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Enforcing USERRA against a Federal Agency

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Update on Sam Wright

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As I have explained in Law Review 15067 and other articles, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) and President Bill Clinton signed it into law on October 13, 1994.³ This was a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA).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 more than ten million young men (including my late father) for World War II. As originally enacted in 1940, the VRRA only applied to those who were drafted, but in 1941 Congress enacted the Service Extension Act, which expanded the VRRA to make it apply to voluntary enlistees as well as draftees.

Effective enforcement of the reemployment statute is relevant and important, now more than ever. In the almost 15 years since the terrorist attacks of September 11, 2001, 921,676 Reserve

¹ Please see www.servicemembers-lawcenter.org. You will find more than 1400 "Law Review" 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. The Reserve Officers Association (ROA) established this column in 1997.

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³ Public Law 103-353. USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-4335).

Component⁴ (RC) personnel have been called to the colors, including 24,845 currently serving on active duty.⁵ Without a law like USERRA, the services would not be able to recruit and retain a sufficient quality and quantity of personnel in the Active Component⁶ (AC) as well as the RC of our nation's five armed forces.⁷

Especially in a time (like now) of DOD budget stringency, RC personnel are a great deal for the nation economically, because they are only paid for days when they are serving or training.⁸ Because RC service members receive only part-time pay from the military, they need civilian jobs to support themselves and their families during the greater part of the year and the career, when they are not on military duty. It is only because of the protections of USERRA that RC service members are able to balance the demands of a full-time civilian job and career with the demands of the Reserve Component.

As I have explained in Law Review 15116 and many other articles, a person has the right to reemployment under USERRA if he or she meets five simple conditions:

- a. Must have left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services.
- b. Must have given the employer prior oral or written notice.
- c. Must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which the individual seeks reemployment. As I have explained in Law Review 201 and other articles, there are nine exemptions—kinds of service that do not count toward exhausting the individual's five-year limit.
- d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.

⁴ There are seven Reserve Components: the Army National Guard (ARNG), the Army Reserve (USAR), the Air National Guard (ANG), the Air Force Reserve (USAFR), the Navy Reserve (USNR), the Marine Corps Reserve (USMCR), and the Coast Guard Reserve (USCGR). The ARNG and ANG are hybrid federal-state organizations. The other five components are purely federal.

⁵ Report of the Office of the Secretary of Defense dated March 1, 2016.

⁶ USERRA most definitely applies to individuals who leave civilian jobs for service in the Active Component as well as the Reserve Component. Please see Law Review 0719.

⁷ Only 25% of American men and women aged 17-24 are eligible for military service. The other 75% are disqualified by medical issues (especially obesity and diabetes), use of illegal drugs or certain prescription medications like Ritalin, felony convictions, educational deficiencies, and other issues. Mission Readiness Press Release dated November 5, 2009, available at <http://cdn.missionreadiness.org/NATPR1109.pdf>. According to the Pew Research Center, only 1% of 17-24 year old Americans are both eligible for military service and willing to consider enlisting. The services need half of that 1% each year to meet their AC and RC recruiting goals. Please see Law Review 14080.

⁸ The “fully loaded” cost of an RC service member is 22% to 39% of the cost of the full-time AC service member, according to the Reserve Forces Policy Board. <http://www.fiercegovernmentit.com/story/compare-reserve-and-active-duty-military-personnel-costs-fairly-reserve-gro/2013-01-17>.

- e. After release from the period of service, must have made a timely application for reemployment.⁹

A person who meets these five conditions is entitled to *prompt* reemployment by the pre-service civilian employer.¹⁰ The person is entitled to be reemployed in the position that he or she *would have attained if continuously employed*, or in another position for which he or she is qualified that is of like seniority, status, and pay.¹¹ Upon reemployment, the person is entitled to be treated *as if he or she had been continuously employed* for seniority and pension purposes.¹²

Congress recognized that an employer could effectively nullify the value of USERRA by discriminating against employees or potential employees. Accordingly, section 4311 of USERRA makes it unlawful for an employer to deny a person initial employment, retention in employment, promotion, or a benefit of employment on the basis of the person's membership in a uniformed service, application to join a uniformed service, performance of service, or application or obligation to perform service.¹³ Here is the text of section 4311:

§ 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

- (a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.
- (b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.
- (c) An employer shall be considered to have engaged in actions prohibited--

⁹ After a period of service of 181 days or more, the individual has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

¹⁰ Except in the most unusual circumstances, the employer must have the returning service member back on the civilian payroll within two weeks after the application for reemployment. 20 C.F.R. 1002.181. The citation is to section 1002.181 of title 20 of the Code of Federal Regulations. This is part of the Department of Labor (DOL) USERRA Regulations.

¹¹ 38 U.S.C. 4313(a)(2)(A).

