

LAW REVIEW 16120¹

November 2016

Amendments Proposed To Improve USERRA Enforcement

By Rosario Vega Lynn, Esq.²

1.1.1.7—USERRA applies to state and local governments

1.4—USERRA enforcement

Based on my experience representing Sergeant First Class Phillip Ramirez in his successful lawsuit against the New Mexico Department of Children, Youth and Families³, I have sent the attached letter to Senator Charles Grassley (Chairman of the Senate Judiciary Committee) and to several other Senators. As we start the 115th Congress in January, this is an excellent time to try to get the attention of Congress and to persuade them to improve the Uniformed Services Employment and Reemployment Rights Act (USERRA).

Here is the letter:

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November 2, 2016

Via facsimile: (202) 224-6020
Sen. Chuck Grassley, Chairman

Via facsimile: (202) 224-3479
Sen. Patrick Leahy

¹ Please see www.servicemembers-lawcenter.org. You will find more than 1600 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997.

² Rosario D. Vega Lynn devotes her practice to the area of USERRA, civil rights, employment and labor law, media law in administrative actions and litigation in state and federal court. Ms. Vega Lynn has represented numerous individuals, small businesses, municipalities and state governmental entities in employment, civil rights, open meetings and records, and related matters. Ms. Vega Lynn received her B.A. and J.D. degrees from the University of New Mexico and served as lead articles editor for the *New Mexico Law Review*. She has been practicing law since 1998.

³ Please see Law Review 16034 (April 2016) for a detailed discussion of the *Ramirez* case.

United States Senate Committee on the Judiciary

Via facsimile: (202) 224-6020

Sen. Ted Cruz, Chair Subcommittee on Oversight, Federal Rights and Agency Action

United States Senate 224 Dirksen Senate Office Building, Washington, D.C. 20510-6050

Re: Proposed improvements to USERRA from perspective of attorney for service member

Dear Chairman Grassley, Senator Leahy, Senator Cruz and Committee Members:

On April 14, 2016, the New Mexico Supreme Court issued a ruling finding that the state had waived sovereign immunity to claims arising from the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301-4335 (2012). In doing so, the state supreme court reversed the New Mexico Court of Appeals who had concluded that Congress did not have authority to abrogate a state's sovereign immunity when acting pursuant to its War Powers. Attached is a *Ramirez v. CYFD* opinion. I represented the plaintiff in this nine-year litigation against the state of New Mexico.

The purpose of this letter is to respectfully provide you with my experience with USERRA and my suggestions on how Congress can improve upon this very important law.

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In April 2008, I met Sergeant First Class (SFC) Phillip Ramirez, Jr., a member of the New Mexico Army National Guard, soon after had returned from his second deployment to Iraq. SFC Ramirez had been diagnosed with military service-related Post Traumatic Stress Disorder (PTSD) and had been assigned new supervisors. SFC Ramirez was employed by the New Mexico Children Youth and Families Department. These new supervisors imposed stricter work performance standards unrelated to his job as a surveillance officer and made drastic changes in his terms of employment. When I first agreed to represent SFC Ramirez, I naively hoped that, as soon as I explained his military protected rights to employment to his employer, the hostile work environment would be rectified. I was wrong. CYFD terminated SFC Ramirez's employment on May 8, 20081. The litigation lasted until a Gallup jury found in favor of SFC Ramirez on March 4, 2011 which was followed by 5 years of appellate proceedings.

While we made some headway concerning service members employed by the state, the lack of mandatory attorney fees is problematic for attorneys in private practice. USERRA states, “In any action or proceeding to enforce a provision of this chapter by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses.” This discretionary language makes it very difficult for service members to find private counsel willing to take their cases. In those situations where the state as an employer is arguing that sovereign immunity prohibits USERRA from applying to it as an employer (as occurred here), there is an even lower chance that a service member will find counsel willing to challenge what is often a losing battle against the state.

For example, the state hired a private law firm to defend against SFC Ramirez and the record proper shows 3,209 pages of various filings by both the state and SFC Ramirez’s counsel through the jury verdict. The litigation took an astronomical amount of time, effort and prevented me, as a solo practitioner, from taking other cases. In litigation, the state engaged in wasteful procedural maneuvers that are often successful against solo practitioners as we have limited resources and our clients typically have no financial resources. As most service members who need the protections of USERRA are unemployed or their employment is threatened, it would not be realistic to assume that service members can assist with costs. The costs I advanced in this case were more than \$25,000.00.

The jury in Gallup awarded SFC Ramirez \$100,000 in damages for violation of USERRA. However, the jury did not find that CYFD willfully violated USERRA and so did not award liquidated damages. The state requested that the district court reduce the amount awarded and the trial court entered an amended judgment for \$36,000. Adding to the reduction, CYFD 1 The New Mexico State Personnel Office ordered SFC Ramirez reinstated after his first termination on May 8, 2008 but CYFD fired him again him on November 19, 2010.

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did not hesitate to terminate SFC Ramirez a second time and he remains unemployed. The state did not pay SFC Ramirez the \$36,000 until August 1, 2016 (without interest).

Respectfully, I suggest that USERRA be amended to read “the court shall award” fees to a prevailing service member subject to the same rare exceptions allowed under 42 U.S.C. §1988. USERRA should also be amended to expressly state that 42 U.S.C. §1988 jurisprudence applies and, whether the case is in federal or state court, the service member’s counsel shall get fees not just for the work on the USERRA case but also for the state law claims which have

inextricably linked facts regardless whether the servicemember ultimately prevails on those state law claims if the plaintiff prevails on the USERRA claim.

The USERRA monetary remedies are inadequate to compensate service members for violations of their rights under USERRA. CYFD terminated him twice – even after he was ordered reinstated by the administrative law judge and a full understanding that the agency's actions against SFC Ramirez violated USERRA. While CYFD may have not willfully violated USERRA in the first termination, it acted in reckless disregard of his USERRA rights by firing him the second time. Yet, USERRA does not provide SFC Ramirez a remedy other than relitigating the terminations which run the risk of being dismissed on collateral estoppel. Perhaps USERRA can be amended to eliminate the “willful” violation and replace it with damages for emotional pain and suffering which addresses the situations wherein an attorney takes a USERRA case for a servicemember who already suffers from PTSD and has experienced emotional pain and suffering from his/her employer in retaliation as prohibited by USERRA.

I also respectfully suggest that USERRA allow for punitive damages against state and federal employers, government actors, and individual defendants (as provided in 42 U.S.C. §1983 and Title VII cases). Perhaps then state agencies/actors would not be so willing to violate USERRA.

Typically, in federal court, Rule 68 of the Federal Rules of Civil Procedure allows a defendant to make an offer of judgment and shifts costs if the plaintiff rejects the offer and recovers less than the offer at trial. USERRA prohibits the employer, as prevailing party, to obtain costs from the servicemember. In 2003 New Mexico amended the corresponding state court rule, Rule 1-068, to allow plaintiffs to make such offers of judgment and to award the plaintiff double costs if the verdict exceeds the Rule 1-068 offer. I respectfully request that USERRA be amended to allow the plaintiffs in USERRA to extend offers of judgment with the same results. The incentive for defendants will be to engage in early settlement discussions to avoid shifted costs, including expert witness fees, instead of protracted litigation.

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I would be happy to speak with anyone from your office or speak to the committee should you or any of the committee members have any questions or want more information about this case.

Sincerely,

Rosario Vega Lynn
Attorney at Law

Enclosure: Ramirez v. CYFD, 2016 NMSC 016