

## Interesting MSPB Case on USERRA

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### 1.1.1.8—USERRA applies to Federal Government

#### 1.2—USERRA forbids discrimination

#### 1.4—USERRA enforcement

#### 1.8—Relationship between USERRA and other laws/policies

***Davison v. Department of Veterans Affairs*, 2011 MSPB 25 (Feb. 18, 2011), settled on remand, 2011 MSPB LEXIS 4672 (July 29, 2011).**

James W. Davison, MD is a physician employed by the United States Department of Veterans Affairs (VA) and also a disabled veteran. He is a “title 38 employee” of the VA. Please see Law Review 13097<sup>1</sup> (the immediately preceding article) for a detailed description of title 38 employees and their rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

As I explained in Law Review 13080 (June 2013), Executive Order 5396 (signed by President Herbert Hoover on July 17, 1930) gives federal employees who are disabled veterans the right (essentially without limit) to use sick leave and annual leave and leave without pay after all paid leave has been exhausted for medical treatment and recuperation. This 83-year-old executive order is still in effect and is still binding on all Executive Branch agencies, including the VA.

While employed by the VA, Dr. Davison had serious health problems. After exhausting his sick leave and annual leave, he took leave without pay under Executive Order 5396. It is unclear whether the health problems that he has suffered recently are the result of the illness, injury, or wound that he suffered on active duty. Executive Order 5396 does not say that the disabled veteran who is a federal employee can only take leave for service-connected medical conditions.

After recovering from his medical problems, Dr. Davison applied to the VA to terminate his leave-without-pay status and to return to work, but the VA failed to reinstate him to the payroll. Representing himself, Dr. Davison initiated an action against the VA in the Merit Systems Protection Board (MSPB).<sup>2</sup> He claimed that by refusing to reinstate him from a leave-without-pay status after he informed the VA that he was recovered and ready to return to work the VA effectively suspended him without pay, and that the MSPB should review the lawfulness of the suspension.

Whenever you initiate a legal action in a court or in a quasi-judicial administrative agency like the MSPB, the first question you need to answer is *jurisdiction*. You must show that the court or agency has jurisdiction to hear and adjudicate the case that you are bringing. If you fail to show that, the court or agency will dismiss your case for want of jurisdiction, without even considering the merits.

As I explained in Law Review 13097, MSPB cases are decided initially by Administrative Judges (AJs) at MSPB regional offices around the country. The VA raised the issue of jurisdiction and made a motion to dismiss the case

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<sup>1</sup> I invite the reader’s attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find 920 articles about 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. I initiated this column in 1997, and we add new articles each week. We added 122 articles in 2012, and we have added another 98 so far in 2013.

<sup>2</sup> Please see Law Review 13097 for a detailed discussion of the jurisdiction, role, and procedures of the MSPB.

for want of jurisdiction. After giving Dr. Davison the opportunity to respond, the AJ dismissed Dr. Davison's case for want of jurisdiction in the MSPB.

The MSPB does not ordinarily have the jurisdiction to review the firing or suspension of a title 38 employee like Dr. Davison. Section 4324 of USERRA (38 U.S.C. 4324) is a separate grant of jurisdiction to the MSPB. The AJ asked Dr. Davison if he was claiming that his USERRA rights were violated, and he responded by conceding that he was not claiming reinstatement rights under section 4312 of USERRA. His time away from work for medical treatment and recuperation did not amount to "service in the uniformed services" as defined by 38 U.S.C. 4303(13), so USERRA did not give him the right to reinstatement after he recovered from the illness.

On appeal by Dr. Davison, the MSPB considered the question of whether section 4311 of USERRA is relevant to Dr. Davison's case. That section provides:

**"(a)** 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.

**(b)** An employer may not discriminate in employment against or take any adverse employment action against any person because such person

**(1)** has taken an action to enforce a protection afforded any person under this chapter,

**(2)** has testified or otherwise made a statement in or in connection with any proceeding under this chapter,

**(3)** has assisted or otherwise participated in an investigation under this chapter, or

**(4)** has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

**(c)** 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; or

**(2)** under subsection (b), if the person's

**(A)** action to enforce a protection afforded any person under this chapter,

**(B)** testimony or making of a statement in or in connection with any proceeding under this chapter,

**(C)** assistance or other participation in an investigation under this chapter, or

**(D)** exercise of a right provided for in this chapter, 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 person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

**(d)** The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title."

38 U.S.C. 4311 (emphasis supplied).

On appeal, the MSPB held that the right to leave-without-pay for medical treatment and recuperation under Executive Order 5396 is a "benefit of employment" protected by section 4311 of USERRA, so Dr. Davison had a non-frivolous USERRA claim that the MSPB AJ should have heard and adjudicated. The MSPB reversed the dismissal for want of jurisdiction and remanded Dr. Davison's case to the AJ. On remand, Dr. Davison and the VA resolved their differences and signed a settlement agreement.

This case is important because it illustrates the breadth of USERRA's protections. Also, this case illustrates an enforcement mechanism if a federal agency violates Executive Order 5396 by refusing to grant a disabled veteran unpaid leave for necessary medical treatment and recuperation or by refusing to reinstate the employee to the payroll after he or she has recovered sufficiently to return to work.