

DOJ Sues Guam for Violating USERRA

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1.1.1.7—USERRA applies to State and local governments

1.3.2.3—Pension credit for service time

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

On 9/1/2021, the United States Department of Justice (DOJ) announced that it had filed suit against the Territory of Guam and the Guam Retirement Fund for violating the Uniformed Services Employment and Reemployment Rights Act (USERRA). You will find a copy of the DOJ press release at the bottom of this article. I congratulate DOJ and the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS) for their diligent efforts on behalf of those who are serving and have served our country in uniform.

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2200 "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 specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 2000 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. For 44 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 38 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.

In this article, I will provide additional information about what this lawsuit is about and how this lawsuit came to be filed.

What is the Territory of Guam?

“Guam is an organized, unincorporated territory of the United States in the Micronesia subregion of the western Pacific Ocean. ... It is the largest and southernmost of the Mariana Islands. ... People born in Guam are American citizens by birth. ... As of 2021, Guam’s population is 168,801. ... During the Spanish-American War, the United States captured Guam on June 21, 1898. Under the Treaty of Paris, signed on December 10, 1898, Spain ceded Guam to the United States effective April 11, 1899.”³

Is there a United States District Court for Guam?

Yes. On its website, that court describes itself as follows:

The District Court of Guam was created in 1950 through the Organic Act of Guam. At that time, the Organic Act granted the District Court of Guam original jurisdiction over cases arising under federal law and cases not transferred by the Guam Legislature to local courts. ... Today, as a result of the above amendments to the Organic Act of Guam, the District Court of Guam exercises exclusive federal jurisdiction. It has the same jurisdiction as that of any district court of the United States, to include federal question and diversity jurisdiction. In addition, the District Court of Guam has the jurisdiction of a United States bankruptcy court and Guam’s tax court. ... Two judicial officers serve the District Court: one Chief District Judge, Honorable Frances Tydingo-Gatewood, and one Magistrate Judge, Honorable Michael J. Bordallo.⁴

This case was filed in and will be adjudicated by the United States District Court for the District of Guam, with a possible appeal to the United States Court of Appeals for the 9th Circuit.

Is Guam a State?

Guam is not a State, but, like Puerto Rico and the United States Virgin Islands, it is treated like a State for many legal purposes, including USERRA. Section 4303 of USERRA⁵ defines 17 terms used in this law. The term “State” is defined as follows: “The term ‘State’ means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico,

³ See <https://en.wikipedia.org/wiki/Guam>.

⁴ See <https://www.gud.uscourts.gov>.

⁵ 38 U.S.C. 4303,

Guam, the Virgin Islands, and other territories of the United States (including the agencies and political subdivisions thereof)."⁶

What is this case about?

As I have explained in detail in footnote 2 and in Law Review 15067 (August 2015), among other articles, Congress enacted USERRA, and President Bill Clinton signed it into law on 10/13/1994. USERRA was a long-overdue update and rewrite of the Veterans' Reemployment Rights Act (VRRRA), which was originally enacted in 1940. Under USERRA, a person who meets the five USERRA conditions⁷ is entitled to prompt reinstatement in the position that he or she *would have attained if continuously employed* or another position, for which he or she is qualified, that is of like seniority, status, and pay.⁸ Upon reemployment, the returning service member or veteran must be treated, for seniority and pension purposes, as if he or she had been continuously employed by the employer during the time that he or she was away from work for service.⁹

Section 4318 of USERRA provides:

(a)

(1)

(A) Except as provided in subparagraph (B), in the case of a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974) or a right provided under any Federal or State law governing pension benefits for governmental employees, the right to pension benefits of a person reemployed under this chapter shall be determined under this section.

⁶ 38 U.S.C. 4303(14) (emphasis supplied).

⁷ The person must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary uniformed service and must have given the employer prior oral or written notice. The person's cumulative period or periods of uniformed service, relating to the employer relationship for which he or she seeks reemployment, must not have exceeded five years, but there are nine exemptions to the five-year limit—kinds of service that do not count toward exhausting the individual's limit. 38 U.S.C. 4312(c). Please see Law Review 16043 (May 2016) for a detailed summary of what counts and what does not count in exhausting the five-year limit. The person must have been released from the period of service without having received a disqualifying bad discharge like a punitive discharge awarded by court martial or an OTH (other than honorable) administrative discharge. 38 U.S.C. 4304. After release from the period of service, the person must have made a timely application for reemployment or return to work. 38 U.S.C. 4312(e). Please see Law Review 15116 (December 2015) for a detailed discussion of the USERRA eligibility criteria.

