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If you Are Claiming that the Firing Violates USERRA, you Can Appeal to the MSPB even if you Are a New Federal Employee

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Update on Sam Wright

1.1.1.8—USERRA applies to the Federal Government
1.1.2.1—USERRA applies to part-time, temporary, probationary, and at-will employees
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Q: I am a Sergeant in the Marine Corps Reserve (USMCR) and a member of the Reserve Officers Association (ROA). I have read with great interest some of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

I was hired by a federal agency, in my first federal civilian job, on February 1, 2016 and started work a few days later. In late January 2017, when I was within a few days of the first anniversary of my federal civilian employment, the agency fired me without giving any explanation. When I protested, the personnel office told me that because I am "probationary" and had not completed one year of federal civilian employment as of the date of the firing, no explanation need be given and no appeal of the firing is available. Is that correct?

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[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1600 "Law Review" articles about military voting rights, reemployment rights, and other military-legal topics, along with 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. I am the author of more than 1400 of the articles.

[2] BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. I have dealt with USERRA and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for more than 34 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC.

From the start of my federal job, my supervisor gave me a hard time about absences from work necessitated by my USMCR drill weekends and annual training. The supervisor told me: "You must make a choice. You can work for this agency, or you can go play soldier. You cannot do both."

I told the supervisor that USERRA gives me the right to do both and requires the agency, as my employer, to give me time off from the civilian job for my USMCR activities. I provided the supervisor copies of some of your "Law Review" articles. That only seemed to make him madder.

I contacted the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR).[3] An ESGR volunteer contacted my supervisor and the agency's personnel office, but they refused to meet with her or to discuss my situation on the telephone. My supervisor excoriated me for "taking your personnel issues outside the family."

During my USMCR drill weekend in early January, I learned that it is likely that our unit will be mobilized and deployed in May or June. On Monday after the drill weekend, I shared this information with my supervisor and with the personnel office. I was fired a few days later.

Is it true that no appeal is available to me? If I have appeal rights, where and how should I appeal?

Answer, Bottom Line Up Front:

Because you are claiming that the firing violated USERRA, you can appeal to the Merit Systems Protection Board (MSPB), even though you have no general appeal right to the MSPB.

Explanation:

Congress created the MSPB in 1978, when it enacted the Civil Service Reform Act (CSRA). That statute split the former Civil Service Commission (CSC) into three separate agencies. The Office of Personnel Management (OPM) inherited the CSC's headquarters building, most of the staff and resources, and the functions as the personnel office of the Executive Branch of the Federal Government. The MSPB inherited the adjudicatory functions of the CSC. The Office of Special Counsel (OSC) inherited the CSC's investigatory and prosecutorial functions.

[3] ESGR's mission is to gain and maintain the support of civilian employers (federal, state, local, and private sector) for the men and women of the National Guard and Reserve. You can reach ESGR toll-free at 800-336-4590. ESGR's website is www.esgr.mil.

A federal employee *who has completed the initial year of federal civilian employment* and who has been fired or suspended without pay for 15 days or more can appeal the firing or suspension to the MSPB.[4] Hearing appeals of firings and suspensions, from federal employees or former employees who have completed the initial year of federal employment, constitutes the bulk of the work of the MSPB. Prior to 1978, the bulk of the adjudicatory work of the CSC was adjudicating appeals of firings and suspensions of federal employees who had completed their initial probationary periods.

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA[5] and President Bill Clinton signed it on 10/13/1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. The VRRA applied to the Federal Government, as an employer, but the VRRA lacked a specific enforcement mechanism with respect to federal agencies as employers. If a federal employee could otherwise bring his or her claim to the MSPB or the CSC (prior to 1978), but MSPB or CSC would adjudicate the VRRA claim, but if the VRRA claimant had no appeal right to the MSPB or CSC there was no remedy for a VRRA violation by a federal agency as employer.

One of the big improvements made in 1994 was to provide a specific enforcement mechanism for USERRA claims against federal executive agencies as employers. Section 4324 of USERRA provides:

> § 4324. Enforcement of rights with respect to Federal executive agencies
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> - **(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.

[4] 5 U.S.C. 7511(a)(1)(A).
[5] See footnote 2.

        - **(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.

- **(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.[6]

USERRA (enacted in 1994) did not create the MSPB—that agency was created 16 years earlier (1978) by the CSRA. But USERRA greatly expanded the jurisdiction, authority, and responsibility of the MSPB, to include adjudicating claims that federal executive agencies (as employers) have violated USERRA and awarding appropriate relief in cases where violations have been found.

