

November 2013

OSC Effectiveness in Enforcing USERRA against Federal Agencies as Employers

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1.1.1.8—USERRA applies to the Federal Government

1.4—USERRA enforcement

As I explained in Law Review 104¹ and other articles, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA).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.

Under USERRA, a person who leaves a civilian job (federal, state, local, or private sector) for voluntary or involuntary service in the uniformed services is entitled to reemployment upon release from the period of service. The person must have given the employer prior oral or written notice,² and the cumulative duration of the person's period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment, must not have exceeded five years.³ The person must have been released from the period of service without having received a disqualifying bad discharge from the military, like a bad conduct discharge, a dishonorable discharge, or an other-than-honorable discharge.⁴ After release from the period of service, the person must have made a timely application for reemployment.⁵

A person who meets these conditions is entitled to prompt reinstatement⁶ in the position of employment that the individual would have occupied if the individual's continuous employment with the employer had not been interrupted by uniformed service or another position (for which the individual is qualified) that is of like seniority, status, and pay.⁷ Upon reemployment, the individual is entitled to the seniority and pension credit in the civilian job that the individual had when he or she left the job for uniformed service plus the additional seniority (and benefits and pension credit that depend upon seniority) that the person would have had if he or she had been continuously employed in the civilian job.⁸

It is unlawful for an employer (federal, state, local, or private sector) to deny a person initial employment, retention in employment, or a promotion or benefit of employment on the basis of the individual's membership in a uniformed service, application to join a uniformed service, performance of service, or application or obligation to

¹ I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 969 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 147 so far in 2013.

² 38 U.S.C. 4312(a)(1).

³ As is explained in Law Review 201 and other articles, all involuntary service and some voluntary service are exempted from the computation of the individual's five-year limit.

⁴ 38 U.S.C. 4304.

⁵ After a period of service of 181 days or more, the person has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

⁶ The reinstatement generally must be within two weeks after the individual's application for reemployment. See 20 C.F.R. 1002.181.

⁷ 38 U.S.C. 4313(a)(2)(A).

⁸ 38 U.S.C. 4316(a), 4318.

perform service.⁹ If one of these protected factors was *a motivating factor* (not necessarily the only factor) in the employer's unfavorable personnel decision, the decision is unlawful, unless the employer can *prove* (not just say) that the employer would have made the same decision in the absence of the protected factor.¹⁰

A person who claims that a state or local government or private employer has violated the person's USERRA rights is authorized to file a written complaint with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS).¹¹ The agency investigates the complaint and advises the person of the results of its investigation, and DOL-VETS attempts to persuade the employer to come into compliance with USERRA.¹² If the DOL-VETS efforts do not result in a resolution of the complaint, the complainant can request (in effect demand) that DOL-VETS refer the case file to the United States Department of Justice (DOJ).¹³

If DOJ believes that the complainant is entitled to the benefits that he or she seeks, DOJ can appear and act as attorney in filing and prosecuting a civil action against the employer in the appropriate United States District Court.¹⁴ If the individual did not make a complaint in writing to DOL-VETS or did not request that DOL-VETS refer the case file to DOJ, or if DOJ has declined the individual's request for representation, the individual can file suit¹⁵ through private counsel that he or she retains or *pro se*.¹⁶

Similarly, an individual that a federal agency (as employer) has violated the individual's USERRA rights can file a written complaint with DOL-VETS.¹⁷ If the DOL-VETS investigation does not resolve the complaint, the individual can request (in effect demand) that the case file be referred to the United States Office of Special Counsel (OSC).¹⁸ If OSC is reasonably satisfied that the individual is entitled to the benefits he or she seeks, OSC can appear and act as attorney for the individual in initiating and prosecuting an action in the Merit Systems Protection Board (MSPB).¹⁹

The individual claiming that a federal agency (as employer) has violated the individual's USERRA rights is permitted to initiate an action in the MSPB if the individual did not complain to DOL-VETS or did not request that DOL-VETS refer the case file to OSC or if OSC has turned down the individual's request for representation.²⁰

On October 13, 2010, President Obama signed into law the Veterans' Benefits Act of 2010 (VBA-2010), Public Law 111-275. This important new law made several welcome amendments to USERRA. Section 105 of VBA-2010 ordered DOL and OSC to conduct a new demonstration project (DP) on the enforcement of USERRA with respect to federal executive agencies as employers. In the Veterans' Benefits Improvement Act of 2004, Congress ordered the

⁹ 38 U.S.C. 4311(a).

¹⁰ 38 U.S.C. 4311(c).

¹¹ 38 U.S.C. 4322.

¹² 38 U.S.C. 4322(d), 4322(e).

¹³ 38 U.S.C. 4323(a)(1).

¹⁴ *Id.*

¹⁵ 38 U.S.C. 4323(a)(3).

¹⁶ *Pro se* means that the individual acts as his or her own attorney. I certainly do not recommend that course. Abraham Lincoln said, "A man who represents himself has a fool for a client." And the law is so much more complex today than it was during Lincoln's lifetime.

¹⁷ 38 U.S.C. 4322.