¹² 38 U.S.C. 4316(a), 4318.

¹³ 38 U.S.C. 4311(a).

- (1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or
- (2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.
- (d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.¹⁴

Like the VRRA, USERRA applies to almost all employers in this country, including the Federal Government (Executive Branch and Legislative Branch¹⁵), state and local governments,¹⁶ and private employers regardless of size.¹⁷ Among employers in the United States, only the following classes of employers are exempt from USERRA enforcement:

- a. Foreign embassies and consulates and international organizations (United Nations, World Bank, International Monetary Fund).¹⁸
- b. American Indian tribes.¹⁹
- c. Religious institutions.²⁰
- d. The Judicial Branch of the Federal Government.²¹

USERRA also applies all over the world to the United States Government and other United States employers.²²

¹⁴ 38 U.S.C. 4311.

¹⁵ Please see Law Review 15009 for a detailed discussion of the application of USERRA to the Legislative Branch of the Federal Government.

¹⁶ In 1974, Congress enacted the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA), which made some significant improvements to the VRRA. One of those improvements was to expand the applicability of the VRRA to include state and local governments, as employers.

¹⁷ You only need one employee to be an employer for purposes of the reemployment statute. See *Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992).

¹⁸ Foreign embassies and consulates and international organizations have diplomatic immunity. Please see Law Review 15112.

¹⁹ See Law Review 15111.

²⁰ Law Review 15112.

²¹ Law Review 15009.

²² See 38 U.S.C. 4319. Please see Law Review 24 concerning the extraterritorial application of USERRA.

Applying the VRRA and USERRA to federal executive agencies

Twenty-one percent (21%) of serving RC members have civilian jobs for the Federal Government.²³ It is important that the Federal Government, as an employer, comply with USERRA, not only because more than one-fifth of RC members are federal employees, but also because the Federal Government is imposing this obligation (to comply with USERRA) on state and local governments and private employers, so the Federal Government must not be seen as shirking this responsibility with respect to its relationship with its own civilian employees. 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."²⁴

Although the VRRA has applied to the Federal Government (as an employer) since 1940,²⁵ the VRRA lacked an enforcement mechanism with respect to federal agencies as employers. A federal employee claiming VRRA rights could enforce those rights against a federal agency employer only if the MSPB (or prior to 1978 the OSC) otherwise had jurisdiction.²⁶

USERRA was enacted in 1994 to improve upon the VRRA, especially with regard to the effectiveness of the VRRA's enforcement mechanism. One of USERRA's most important improvements was to provide, for the first time, for a specific enforcement mechanism for federal employees, former federal employees, and applicants for federal employment who claim unlawful discrimination in employment based on performance of uniformed service, application or obligation to perform uniformed service, etc.²⁷

²³ "Too Much to Ask? Supporting Employers in the Operational Reserve Era" by Dr. Susan M. Gates, *The Officer*, December 2013, pages 32-40. Dr. Gates further reported that 10% of RC members work for state governments and another 11% for local governments. The other 58% are employed by private employers or are self-employed, unemployed, or full-time students.

²⁴ 38 U.S.C. 4301(b).

²⁵ The VRRA has also applied to private employers since 1940. In 1974, Congress amended the VRRA to make it apply also to state and local governments, as employers.

²⁶ For example, let us assume that Joe Smith, a Navy Reservist and federal civilian employee, was fired by his employing agency for unauthorized absence from the civilian job, but Smith was in fact performing Navy Reserve duty during the time for which he was absent from the civilian job. If Smith had completed his one-year probationary period as a federal employee, he could appeal the firing to the MSPB. If Smith had not completed the probationary period, he had no appeal rights and no way to enforce his VRRA rights.

²⁷ *McMillan v. Department of Justice*, 2016 U.S. App. LEXIS 2605 (Fed. Cir. February 16, 2016) is a good example of the kind of case where a remedy is available to the aggrieved RC member under USERRA but no remedy would have been available under the VRRA. McMillan was and is a special agent of the United States Drug Enforcement Administration (DEA), a law enforcement agency in the United States Department of Justice (DOJ). He was assigned to the DEA office in Lima, Peru, and he requested an extension of his foreign tour in Peru. His extension request was denied. He claims that the tour extension request was denied *because of* his Army Reserve service, and that the tour extension was a "benefit of employment" as defined by section 4303(2) of USERRA, 38 U.S.C. 4303(2). Denying this benefit of employment because of his uniformed service violates section 4311 of USERRA (38 U.S.C. 4311), McMillan claims. Prior to the enactment of USERRA in 1994, the MSPB did not have jurisdiction to adjudicate a claim of this kind, and there was no remedy for such a violation. Under section 4324 of USERRA, 38 U.S.C. 4324, the MSPB has the authority to adjudicate such a claim and to award relief. I discuss *McMillan* in detail in Law Review 16013, the very next article in this "Law Review" series.

