

## LAW REVIEW 17107<sup>1</sup>

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### Don't File an EEO Complaint for a USERRA Violation

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[Update on Sam Wright](#)

1.1.1.8—USERRA applies to the Federal Government

1.2—USERRA forbids discrimination

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

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

**On the civilian side, I am a GS-13 employee of a federal agency. My immediate supervisor and his supervisor continually give me a hard time about my Army Reserve service and the work days that I must miss because of that service. I am tired of this harassment. Also, I believe that recently I was denied a promotion at work because of my**

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<sup>1</sup> I invite the reader's attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 1500 "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, 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 1300 of the articles.

<sup>2</sup> 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 35 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. 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](mailto:SWright@roa.org).

**Army Reserve service.**

**I complained to the agency's personnel office, and I was told that I should file an Equal Employment Opportunity (EEO) complaint. Was that the right answer?**

**A:** No, that was the wrong answer. The proper scope of the EEO process has been stated as follows:

An employee, former employee, or applicant for employment who feels he/she has been discriminated against *because of race, color, religion, sex, national origin, age (40 years of age and over), physical or mental disability, or reprisal for prior EEO involvement* may file a complaint by contacting an EEO counselor within 45 days following the alleged discriminatory act.<sup>3</sup>

The EEO process is available for persons asserting violations of three federal statutes:

- a. Title VII of the Civil Rights Act of 1964. That law forbids discrimination in employment based on race, color, sex, religion, or national origin or based on prior EEO involvement.
- b. The Age Discrimination in Employment Act. That law forbids discrimination in employment based on age (40 or older) or based on prior complaint activity.
- c. The Americans with Disabilities Act. That law forbids discrimination based on disability or based on prior complaint activity.

The EEO process is for complaints *under these statutes only*. If you are alleging a violation of another federal law, like USERRA, you must not use the EEO process—the EEO forum is not available to persons claiming USERRA violations.

**Q: What is the enforcement mechanism for a federal employee who claims that his or her USERRA rights have been violated?**

**A:** A person who claims that any employer (federal, state, local, or private sector) has violated his or her USERRA rights can file a formal, written USERRA complaint against the employer with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-

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<sup>3</sup> Emphasis by italics supplied. I have copied this paragraph from a Department of Homeland Security (DHS) EEO form.

VETS).<sup>4</sup> Upon receiving such a complaint, DOL-VETS is required to investigate it.<sup>5</sup> DOL-VETS has subpoena authority to use in investigating USERRA complaints.<sup>6</sup>

Upon completing its investigation, DOL-VETS is required to notify the complainant of the results of the investigation and to tell the complainant of his or her options for USERRA enforcement.<sup>7</sup> The complainant then has the right to request (in effect, to insist upon) referral of the case file to the United States Office of Special Counsel (OSC).<sup>8</sup> If OSC is reasonably satisfied that the complainant is entitled to the benefits that he or she seeks, OSC may bring an action on behalf of the complainant, and in the complainant's name, in the Merit Systems Protection Board (MSPB).<sup>9</sup>

If OSC turns down the complainant's request for recommendation, the complainant can then initiate his or her own MSPB proceeding with counsel that he or she retains.<sup>10</sup> If the complainant chooses not to request that DOL-VETS forward the case file to OSC, the complainant can initiate his or her own MSPB proceeding with private counsel.<sup>11</sup> It is also possible for the person claiming USERRA rights against a federal agency employer to bypass DOL-VETS altogether and initiate a proceeding in the MSPB, with private counsel, without first filing anything with DOL-VETS.<sup>12</sup> If the individual proceeds with private counsel and prevails in the MSPB, the MSPB may, in its discretion, award the successful USERRA claimant reasonable attorney fees, expert witness fees, and other litigation expenses.<sup>13</sup>

The MSPB is a quasi-judicial federal executive agency that was created by the Civil Service Reform Act of 1978. The MSPB has a Chairman and a Vice Chairman, who are of the same political party as the President, and a Member, who is of the other major political party. Each of the three MSPB members is appointed by the President with Senate confirmation. USERRA (enacted in 1994) did not create the MSPB, but USERRA added to the MSPB's authority and jurisdiction.

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<sup>4</sup> 38 U.S.C. 4322(a) and (b).

<sup>5</sup> 38 U.S.C. 4322(d).

<sup>6</sup> 38 U.S.C. 4326.

<sup>7</sup> 38 U.S.C. 4322(e).

<sup>8</sup> 38 U.S.C. 4324(a)(1).

<sup>9</sup> 38 U.S.C. 4324(a)(2)(A).

<sup>10</sup> 38 U.S.C. 4324(b)(4).

<sup>11</sup> 38 U.S.C. 4324(b)(3).

<sup>12</sup> 38 U.S.C. 4324(b)(1).

<sup>13</sup> 38 U.S.C. 4324(c)(4).

MSPB cases (including MSPB USERRA cases) start out before 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 complainant or the federal agency) can appeal to the MSPB itself. If the complainant loses at the MSPB level, he or she can appeal to the United States Court of Appeals for the Federal Circuit.<sup>14</sup> If the agency loses at the MSPB level, it cannot appeal to the Federal Circuit.<sup>15</sup>

If the complainant prevails in the MSPB, at the AJ level or the Board level, the MSPB can award relief, as follows:

If the Board [MSPB] determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter [USERRA] 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.<sup>16</sup>

**Q: In Law Review 17040 (April 2017), you wrote that the MSPB is constrained because it is down to just one member, and at least two members must participate to decide an MSPB case. Has that problem been resolved?**

**A:** No, that problem has not been resolved—it has gotten worse.

The MSPB has three Members—a Chairman, a Vice Chairman, and a Member. They are appointed by the President with Senate confirmation and serve staggered seven-year terms. Chairman Susan Tsui Grundmann resigned her position in January 2017. Her term expired in March 2016, and she was serving as a holdover.

The one remaining Member is Mark A. Robbins. He was appointed by President Obama in December 2011 and confirmed by the Senate in April 2012. His term expires in March 2018.<sup>17</sup>

The MSPB needs at least two Members to adjudicate cases and take other actions. I call upon President Trump to act swiftly in making appointments to the MSPB, and I call upon the Senate to act swiftly in confirming the President's appointees.

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<sup>14</sup> 38 U.S.C. 4324(d)(1). The Federal Circuit is the 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.

<sup>15</sup> *Id.*

<sup>16</sup> 38 U.S.C. 4324(c)(2).

<sup>17</sup> When a Member is appointed to fill a vacancy in an unexpired term, he or she serves only for the remainder of that unexpired term.

In the absence of a quorum at the MSPB, you must still initiate your case before the MSPB. If you lose at the AJ level, you can treat the AJ's decision as the final MSPB decision and appeal to the Federal Circuit. But if you win at the AJ level the agency will likely appeal to the MSPB, and the case will go into limbo until the MSPB has at least two members.

**Q: Because the MSPB lacks a quorum, I want to file my USERRA lawsuit in federal district court. Will that work?**

**A:** No, that will not work. Federal district courts have jurisdiction to adjudicate claims that state and local governments and private employers have violated USERRA.<sup>18</sup> Federal district courts do not have jurisdiction to hear complaints that federal agencies, as employers, have violated USERRA. Only the MSPB has that jurisdiction.

If you file suit in federal district court, your case will be summarily dismissed for lack of jurisdiction, without regard to the merits.

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<sup>18</sup> 38 U.S.C. 4323(b).