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DOJ Sues Missouri Adjutant General under USERRA

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1.1.1.7—USERRA applies to state and local governments
1.1.3.3—USERRA applies to National Guard service
1.2—USERRA forbids discrimination
1.3.2.10—Furlough or leave of absence clause
1.4—USERRA enforcement
1.8—Relationship between USERRA and other laws/policies
2.0—Paid leave for government employees who are Reserve Component members

On February 24, 2014, the United States Department of Justice (DOJ) filed suit against the State of Missouri, the Missouri National Guard, and Major General Stephen L. Danner, the Adjutant General of Missouri[1] (TAG-MO) in the United States District Court for the Western District of Missouri. The case is *United States of America v. State of Missouri,* Case No. 14-4036. The suit alleges that the named defendants violated the Uniformed Services Employment and Reemployment Rights Act (USERRA) in the way that they treated Ms. Kinata C. Holt and other National Guard technicians in Missouri. Yes, you read that correctly. DOJ is alleging (I believe correctly) that the Missouri National Guard is violating the federal law that protects National Guard members and Reservists in their civilian employment.

My principal concern with this situation is with the "optics"—to use "Inside the Beltway" lingo. The appearance is terrible. USERRA's very first section expresses the "sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter." 38 U.S.C. 4301(b). As a civilian employer, the National Guard must strive to be a model among models. It should not be necessary for DOJ to sue a state's National Guard to get that organization to comply with USERRA.

The appearance that the Missouri National Guard does not comply (with respect to its own civilian employees) with the law that protects Guard members generally inevitably undermines the National Guard's moral standing to advocate for National Guard Soldiers and Airmen, with respect to their civilian employers. "Do as I say and not as I do" has always been a losing argument. How will the National Guard leadership tell the gas station owner in Missouri that he must comply with USERRA with respect to his employees when the National Guard has been sued for violating the USERRA rights of its own employees?

[1] In Missouri and other states, the Adjutant General (TAG) is the head of the Army National Guard and Air National Guard of the state. The TAG is a state official, usually appointed by the Governor.

First, it should be noted that the TAG is the *civilian employer* of National Guard technicians and is bound by USERRA, just like any other civilian employer (federal, state, local, or private sector). Section 4303 of USERRA (38 U.S.C. 4303) defines 16 terms used in this law, including the term "employer." That definition includes the following: "In the case of a National Guard technician employed under section 709 of title 32, the term 'employer' means the adjutant general of the State in which the technician is employed." 38 U.S.C. 4303(4)(B).

Congress enacted USERRA in 1994, to replace the Veterans' Reemployment Rights Act (VRRA), which goes back to 1940. USERRA's legislative history explains the rationale for defining the TAG as the civilian employer of National Guard technicians, as follows: "Section 4303(4)(B) would provide that the employer of a National Guard technician shall be the Adjutant General of the State where the technician is employed. Because of the mix of State and Federal attributes of National Guard technicians, these persons have had difficulty enforcing their rights under the existing reemployment statute [VRRA]. The purpose of this provision is to clarify that National Guard technicians are to be considered to be State employees for purposes of chapter 43 of title 38 [USERRA], but not necessarily for any other purpose, except as otherwise provided by law." House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News (USCCAN)* 2449, 2454-55.

National Guard technicians have a unique hybrid status—partly state and partly federal, and partly civilian and partly military.[2] But for purposes of USERRA they are considered to be civilian employees of the state, and the TAG (a state official) is considered to be their civilian employer. Thus, the enforcement mechanism for National Guard technicians claiming USERRA rights is through the appropriate federal district court, not through the Merit Systems Protection Board (MSPB). This case was properly filed in Federal District Court.

Kinata C. Holt was a Missouri National Guard technician when she applied for and was accepted by the Army's Active Guard & Reserve (AGR) Program. She is currently on three-year AGR active duty orders, from November 2011 to November 2014. The Missouri National Guard forced Holt to resign from her technician position before she reported to active duty.

In paragraph 11 of its complaint, DOJ alleged: "Pursuant to Missouri National Guard policy and practice, before allowing Holt to go on active duty with the Army's Guard and Reserve Program, the Missouri National Guard required her to sign a document in which she agreed to be separated (i.e., terminated) from her civilian position rather than allowing her to remain a Missouri National Guard employee and placing her on furlough or leave of absence ('LOA') as required by USERRA, 38 U.S.C. 4316(b)(1)(A)."

[2] A National Guard technician is required (as a condition of employment) to maintain membership in one of the National Guard units that the technician supports. During drill weekends and annual training tours, the technician participates in unit activities in his or her military capacity. During the work week, the technician is a civilian employee, although the technician normally wears a military uniform and observes military courtesies (saluting, etc.).