The MSPB's jurisdiction under section 4324 of USERRA is not limited to cases that are otherwise appealable to the MSPB, because the fired employee had completed the initial year of federal civilian employment before the firing. USERRA provides a workable enforcement mechanism for all persons who claim and can establish that a federal executive agency has violated USERRA. This includes persons (like you) who cannot otherwise get to the MSPB because they have not completed the initial year of federal civilian employment. This also includes employees, former employees, and unsuccessful applicants for employment with non-appropriated fund instrumentalities (NAFIs) of the Federal Government.[7]

The MSPB also has jurisdiction in a case where a federal executive agency is the joint employer of a person who is directly employed by a federal contractor and where the federal agency as joint employer has violated USERRA.[8]

Brigadier General (BG) Michael J. Silva, USAR (a life member of ROA and later ROA's National President) was the named appellant in the case of *Silva v. Department of Homeland Security*.[9] From June 2005 to May 2006, Mr. Silva worked for SPS Consulting LLC (SPS) on a contract with the United States Department of Homeland Security (DHS). SPS provided DHS with financial support services through two positions, one of which was titled Financial Manager (FM). SPS put Mr. Silva in the FM position, but under the contract DHS retained the right to approve or disapprove any substitutions of the person serving as FM.

In February 2006, BG Silva was selected to command the 411th Engineers and immediately prepare for mobilization and deployment to Iraq. He immediately notified SPS and DHS. Mr. Silva suggested a particular person to fill his job, and she was hired, with DHS' approval.
In May 2006, BG Silva was called to active duty and deployed to Iraq. He was released from active duty in August 2007, and he made a timely application for reemployment with SPS and

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[6] 38 U.S.C. 4324.

[7] By far the largest NAFI is the Army & Air Force Exchange Service (AAFES). Prior to the enactment of USERRA in 1994, AAFES routinely flouted the VRRA, knowing that there was no remedy available for persons whose VRRA rights were violated by AAFES. Please see Law Review 15064 (July 2015).

[8] *See Silva v. Department of Homeland Security,* 2009 MSPB 189 (Merit Systems Protection Board September 23, 2009). I discuss this case in detail in Law Review 0953 (October 2009).

[9] See footnote 7.

DHS. Although he met the eligibility criteria for reemployment under USERRA,[10] he was not reemployed.

SPS initially told Mr. Silva that it would reemploy him in the FM position that he had left, but the company changed its position and told him that it would not reemploy him because DHS had disapproved his reemployment. The new employee apparently did a fine job during Mr. Silva's absence, and the DHS contract administrator did not want her to be displaced.

The lack of a current vacancy in the FM position, at the time Mr. Silva applied for reemployment, in no way excused SPS from its obligation to reemploy Mr. Silva.[11] In some circumstances, reemploying the returning veteran necessarily means displacing another employee, and this was apparently one of those cases. If an employer could defeat the reemployment rights of the employee called to the colors simply by filling the position, USERRA would be of little value.

As I explained in Law Review 154 (December 2004), and as the Department of Labor (DOL) USERRA regulations provide,[12] it is possible for an individual employee to have two employers, in the same job, at the same time. This is called the "joint employer" situation, and Mr. Silva's situation is a good example.

SPS and DHS were Mr. Silva's joint employers at the time he was called to the colors, in that each entity had control over certain aspects of his employment situation. Both SPS and DHS had responsibilities under USERRA. By standing in the way of the reemployment of the returning veteran, DHS violated USERRA, even though Mr. Silva never worked for DHS in the traditional sense-he was not a federal civilian employee.

In accordance with MSPB rules, Mr. Silva's case was presented to an Administrative Judge (AJ) of the MSPB. The AJ conducted a hearing on the merits of Mr. Silva's claim but then granted the DHS motion to dismiss based on an asserted lack of MSPB jurisdiction over cases of this nature (involving "joint employees" who are not federal employees in the traditional sense).

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[10] As I have explained in Law Review 15116 (December 2015) and other articles, a person must meet five simple conditions to have the right to reemployment under USERRA. The person must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary service in the uniformed services and must have given the employer prior oral or written notice. The person must not have exceeded USERRA's five-year cumulative limit on the duration of the period or periods of uniformed service relating to the employer relationship for which the person seeks reemployment. There are nine exemptions—kinds of service that do not count toward exhausting the person's limit. Please see Law Review 16043 (May 2016). The person must have been released from the period of service without having received a disqualifying bad discharge from the military and must have made a timely application for reemployment after release from service. It is clear beyond any question that Mr. Silva met these five conditions in August 2007.

[11] *See Nichols v. Department of Veterans Affairs,* 11 F.3d 160, 163 (Fed. Cir. 1993).

[12] 20 C.F.R. 1002.37.

The OSC appealed, on behalf of Mr. Silva, to the MSPB itself. The MSPB consists of three members, each of whom is appointed by the President with Senate confirmation. On September 23, 2009, the MSPB agreed with OSC and found that it had jurisdiction to hear Mr. Silva's case against DHS. The MSPB remanded the case to the AJ to make findings on the merits of Mr. Silva's claim. On remand, the case settled. DHS made a substantial payment (of an undisclosed amount) to Mr. Silva to settle his claim against DHS.

Q: If I lose at the AJ level, can I appeal to the MSPB itself?

A: Yes, you can appeal, as Mr. Silva did. If you win at the AJ level, the agency can appeal to the MSPB.

