

Good News on USERRA Enforcement

By CAPT Samuel F. Wright, JAGC, USNR*

Regular readers of this column will recognize that one of my key interests is ensuring the effective enforcement of the Uniformed Services Employment and Reemployment Rights Act (USERRA). I have addressed the USERRA enforcement mechanism in Law Reviews 12, 24, 34, 61, 65, 67, 89, 93, 115, 127, and 128. A person claiming USERRA rights against a federal executive agency (any agency in the executive branch except an intelligence agency) complains to the Veterans' Employment and Training Service, U.S. Department of Labor (DOL-VETS), which conducts an investigation. See 38 U.S.C. 4321, 4322.

If DOL-VETS concludes that the case has merit, and if the federal agency employer refuses to comply, DOL-VETS refers the case to the Office of Special Counsel (OSC), a small federal agency headed by the special counsel (appointed by the president with Senate confirmation). "If the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred under paragraph (1) is entitled to the rights or benefits sought, the Special Counsel (upon request of the person submitting the complaint) may appear on behalf of, and act as attorney for, the person and initiate an action regarding such complaint before the Merit Systems Protection Board [MSPB]." 38 U.S.C. 4324(a)(2)(A).

I pointed out in Law Reviews 67 and 93 that *OSC has never filed a single USERRA case in the MSPB*. (Several USERRA cases have been filed and won in the MSPB by private counsel representing claimants or by the claimants acting as their own attorneys.) *Just recently, the OSC filed its first USERRA case.*

I am most pleased with the Hon. Scott J. Bloch, the new special counsel (confirmed by the Senate in December 2003). Unlike the last two special counsels since USERRA was enacted in 1994, Scott Bloch understands and supports the vigorous enforcement of USERRA. At a Pentagon ceremony on July 8, 2004, Special Counsel Bloch said, "As a member of the administration, I support USERRA. But I also support it as a citizen and as the father of an active duty Marine." The special counsel's son is Lance Cpl. Michael Bloch, who recently returned to Iraq for a second tour of duty.

At the Pentagon ceremony, Special Counsel Bloch signed the "Statement of Support for the National Guard and Reserve" prepared by the National Committee for Employer Support of the Guard and Reserve (ESGR). I was most impressed by the ceremony and by the remarks of Special Counsel Bloch and by the Hon. Thomas Hall, assistant secretary of Defense for Reserve Affairs. I am even more impressed by the actions that Special Counsel Bloch has taken and is taking to ensure that federal agencies comply with USERRA. Referring a USERRA case to OSC is no longer a useless formality.

There is also good news about USERRA enforcement in the non-federal sector. If the employer is a state, a political subdivision of a state (county, city, school district,

etc.), or a private employer, DOL-VETS refers the case to the attorney general. “If the attorney general is reasonably satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the attorney general may appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action for relief under this chapter [USERRA] for such person. In the case of such an action against a state (as an employer), the action shall be brought in the name of the United States as plaintiff in the action.” 38 U.S.C. 4323(a)(1).

Responsibility for filing suit on behalf of and representing USERRA complainants has been transferred from the Civil Division of the Department of Justice (DOJ) to DOJ’s Civil Rights Division. The Employment Litigation Section of the Civil Rights Division will undertake this responsibility, representing USERRA complainants in Federal District Courts all over the country, as necessary.

I have met with the leaders of the Employment Litigation Section. I am most pleased with this change, because I believe that the Employment Litigation Section is taking this new responsibility most seriously. The lawyers in that section are intent upon ensuring that USERRA is effectively enforced.

There is also progress to report on another USERRA front: regulations. Section 4331(a) of USERRA, 38 U.S.C. 4331(a), gives the secretary of Labor the authority to adopt regulations concerning the application of USERRA to state and local governments and private employers. On September 20, proposed USERRA regulations were published in the *Federal Register*, for notice and comment. See *Federal Register*, Volume 69, No. 181, pages 56266-56301. [See “Capitol Hill Connection,” page XX of this issue, for information on how to make public comment and where to locate the regulations.] I am most pleased with the proposed regulations. There is a 60-day period for comments, ending on November 19. I will file comments on behalf of ROA, but, at this time, I cannot find anything to quibble about.

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