Why, you may ask, would the Missouri National Guard seek to force Holt and other similarly situated technicians resign from their civilian positions? Paragraph 12 of the DOJ complaint states: "By forcing dual technicians to separate from their employment with the Missouri National Guard before performing active duty military service with the Army's Guard and Reserve Program, defendants are effectively denying Missouri National Guard dual technicians the benefit of 15 days [per year] paid military leave to which they are otherwise entitled under 5 U.S.C. 6323."

Paragraph 11 of the DOJ complaint asserts that the Missouri National Guard policy violates section 4316(b)(1)(A) of USERRA. That subsection provides: "Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be—deemed to be on furlough or leave of absence while performing such service." 38 U.S.C. 4316(b)(1)(A).

USERRA's 1994 legislative history expounds upon this provision as follows: "Section 4315(b) [later renumbered 4316(b)] would reaffirm that a departing serviceperson is to be placed on a statutorily-mandated military leave of absence while away from work, regardless of the employer's policy. Thus, terminating a departing serviceperson, or forcing him or her to resign, even with the promise of reemployment, is of no effect. *See Green v. Oktibbeha County Hospital,* 526 F. Supp. 49, 54 (N.D. Miss. 1981); *Winders v. People Express Airlines, Inc.,* 595 F. Supp. 1512, 1518 (D.N.J. 1984), *affirmed,* 770 F.2d 1078 (3rd Cir. 1985)." 1994 *USCCAN* at 2466.

National Guard technicians are considered to be state employees for USERRA purposes, but they are treated as if they were federal employees for purposes of the right to *paid* military leave under section 6323 of title 5 of the United States Code, which provides as follows:

§ 6323. Military leave; Reserves and National Guardsmen

(a)
(1) Subject to paragraph (2) of this subsection, an employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, is entitled to leave without loss in pay, time, or performance or efficiency rating for active duty, inactive-duty training (as defined in section 101 of title 37), funeral honors duty (as described in section 12503 of title 10 and section 115 of title 32), or engaging in field or coast defense training under sections 502-505 of title 32 as a Reserve of the armed forces or member of the National Guard. Leave under this subsection accrues for an employee or individual at the rate of 15 days per fiscal year and, to the extent that it is not used in a fiscal year, accumulates for use in the succeeding fiscal year until it totals 15 days at the beginning of a fiscal year.
(2) In the case of an employee or individual employed on a part-time career employment basis (as defined in section 3401(2) of this title), the rate at which leave accrues under this subsection shall be a percentage of the rate prescribed under paragraph (1) which is determined by dividing 40 into the number of hours in the regularly scheduled workweek of that employee or individual during that fiscal year.

(3) The minimum charge for leave under this subsection is one hour, and additional charges are in multiples thereof.

(b) Except as provided by section 5519 of this title, an employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, who--
(1) is a member of a Reserve component of the Armed Forces, as described in section 10101 of title 10, or the National Guard, as described in section 101 of title 32; and
(2) (A) performs, for the purpose of providing military aid to enforce the law or for the purpose of providing assistance to civil authorities in the protection or saving of life or property or the prevention of injury--
(i) Federal service under section 331, 332, 333, or 12406 of title 10, or other provision of law, as applicable, or
(ii) full-time military service for his State, the District of Columbia, the Commonwealth of Puerto Rico, or a territory of the United States; or
(B) performs full-time military service as a result of a call or order to active duty in support of a contingency operation as defined in section 101(a)(13) of title 10;

is entitled, during and because of such service, to leave without loss of, or reduction in, pay, leave to which he otherwise is entitled, credit for time or service, or performance or efficiency rating. Leave granted by this subsection shall not exceed 22 workdays in a calendar year. Upon the request of an employee, the period for which an employee is absent to perform service described in paragraph (2) may be charged to the employee's accrued annual leave or to compensatory time available to the employee instead of being charged as leave to which the employee is entitled under this subsection. The period of absence may not be charged to sick leave.

(c) An employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, who is a member of the National Guard of the District of Columbia, is entitled to leave without loss in pay or time for each day of a parade or encampment ordered or authorized under title 39, District of Columbia Code. This subsection covers each day of service the National Guard, or a portion thereof, is ordered to perform by the commanding general.

(d) (1) A military reserve technician described in section 8401(30) is entitled at such person's request to leave without loss of, or reduction in, pay, leave to which such person is otherwise entitled, credit for time or service, or performance or efficiency rating for each day, not to exceed 44 workdays in a calendar year, in which such person is on active duty without pay, as authorized pursuant to section 12315 of title 10, under section 12301(b) or 12301(d) of title 10 for participation in operations outside the United States, its territories and possessions.
(2) An employee who requests annual leave or compensatory time to which the employee is otherwise entitled, for a period during which the employee would have been entitled upon request to leave under this subsection, may be granted such annual leave or compensatory time without regard to this section or section 5519.

