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Sometimes DOL-VETS Is Not Totally Worthless

By Captain Samuel F. Wright, JAGC, USN (Ret.)

1.4—USERRA enforcement

Regular readers of our “Law Review” column¹ will recognize that I have been critical of the Veterans’ Employment and Training Service of the United States Department of Labor (DOL-VETS). For example, I invite the reader’s attention to Law Review 0758 (November 2007). In the case discussed in that article, the DOL-VETS investigator accepted at face value the assurances of the employer that the Air Force Reservist claimant had been fired because of insubordination and sloppy work, not because of his two-year mobilization and his complaint that the employer had violated USERRA. The employer “proved” the allegations of insubordination and sloppy work, to the satisfaction of the DOL-VETS investigator, by means of business records of the company.

After DOL-VETS closed the case as “without merit” the reservist retained private counsel, attorney James Beck of Tacoma, Washington. Mr. Beck obtained a copy of the DOL-VETS case file, by means of the Freedom of Information Act. Mr. Beck noticed something very interesting. The first business record showing insubordination and sloppy work was dated February 29, 2005. One problem—2005 was not a leap year.

Mr. Beck filed suit on the reservist’s behalf and was able to establish, to the satisfaction of the jury, that the employer had created these false records only after the reservist had complained to DOL-VETS. Mr. Beck obtained a very substantial verdict for lost pay, liquidated damages (for a willful violation), and defamation (for falsely accusing the reservist of insubordination and sloppy work).

All too often, the DOL-VETS idea of an “investigation” is to send a copy of the USERRA complaint to the employer, requesting comment. The employer ordinarily retains an attorney to draft a response. The DOL-VETS “investigator” sends the employer’s response to the claimant, directing the claimant to “respond in 15 days or we close the case.”

¹ I invite the reader’s attention to www.servicemembers-lawcenter.org. You will find 947 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 new articles in 2012 and another 125 so far in 2013.

For more than three decades, I have been complaining about sloppy case work and lack of advocacy by DOL-VETS in reemployment rights cases, under USERRA and the predecessor reemployment statute. Perhaps my complaints are finally being heard. Here is a copy of a very recent DOL-VETS press release:

DOL Working for You

USERRA Helps Army Reservist in Florida



For 10 of the past 12 years, Army reservist Scott Harrison was repeatedly called up to spend years at a time planning and supporting global military operations in places such as Kuwait, Afghanistan and Iraq. Over the course of his time abroad as a reservist, he achieved the rank of colonel in the Army. But back at home in Florida, the large telecommunication company Harrison worked for failed to provide him with promotions and raises for a variety of reasons, including what the company said was the lack of sufficient annual evaluations by his supervisor to support promotions during his military service. After trying to collaborate with the company to recapture the raises and promotions, Harrison filed a claim with the department under the Uniformed Services Employment and Reemployment Rights Act. USERRA mandates that returning service members must be promptly re-employed in the same position that they would have attained had they not been absent for military service, with the same seniority, status and pay, as well as other rights and benefits determined by seniority. As part of the complaint review process, an investigator from the department's Veterans' Employment and Training Service collects and reviews evidence and conducts witness interviews in order to obtain a resolution. Regardless of the outcome of the case, if a claimant is dissatisfied, he or she may request that the case be referred to the Department of Justice. After several months of review, Harrison's company settled the claim. He has been promoted and paid \$96,000 in lost wages. Harrison said, "The Department of Labor was able to advocate on my behalf and get results I could not get on my own."

Colonel Scott K. Harrison is a life member of ROA. I am pleased that DOL-VETS obtained relief for him.

If you want free legal representation from the Department of Justice (DOJ) under USERRA, you must first file a complaint with DOL-VETS. That agency will investigate your complaint and advise you of the results of the investigation. DOL-VETS will also advise you of your right to request referral to DOJ. If you do not request referral, or if you request referral and DOJ turns down your request for representation, you can file suit in your own name and with your own lawyer.² See 38 U.S.C. 4323(a)(3).

² This discussion applies to cases against private employers and state political subdivisions, which are treated as private employers for purposes of USERRA enforcement. See 38 U.S.C. 4323(i). Cases against state government employers are more complicated, because of the 11th Amendment of the United States Constitution. Cases against federal agencies, as employers, are filed in the Merit Systems Protection Board, under 38 U.S.C. 4324.

Unlike other statutes, USERRA has no “exhaustion of remedies” requirement, and you do not need a “right to sue letter” before filing suit. If you do not complain to DOL-VETS, you can file suit directly in the United States District Court for any district where the employer maintains a place of business. *See* 38 U.S.C. 4323(a)(3)(A), 4323(c)(2). If you file suit through private counsel and prevail, you can get the court to order the employer to pay your attorney fees. *See* 38 U.S.C. 4323(h)(2).