

## LAW REVIEW 13124

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### Beware the Judgment-Proof Defendant

By Gavriel Swerling<sup>1</sup>

#### 1.4 USERRA Enforcement

It is possible for plaintiffs to collect monetary damages from defendants for USERRA violations. For examples I invite your attention to Law Reviews [No. 1275](#), [No. 1046](#), [No. 13090](#), and [No. 206](#). Getting a favorable judgment for monetary damages, however, does not mean that the plaintiff walks out of the courtroom with cash in hand. A judgment is just a piece of paper allowing a plaintiff to collect. After a judgment is issued, it is up to the plaintiff to initiate the collection process. This process should have started, however, before a defendant was even named in a suit.

A plaintiff should conduct research prior to the start of the suit to evaluate the ability of each potential defendant to pay. If a defendant simply does not have the money (or the proper insurance to cover damages), there is not much that a plaintiff can do. So it is important to investigate potential defendants and strategically decide whom to name in a suit using ability to pay as a major consideration. Some important things to look for when evaluating a defendant's ability to pay are current assets, earning potential, and liability insurance.

Even if you name a defendant with the means to pay and are awarded monetary damages, you still may be unable to collect. The defendant may flat out refuse to pay; what then? The process of collecting from an unwilling defendant is a complex legal matter governed by state law. So the process is unique in each state. It is, however, generally illegal to utilize self-help (i.e. illegally take possessions from the defendant of your own accord). The first step is usually to show your judgment to the local sheriff's office. Then deputies can take possession of the defendant's goods and sell them at public auction to recoup the money to which you are entitled. This remedy is not, however, a guaranteed success. The defendant may physically hide assets, there may be a line of debt collectors whose claims take precedence over yours, and the defendant may file for bankruptcy. All of these situations may lead to your being unable to collect, and without legal remedy. Unfortunately, some defendants are just plain judgment-proof. So it is important to do research on the front end to avoid ending up with no way to collect.

When you look for an attorney to file a USERRA case on your behalf, the attorney may tell you that he or she is unwilling to take on your case because the potential defendant is "judgment proof"—this is what the attorney is saying.

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\*The views expressed in this article do not represent the Maryland Law School or the Marine Corps.

The ability of the defendant to pay and the likelihood of difficulty of collecting on a judgment are also considerations that you should bear in mind when evaluating a settlement offer. The payment of \$50,000 in cash, upon signing the settlement, may be worth more than the likelihood of getting a judgment for \$100,000 that cannot practically be collected.

Under section 4321 of USERRA, you can file a USERRA complaint against an employer with the Veterans' Employment and Training Service of the Department of Labor (DOL-VETS), and that agency will conduct an investigation and advise you of the results. Upon your request, DOL-VETS will refer the case file to the United States Department of Justice (DOJ). If DOJ agrees that your case has merit, DOJ will file suit on your behalf, at no expense to you. Unless the employer is a state government entity, the named plaintiff will be you, not the United States, even though DOJ is representing you. If you obtain a judgment through the efforts of DOJ, you are in essentially the same position as if you had obtained the judgment through the efforts of private counsel that you retained on a contingent fee basis, but this is at least another option to consider if private lawyers refuse to take your case because the prospective defendant is an apparent deadbeat.