⁸ 38 U.S.C. 4313(a)(2)(A).

⁹ 38 U.S.C. 4316(a), 4318.

(B) In the case of benefits under the Thrift Savings Plan, the rights of a person reemployed under this chapter shall be those rights provided in section 8432b of title 5. The first sentence of this subparagraph shall not be construed to affect any other right or benefit under this chapter.

(2)

(A) *A person reemployed under this chapter* shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services.

(B) Each period served by a person in the uniformed services shall, *upon reemployment under this chapter*, be deemed to constitute service with the employer or employers maintaining the plan for the purpose of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan.

(b)

(1) *An employer reemploying a person under this chapter* shall, with respect to a period of service described in subsection (a)(2)(B), be liable to an employee pension benefit plan for funding any obligation of the plan to provide the benefits described in subsection (a)(2) and shall allocate the amount of any employer contribution for the person in the same manner and to the same extent the allocation occurs for other employees during the period of service. For purposes of determining the amount of such liability and any obligation of the plan, earnings and forfeitures shall not be included. For purposes of determining the amount of such liability and for purposes of section 515 of the Employee Retirement Income Security Act of 1974 or any similar Federal or State law governing pension benefits for governmental employees, service in the uniformed services that is deemed under subsection (a) to be service with the employer shall be deemed to be service with the employer under the terms of the plan or any applicable collective bargaining agreement. In the case of a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability of the plan described in this paragraph shall be allocated—

(A) by the plan in such manner as the sponsor maintaining the plan shall provide; or

(B) if the sponsor does not provide—

(i) to the last employer employing the person before the period served by the person in the uniformed services, or

(ii) if such last employer is no longer functional, to the plan.

(2) *A person reemployed under this chapter* shall be entitled to accrued benefits pursuant to subsection (a) that are contingent on the making of, or derived from, employee

contributions or elective deferrals (as defined in section 402(g)(3) of the Internal Revenue Code of 1986) only to the extent the person makes payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of service described in subsection (a)(2)(B). Any payment to the plan described in this paragraph shall be made during the period beginning with the date of reemployment and whose duration is three times the period of the person's service in the uniformed services, such payment period not to exceed five years.

(3) For purposes of computing an employer's liability under paragraph (1) or the employee's contributions under paragraph (2), the employee's compensation during the period of service described in subsection (a)(2)(B) shall be computed—

(A) at the rate the employee would have received but for the period of service described in subsection (a)(2)(B), or

(B) in the case that the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).

(c) Any employer who *reemploys a person under this chapter* and who is an employer contributing to a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter, shall, within 30 days after the date of such reemployment, provide information, in writing, of such reemployment to the administrator of such plan.¹⁰

In this lawsuit, DOJ alleges that the Territory of Guam, as employer, has failed to give eligible veterans and service members civilian pension credit for the times that they have been away from their Territory jobs for uniformed service, as required by section 4318 of USERRA.

Does USERRA also apply to private sector employees in Guam?

Yes. USERRA applies to private-sector employers and employees in Guam, just as if applies to private sector employers and employees in Kansas or any other State. But this lawsuit is about employees of the Territory of Guam who left their jobs for uniformed service, met the five USERRA conditions, and returned to work for the Territory.

How did this case come to be filed by DOJ?

¹⁰ 38 U.S.C. 4318 (emphasis supplied).

A person who claims that his or her employer (federal, state, local, or private sector) has violated USERRA 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-VETS), and DOL-VETS is required to investigate the complaint.¹¹ At least two such persons filed USERRA complaints against the Territory of Guam with DOL-VETS. The agency investigated the complaints and found them to be meritorious. In accordance with section 4323(a)(1) of USERRA,¹² DOL-VETS forwarded the case files to DOJ, and DOJ agreed with DOL that the claims were meritorious. Accordingly, DOJ filed this lawsuit, in accordance with section 4323(a)(1).

