

Who Is the Named Plaintiff in a USERRA Lawsuit Initiated by DOJ?

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Update on Sam Wright

1.1.1.7—USERRA applies to state and local governments

1.4—USERRA enforcement

1.5—USERRA arbitration

1.8—Relationship between USERRA and other laws/policies

Q: I am a Chief Master Sergeant in the Air Force Reserve and a member of the Reserve Officers Association (ROA).³ I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

I work for a major private sector company—let’s call it Daddy Warbucks Industries or DWI. For many years, my direct supervisor at DWI has given me a hard time about my Air Force Reserve affiliation and my absences from work for training and service in the Air Force Reserve, although those absences are clearly protected by USERRA. I also believe that several of DWI’s written employment rules violate USERRA. The company has about 50,000

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 1700 “Law Review” articles about military voting rights, reemployment rights, and other military-legal topics, along with a detailed Subject Index, 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 1500 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 the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans’ Reemployment Rights Act (VRRRA—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 VRRRA 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 VRRRA 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. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org or by telephone at 800-809-9448, ext. 730.

³ In 2013, ROA members amended the ROA Constitution and made noncommissioned officers and petty officers eligible for full membership in the organization.

employees, and approximately 1% of them (500 employees) are active current participants in Reserve Components of the armed forces.

Last year, I applied for a promotion at DWI and was interviewed, along with the other candidates. During the interview, I was asked several questions about my Air Force Reserve service and how it impacted my job performance at DWI. I was not selected for the promotion. I believe that my Air Force Reserve service was at least a motivating factor in the company's decision not to promote me.

I contacted Employer Support of the Guard and Reserve (ESGR), the Department of Defense (DOD) organization that assists Reserve Component personnel with problems of this nature. ESGR headquarters referred my case to an ombudsman in my city, but the DWI personnel office refused to meet with the ombudsman or even to discuss my case with the ombudsman on the telephone. Just ten days later, the ombudsman called me to inform me of these developments. The ombudsman suggested that I file a formal, written USERRA complaint against DWI with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). I did so on-line, at www.dol.gov/vets.

Just three days after I filed my on-line USERRA complaint, a DOL-VETS investigator contacted me and began his investigation. He did a first-class job and found my case to have merit. He completed his investigation in 80 days and then advised me and the employer, in writing, of the results of his investigation. He urged the employer to come into compliance with USERRA and to compensate me for the pay that I had lost because of the denial of the promotion. DWI refused to discuss compliance with the DOL-VETS investigator.

The investigator informed me of my right to request referral of the case file to the United States Department of Justice (DOJ), and I requested referral. The investigator promptly referred the case file to DOJ. A few weeks later, I heard from DOJ, informing me that DOJ agreed with DOL-VETS that my case has merit and that DOJ will represent me in the case against DWI.

DOJ sent a formal demand letter to DWI, which the company ignored. In the next few days, DOJ will be filing suit against the company, on my behalf, in our state's federal district court. When DOJ files this lawsuit, who will be the named plaintiff?

Answer, bottom line up front

When DOJ files the lawsuit, you will be the named plaintiff. When the defendant employer is a state, the named plaintiff is the United States of America, if DOJ is filing the lawsuit. In all other cases, the named plaintiff is the individual veteran or Reserve Component member.

Explanation

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRRA), which was originally enacted in 1940. As I have explained in footnote 2, I had a role in the drafting of USERRA when I was an attorney for DOL. I am gratified to learn that, at least in your case, the system has worked exactly as intended.

The pertinent USERRA subsection is as follows:

A person who receives from the Secretary [of Labor] a notification pursuant to section 4322(e) of this title of an unsuccessful effort to resolve a complaint relating to a State (as an employer) or a private employer may request that the Secretary refer the complaint to the Attorney General. Not later than 60 days after the Secretary receives such a request with respect to a complaint, the Secretary shall refer the complaint 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 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 the plaintiff in the action.*⁴

Because your employer is a private employer, rather than a state, you will be the named plaintiff. For purposes of USERRA enforcement under section 4323, political subdivisions of states (counties, cities, school districts, etc.) are treated as private employers.⁵

In 2011, DOJ asked Congress to amend USERRA to make the United States the named plaintiff in any USERRA case initiated by DOJ, but Congress has not acted on that DOJ request. I urge Congress to do so, for two reasons.

First, if the United States were the named plaintiff, rather than the individual service member or veteran, DOJ would have standing to demand relief for all 500 DWI employees who are actively participating in Reserve Components of the armed forces. Under the current law, you alone are the named plaintiff, so DOJ can only demand correction of DWI policies as those policies affect you. It should not be necessary to bring 500 lawsuits to get DWI to comply with the law.

⁴ 38 U.S.C. 4323(a)(1) (emphasis supplied).

⁵ 38 U.S.C. 4323(i).

Second, if the named plaintiff were the United States, rather than the individual, it would be possible to avoid the adverse effect of agreements to arbitrate employment disputes. As I have explained in Law Review 16110 (October 2016) and other articles, employees are often required, as a condition of employment, to sign agreements stipulating that any employment dispute (including a USERRA dispute) will be submitted to binding arbitration, rather than litigated in federal or state court. These agreements are supposedly “voluntary,” but if you want a job you must sign the agreement at the time of hiring. Arbitrators often misapply USERRA and other laws, and there is no remedy when they do so because arbitrators’ decisions on legal issues are not reviewable in court. If the named plaintiff were Uncle Sam, DOJ could respond to a motion to compel arbitration by pointing out that Uncle Sam never agreed to arbitrate.