Section 4324 of USERRA provides for the Merit Systems Protection Board (MSPB) to adjudicate claims that federal executive agencies²⁸ have violated USERRA. Here is the text of that section:

§ 4324. Enforcement of rights with respect to Federal executive agencies

- (a)
 - (1) A person who receives from the Secretary a notification pursuant to section 4322(e) may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board. Not later than 60 days after the date the Secretary receives such a request, the Secretary shall refer the complaint to the Office of Special Counsel established by section 1211 of title 5.
 - (2)
 - (A) 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 the 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.
 - (B) Not later than 60 days after the date the Special Counsel receives a referral under paragraph (1), the Special Counsel shall--
 - (i) make a decision whether to represent a person before the Merit Systems Protection Board under subparagraph (A); and
 - (ii) notify such person in writing of such decision.
- (b) A person may submit a complaint against a Federal executive agency or the Office of Personnel Management under this subchapter directly to the Merit Systems Protection Board if that person--
 - (1) has chosen not to apply to the Secretary for assistance under section 4322(a);
 - (2) has received a notification from the Secretary under section 4322(e);
 - (3) has chosen not to be represented before the Board by the Special Counsel pursuant to subsection (a)(2)(A); or
 - (4) has received a notification of a decision from the Special Counsel under subsection (a)(2)(B) declining to initiate an action and represent the person before the Merit Systems Protection Board.

²⁸ “The term ‘Federal executive agency’ includes the United States Postal Service, the Postal Regulatory Commission, any nonappropriated fund instrumentality of the United States, any Executive agency (as that term is defined in section 105 of title 5) other than an agency referred to in section 2302(a)(2)(C)(ii) of title 5 [intelligences agencies], and any military department (as that term is defined in section 102 of title 5) with respect to the civilian employees of that department.” 38 U.S.C. 4303(5).

- (c)
 - (1) The Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to subsection (a)(2)(A) or (b), without regard as to whether the complaint accrued before, on, or after October 13, 1994. A person who seeks a hearing or adjudication by submitting such a complaint under this paragraph may be represented at such hearing or adjudication in accordance with the rules of the Board.
 - (2) If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.
 - (3) Any compensation received by a person pursuant to an order under paragraph (2) shall be in addition to any other right or benefit provided for by this chapter and shall not diminish any such right or benefit.
 - (4) If the Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that such person is entitled to an order referred to in paragraph (2), the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.
- (d)
 - (1) A person adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board under subsection (c) may petition the United States Court of Appeals for the Federal Circuit to review the final order or decision. Such petition and review shall be in accordance with the procedures set forth in section 7703 of title 5.
 - (2) Such person may be represented in the Federal Circuit proceeding by the Special Counsel unless the person was not represented by the Special Counsel before the Merit Systems Protection Board regarding such order or decision.²⁹

The MSPB is a quasi-judicial federal agency that was created by the Civil Service Reform Act of 1978 (CSRA). The CSRA split the former Civil Service Commission (CSC) into three entities. The Office of Personnel Management (OPM) inherited most of the CSC assets (including the headquarters building) and staff and functions as the personnel office for the Executive Branch of the Federal Government. The MSPB inherited the adjudicatory functions of the CSC. The Office of Special Counsel (OSC) inherited the investigatory and prosecutorial functions of the CSC.

²⁹ 38 U.S.C. 4324.

Under general title 5 rules (not USERRA), a federal employee who has completed the initial one-year probationary period has the right to appeal to the MSPB if he or she is fired or suspended without pay for 15 days or more. Adjudicating appeals of such adverse actions makes up the majority of the MSPB caseload. Prior to the enactment of USERRA in 1994, a federal employee who was fired during the initial one-year probationary period could not appeal to the MSPB, even if he or she were claiming that the firing was motivated by the employee's uniformed service protected by the VRRA. Similarly, a person claiming that he or she had been denied initial employment by a federal agency because of uniformed service had no remedy. Further, a person claiming that he or she had been denied a federal promotion or a benefit of federal employment because of uniformed service had no remedy. The enactment of section 4324 of USERRA provided a remedy for these folks who had no remedy under the VRRA.

An MSPB case (either a USERRA case or a general MSPB case) is heard initially by an Administrative Judge (AJ) of the MSPB. The AJ conducts a hearing and makes findings of fact and conclusions of law. The losing party at the AJ level (either the appealing employee or the agency) can appeal to the MSPB itself. The MSPB has three members, each of whom is appointed by the President with Senate confirmation. If the employee loses at the MSPB level, he or she can appeal to the Federal Circuit, but the agency cannot appeal an MSPB decision to the Federal Circuit.³⁰

Under section 4322 of USERRA,³¹ a person who asserts that any employer (federal, state, local, or private sector) has violated the person's USERRA rights can file a written complaint with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). That agency is then required to investigate the complaint.³² Under section 4326 of USERRA,³³ DOL-VETS has subpoena authority for USERRA investigations.