Please note that an appeal is not a new trial. The three MSPB members will review the record of the hearing, as created by the AJ. The MSPB will overturn the decision of the AJ if it is not in accordance with law or is not supported by the evidence. The MSPB may have oral argument, but it does not conduct a new trial and does not accept new evidence. At the AJ level, you can obtain evidence, through the discovery process, and you can present evidence. In an appeal to the MSPB, you are stuck with the record created at the AJ level.

If you have legal arguments to make, you have a decent shot at the MSPB level, because the MSPB reconsiders de novo (as of new) the AJ's conclusions of law. On questions of fact, the MSPB gives great deference to the AJ's findings.

Q: If I lose at the MSPB level, can I appeal?

A: Yes. If you lose at the MSPB, you can appeal to the United States Court of Appeals for the Federal Circuit.[13]

Q: Who represents me in a federal employee USERRA case?

A: If your case is referred to OSC by DOL-VETS, and if OSC agrees to represent you, OSC lawyers (who are generally quite diligent and competent) represent you at each stage of the case, at no cost to you.

After DOL-VETS completes its investigation and advises you of the results, you can retain private counsel and initiate your own MSPB case, instead of requesting referral to OSC.[14] If you request referral to OSC and OSC turns down your request for representation, you can retain private counsel and initiate your own MSPB case.[15]

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[13] 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. If you win at the MSPB, the agency cannot appeal to the Federal Circuit.

[14] 38 U.S.C. 4324(b)(3).

[15] 38 U.S.C. 4324(b)(4).

You can also bypass DOL-VETS altogether. If you choose not to file a complaint with DOL-VETS, you can bring your own MSPB case with private counsel.[16]

You can also represent yourself and initiate your own MSPB case under all the circumstances (outlined above) under which you can initiate the MSPB case through private counsel. I generally do not recommend this course of action. 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 in Lincoln's lifetime.

Q: If I proceed with private counsel and win, can the MSPB order the employer (federal agency) to pay my attorney fees?

A: Yes. USERRA provides:

> If the Board [MSPB] 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.[17]

Unfortunately, the MSPB has held and the Federal Circuit has agreed that attorney fees may not be awarded for representation in the Federal Circuit, only in the MSPB itself.[18]

Q: If I initiate an MSPB action challenging the lawfulness of my firing, under section 4311 of USERRA, what do I have to prove to win?

A: Under section 4311(a),[19] it is unlawful for an employer (federal, state, local, or private sector) to deny a person *retention in employment* (or initial employment, a 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. Under section 4311(b),[20] it is unlawful for an employer to deny a person any of those things because the person "has taken an action to enforce" USERRA rights. Your argument is that you were denied retention in employment (you were fired) on the basis of your performance of service (the work periods that you missed because of your USMCR service), your obligation to perform service (the likely mobilization later this year), and having taken an action to enforce your USERRA rights (contacting ESGR).

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[16] 38 U.S.C. 4324(b)(1).
[17] 38 U.S.C. 4324(c)(4).
[18] *See Erickson v. United States Postal Service,* 759 F.3d 1341 (Fed. Cir. 2014), *cert. denied,* 135 S. Ct. 2919 (2015). Lieutenant Colonel Mathew Tully and I discuss this issue in detail in Law Review 14090 (December 2014).
[19] 38 U.S.C. 4311(a).
[20] 38 U.S.C. 4311(b).

Under section 4311(c),[21] you are not required to prove that your protected activities were *the reason* for the firing. You are only required to prove that your protected activities were "*a motivating factor"* in the employer's decision to fire you. If you prove motivating factor, the burden of proof shifts to the employer to *prove* (not just say) that it would have fired you anyway, for a lawful reason unrelated to your USMCR membership.

In a scholarly decision, the Federal Circuit has set forth the mode of analysis that the MSPB and the Federal Circuit should apply to section 4311 cases:

> Discriminatory motivation under USERRA may be reasonably inferred from a variety of factors, including (1) proximity in time between the employee's military activity and the adverse employment action, (2) inconsistencies between the proffered reasons and other actions of the employer, (3) an employer's expressed hostility toward members protected by the statute together with knowledge of the employee's military activity, and (4) disparate treatment of certain employees compared to other employees with similar work records or offenses.[22]

I think that you have a reasonably strong case. You have two strong arguments. First, there is a close proximity in time between when you notified the employer of your likely 2017 mobilization and when you were fired. Second, you can point to your supervisor's expressions of hostility against you because of your USMCR service.

It should also be noted that the first section of USERRA provides: "It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter."[23] And USERRA's final section requires federal supervisors and human resources personnel to undergo periodic training on USERRA.[24]

Good luck, and thank you for your service to our country in the USMCR.

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[21] 38 U.S.C. 4311(c).

[22] *Sheehan v. Department of the Navy,* 240 F.3d 1008, 1014 (Fed. Cir. 2001). *See also McMillan v. Department of Justice,* 812 F.3d 1364 (Fed. Cir. 2016). I discuss *McMillan* in some detail in Law Review 16013 (March 2016).

[23] 38 U.S.C. 4301(b).

[24] 38 U.S.C. 4335. Your supervisor apparently was not listening during this required training.