Who is the named plaintiff in this action?

USERRA provides: "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."¹³ Thus, the named plaintiff in this case is the United States. If the defendant employer had been a private employer, DOJ would have filed the suit in the name of the individual service member or veteran.

Because the named plaintiff is the United States, not an individual veteran, DOJ can seek broad relief for all persons who have been affected by the Territory's violation of USERRA and persons who may be affected by future violations.

If DOJ prevails, what remedies are available?

USERRA provides:

(d) Remedies.

(1) In any action under this section, the court may award relief as follows:

(A) The court may require the employer to comply with the provisions of this chapter.

(B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.

(C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.

¹¹ 38 U.S.C. 4322(a).

¹² 38 U.S.C. 4323(a)(1).

¹³ 38 U.S.C. 4323(a)(1) (final sentence).

(2)

(A) Any compensation awarded under subparagraph (B) or (C) of paragraph (1) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter.

(B) In the case of an action commenced in the name of the United States for which the relief includes compensation awarded under subparagraph (B) or (C) of paragraph (1), such compensation shall be held in a special deposit account and shall be paid, on order of the Attorney General, directly to the person. If the compensation is not paid to the person because of inability to do so within a period of 3 years, the compensation shall be covered into the Treasury of the United States as miscellaneous receipts.

(3) A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section.

(e) **Equity powers.** The court shall use, in any case in which the court determines it is appropriate, its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter.¹⁴

We will keep the readers informed of developments in this interesting and important case.

Please join or support ROA

This article is one of 2200-plus “Law Review” articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs. Indeed, ROA is the *only* national military organization that exclusively supports America’s Reserve and National Guard.

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¹⁴ 38 U.S.C. 4323(d) and (e).

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If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

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JUSTICE NEWS

Department of Justice
Office of Public Affairs

FOR IMMEDIATE RELEASE
Wednesday, September 1, 2021

Justice Department Sues Guam and the Guam Retirement Fund for Denying Servicemembers Proper Pension Credits During Military Service

The Justice Department announced today that it has filed suit against the Territory of Guam and the Guam Retirement Fund (GRF) alleging defendants violated the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) when they refused to properly provide pension credit to servicemembers who used leave from Guam's leave-sharing program while on active military duty. As a result, Guam and the GRF shorted the retirement benefits and pension annuities of at least five servicemembers and potentially many more.

USERRA is a federal statute that protects the civilian employment rights of the non-career individuals who serve in our armed forces. Among its protections, USERRA requires employers to treat an employee's time in military service as service with the employer when determining pension benefits. The United States' complaint filed in the U.S. District Court for the District of

Guam contends Guam and its retirement fund failed to do that when they denied pension credit to servicemembers who used donated leave from Guam's employee leave bank while on military duty.

"This complaint reinforces that the Justice Department will continue to vigorously enforce the protections provided by federal law to those who serve in our country's armed forces at great personal cost," said Assistant Attorney General Kristen Clarke of the Justice Department's Civil Rights Division. "We owe a solemn duty to our servicemembers to act when any employer seeks to infringe on their hard-earned protections."

"These servicemembers were called to active duty and they served honorably," said U.S. Attorney Shawn N. Anderson for Guam and the Northern Mariana Islands. "Their many sacrifices should not include the loss of their civilian retirement benefits. Our office will continue to work hard to protect the employment rights of those who have served to protect all of us."

The United States' lawsuit asks the court to order defendants to stop denying servicemembers proper pension credit, identify all current and former employers who have been harmed by defendants' discriminatory practice and properly credit those employees' retirement funds or adjust their current pension benefits.

Trial Attorneys Joseph J. Sperber and Vendarryl Jenkins of the Civil Rights Division's Employment Litigation Section and Assistant U.S. Attorney Mikel Schwab of the U.S. Attorney's Office for the District of Guam are prosecuting the case.

The full and fair enforcement of USERRA is a top priority of the Justice Department's Employment Litigation Section of the Civil Rights Division. Additional information about the Civil Rights Division and the jurisdiction of the Employment Litigation Section is available at www.justice.gov/crt/ and <https://www.justice.gov/crt/employment-litigation-section>.