If the DOL-VETS investigation does not result in resolution, the agency is required to notify the complainant of the results of the investigation and of the complainant's options.³⁴ At that point, the complainant can request (in effect, insist upon) referral of the case file from DOL-VETS to OSC.³⁵ If OSC is reasonably satisfied that the complainant is eligible for the benefits that he or she seeks, OSC can initiate the action in the MSPB on behalf of the complainant.³⁶ If OSC declines the complainant's request for representation, the complainant can bring the action in the MSPB

³⁰ 38 U.S.C. 4324(d)(1). The Federal Circuit is a specialized federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from the MSPB. The Federal Circuit is an Article III court, referring to Article III of the United States Constitution. The judges on the Federal Circuit are appointed by the President with Senate confirmation and have lifetime tenure.

³¹ 38 U.S.C. 4322.

³² 38 U.S.C. 4322(d).

³³ 38 U.S.C. 4326.

³⁴ 38 U.S.C. 4322(e).

³⁵ 38 U.S.C. 4324(a)(1).

³⁶ 38 U.S.C. 4324(a)(2)(A).

directly, through private counsel or by acting as his or her own counsel.³⁷ In lieu of requesting referral to OSC, the complainant can bring the action in the MSPB.³⁸ It is also possible to bypass DOL-VETS altogether. Instead of filing a complaint with DOL-VETS, one can initiate the action directly in the MSPB.³⁹

If the person claiming that a federal agency has violated his or her USERRA rights proceeds with private counsel in the MSPB and prevails, the MSPB may, in its discretion, award that person reasonable attorney fees.⁴⁰ No attorney fees may be awarded by the MSPB or the Federal Circuit for that portion of the representation that occurred in the Federal Circuit.⁴¹

In summary, USERRA (unlike the VRRA) provides an enforcement mechanism for the enforcement of rights against federal executive agencies as employers. That enforcement mechanism is cumbersome and not always fully effective, but at least there is an enforcement mechanism.

³⁷ 38 U.S.C. 4324(b)(4). I strongly counsel against acting as your own attorney. Abraham Lincoln said, “A man who represents himself has a fool for a client.” And the law is so much more complicated today than it was in Lincoln’s lifetime.

³⁸ 38 U.S.C. 4324(b)(3).

³⁹ 38 U.S.C. 4324(b)(1).

⁴⁰ 38 U.S.C. 4324(c)(4).

⁴¹ See *Erickson v. United States Postal Service*, 759 F.3d 1341 (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 2919 (2015). The citation means that you can find this Federal Circuit decision in Volume 759 of *Federal Reporter Third Series* and the decision starts on page 1341. Sergeant Major Erickson brought an action in the MSPB and lost. He then appealed to the Federal Circuit, which reversed the MSPB and remanded the case back to the MSPB. *Erickson v. United States Postal Service*, 571 F.3d 1364 (Fed. Cir. 2009). On remand to the MSPB, Erickson lost again, and he again appealed to the Federal Circuit, which again reversed the MSPB decision and remanded the case back to the MSPB. *Erickson v. United States Postal Service*, 636 F.3d 1353 (Fed. Cir. 2011). On the second remand, the MSPB ruled in favor of Erickson. The MSPB awarded Erickson attorney fees for the representation of Erickson before the MSPB, but not for the substantial legal representation in the Federal Circuit. Erickson filed a third appeal to the Federal Circuit, this time about the limitation on the attorney fee award, but unfortunately the Federal Circuit upheld the MSPB on this point. I do not agree with the conclusion of the MSPB and the Federal Circuit that the attorney fees to be awarded under section 4324(c)(4) of USERRA [38 U.S.C. 4324(c)(4)] do not include fees for the Federal Circuit portion of the case. I think that this is an illiberal interpretation of section 4324(c)(4). In its first case construing the reemployment statute, the Supreme Court held that this law is to be “liberally construed for the benefit of he who laid aside his civilian pursuits to serve his country in its hour of great need.” *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). On behalf of ROA, I drafted and filed an *amicus curiae* (friend of the court) brief in the Federal Circuit, urging that court to grant rehearing *en banc*. Unfortunately, the Federal Circuit denied rehearing. Erickson then applied to the Supreme Court for a writ of *certiorari* (discretionary review). Unfortunately, the Supreme Court denied *certiorari*, making the Federal Circuit decision final on this point. In Law Review 14090, Lieutenant Colonel Mathew Tully and I discuss in detail the *Erickson* saga.