment* and the PHS was not acting as an *employer*.<sup>[3]</sup> The PHS commissioned corps is a uniformed service as defined by USERRA.<sup>[4]</sup> Service in a uniformed service is much more than and different from civilian employment.

USERRA applies to the relationship between a service member (Army, Navy, Marine Corps, Air Force, Coast Guard, or PHS) and his or her civilian employer or prospective civilian employer. USERRA simply does not apply to the relationship between a service member or person who seeks to become a service member and the uniformed service of which he or she is a member or seeks to become a member. USERRA does not apply to your situation at all.

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<sup>[1]</sup> Please go to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find 814 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. Captain Wright initiated this column in 1997, and we add new articles each week.

<sup>[2]</sup> Please see Law Review 0755 (October 2007) for a detailed description of USERRA's enforcement mechanism for cases involving federal agencies as employers or prospective employers.

<sup>[3]</sup> USERRA would certainly apply to PHS if it were considering you for a civilian job in PHS.

<sup>[4]</sup> *See* 38 U.S.C. 4303(16).