5 U.S.C. 6323.

Just like a DOJ employee who is away from his or her civilian job for voluntary or involuntary military training or service in the National Guard or Reserve, Holt was entitled to paid military leave under section 6323 while on her current three-year (November 2011 to November 2014) active duty period. This is a valuable benefit, especially since only federal work days (not weekends or federal holidays) are to be charged against her paid military leave entitlement.[3] This advantage is a benefit of employment, as defined by section 4303(2) of USERRA, 38 U.S.C. 4303(2). The Missouri National Guard deprived her of this benefit of employment on the basis of her performance of uniformed service, in violation of section 4311(a) of USERRA, 38 U.S.C. 4311(a).

I think that it is clear that the TAG-MO and the other defendants have violated USERRA in a clear and egregious way. I call upon Major General Stephen L. Danner to resolve this matter expeditiously by revising the Missouri National Guard policy to bring it into compliance with federal law and by compensating Holt and other similarly situated Missouri National Guard technicians for the pay and benefits that they lost because of these USERRA violations.

Q: Why was this lawsuit brought by DOJ rather than Holt's own retained attorney? Why was the United States of America the named plaintiff in this case?

A: The final sentence of section 4323(a)(1) of USERRA provides: "In the case of an action [brought by DOJ] against a State (as an employer), the action shall be brought in the name of the United States as the plaintiff in the action." 38 U.S.C. 4323(a)(1). The complaint is correctly drafted, with the United States as the named plaintiff.[4]

As originally enacted in 1994, USERRA authorized an individual to sue a state (as employer) in federal court. In 1998, the United States Court of Appeals for the Seventh Circuit[5] struck down this provision as unconstitutional, under the Eleventh Amendment[6] of the United States Constitution. *Velasquez v. Frapwell,* 160 F.3d 389 (7th Cir. 1998). Later in 1998, Congress addressed the *Velasquez* problem by amending USERRA to provide that in a USERRA lawsuit brought by DOJ against a state the named plaintiff shall be the United States of America, as in

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[3] *Butterbaugh v. Department of Justice,* 336 F.3d 1332 (Fed. Cir. 2003).

[4] If the defendant had been a private employer, the action would have been brought in the name of the individual claimant, even if DOJ was providing free legal representation under section 4323(a)(1). For purposes of USERRA enforcement under section 4323, a political subdivision of a state (county, city, school district, etc.) is treated as a private employer. 38 U.S.C. 4323(i).

[5] The 7th Circuit is the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.

[6] The 11th Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Yes, it is capitalized just that way, in the style of the late 18th Century, when the 11th Amendment was ratified. Although the 11th Amendment speaks to a suit against a state by a citizen of *another* state, the Supreme Court has held that the amendment also bars a suit against a state by a citizen of that same state. *See Hans v. Louisiana,* 134 U.S. 1 (1890).

this case. This solved the problem, because the 11th Amendment does not preclude a suit against a state in federal court with the United States of America as plaintiff. *See United States v. Alabama Department of Mental Health,* 673 F.3d 1320 (11th Cir. 2012).[7]

In January 2013, Kinata C. Holt filed with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS) a formal written complaint alleging that the Missouri National Guard had violated her USERRA rights, in accordance with section 4322(a) of USERRA, 38 U.S.C. 4322(a). DOL-VETS investigated the complaint in accordance with section 4322(d) and found it to have merit. In accordance with section 4322(e), DOL-VETS advised Ms. Holt of the results of its investigation and of her right to request referral to DOJ. Ms. Holt requested referral to DOJ, and the case file was referred. DOJ agreed with DOL-VETS that the case had merit, and DOJ filed this lawsuit on February 24, 2014.

Regular readers of this column will recall that I have been very critical of DOL-VETS with respect to its efforts to enforce USERRA. I find that all too often DOL-VETS simply accepts the employer's assertions of fact and law and closes the case as "without merit" even when the case does have merit. In this case, however, I have nothing but praise for DOL-VETS and DOJ. They found the case to have merit and have filed this lawsuit within 14 months after Ms. Holt filed her complaint with DOL-VETS.

I believe that this case is strong and that DOJ will prevail. We will keep the readers informed of developments in this important case.

[7] The 11th Circuit is the federal appellate court that sits in Atlanta and hears appeals from district courts in Alabama, Florida, and Georgia.