¹⁸ 38 U.S.C. 4324(a)(1).

¹⁹ The MSPB is a quasi-judicial federal agency that hears and adjudicates disputes between individual federal employees and federal agencies (as employers) under USERRA and several other federal laws. The Civil Service Reform Act of 1978 divided the former Civil Service Commission (CSC) into three agencies. The Office of Personnel Management (OPM) inherited the role as the personnel office of the Executive Branch. The MSPB inherited the CSC's adjudicatory functions, and OSC inherited the investigative and prosecutorial functions.

²⁰ 38 U.S.C. 4324(b).

first demonstration project, which lasted from February 2005 to December 2007. That project is described in detail in Law Review 0605 (Feb. 2006).

The new DP will last for 36 months, from August 2011 until August 2014. Like the 2005-07 DP, the new DP only relates to USERRA complaints against federal agencies as employers, not cases against state or local governments or private employers. Federal agency cases account for 15-20% of the USERRA case load.

During the new DP, USERRA cases against federal agencies as employers are being referred to OSC directly, rather than DOL-VETS, if the claimant has a Social Security Number (SSN) ending in an odd digit or if the claimant with an even SSN also has a related Prohibited Personnel Practice case that is within OSC's jurisdiction. DOL-VETS and OSC are required to report to the Comptroller General (head of the Government Accountability Office or GAO) on the details of the DP, and the Comptroller General will report to Congress.

On November 4, 2013, OSC released the following press release:

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OSC Successfully Resolves Service Members' Employment Complaints

FOR IMMEDIATE RELEASE -- CONTACT: Ann O'Hanlon, (202) 254-3631; ohanlon@osc.gov

WASHINGTON, D.C./November 4, 2013 –

The U.S. Office of Special Counsel (OSC) successfully obtained relief for service members in approximately 25 percent of all cases completed during fiscal year 2013 -- a high rate for federal employment cases -- under the Uniformed Services Employment and Reemployment Rights Act (USERRA). This period represents roughly the second year of OSC's three-year Demonstration Project, a program that expands OSC's role in protecting the employment rights of returning service members.

The first two cases below illustrate OSC's enforcement of the USERRA "escalator principle," which holds that service members should not be disadvantaged or denied advancement in their civilian careers due to military duty. The next two are discrimination cases in which service members initially lost job opportunities due to their military obligations.

- The position held by an Army police officer, who was also a member of the Army Reserves, changed while he was deployed, resulting in promotions for his colleagues. Upon his return from active duty, however, the reservist was neither put into the new position nor promoted. OSC intervened and the agency agreed to give the officer a retroactive promotion, provide him with the corresponding back pay, and place him in the correct position description and command structure with his colleagues.
- Upon an Air Force Reservist's return from active duty, the Department of Energy refused to promote her, after initially promising that it would. Management officials indicated that her absence for military service was the reason for this denial. OSC informed the agency of its obligations under USERRA. The Department of Energy then gave the reservist a retroactive promotion with corresponding back pay and reassigned her within the agency, enabling her to get the experience and training necessary for further promotion.
- A Marine deployed overseas was tentatively selected for a nuclear transport courier position with the Department of Energy. His tentative selection was withdrawn when he was unable to complete a required drug test within 30 days, due to his overseas deployment. OSC contacted the agency, which agreed to

restore his tentative selection and to reschedule his drug testing so that he could proceed with the employment process.

- An Army officer received a tentative job offer for a Customs and Border Clearance Agent position with the Department of the Army in Vicenza, Italy. However, after he informed the agency that he was in the middle of a 10-month active duty deployment to Afghanistan, the Army rescinded the job offer. After OSC became involved, the agency extended a new employment offer.

The U.S. Office of Special Counsel (OSC) is an independent federal investigative and prosecutorial agency. Our basic authorities come from four federal statutes: the Civil Service Reform Act, the Whistleblower Protection Act, the Hatch Act, and the Uniformed Services Employment & Reemployment Rights Act (USERRA). OSC's primary mission is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing and to serve as a safe channel for allegations of wrongdoing. For more information, please visit our website at www.osc.gov.

I look forward to the end of the DP (August 2014) and to the GAO report on the performance of DOL-VETS and OSC in investigating USERRA cases and enforcing USERRA against federal agencies as employers. OSC believes that the DP and the GAO report will show that those USERRA claimants who are permitted to complain directly to OSC (because they have odd SSNs) receive faster and better service than those who must file with DOL-VETS (because they have even SSNs). We shall see.

But I think that in most cases the individual claimant is better off with private counsel than with either OSC or DOL-VETS. The claimant needs an *advocate*, not a neutral investigator.

The OSC reports that OSC has obtained relief for approximately 25% of USERRA claimants who have filed with OSC through the DP. Although the press release characterizes 25% as "a high rate for federal employment cases," I am not convinced that this is a sufficient rate for USERRA cases involving federal agencies as employers. I recognize that not all USERRA complaints are valid. Some complainants are seeking benefits that are not supported by the law or are making factual assertions that are not supported by the evidence, but I do not believe that 75% of the cases are without merit.