

The No FEAR Act Does Not Apply to Discrimination against Reserve Component Service Members

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Q: I am a Lieutenant Colonel in the Marine Corps Reserve and a life 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 executive agency. My direct supervisor, a GS-15, and his supervisor, a member of the Senior Executive Service (SES), continuously harass me about my Marine Corps Reserve service and pressure me to quit the

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 1500 “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 1300 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 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 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.

Marine Corps Reserve or quit my civilian job. I have heard that something called the “No FEAR Act” makes it unlawful for federal supervisors to harass federal employees. Does the “No FEAR Act” apply to my situation?

A: Unfortunately, no.

On May 15, 2002, President George W. Bush signed the Notification and Federal Employee Antidiscrimination and Retaliation Act (No FEAR Act).³ The Government Accountability Office (GAO)⁴ has summarized the No FEAR Act as follows:

A Federal agency cannot discriminate against an employee or applicant with respect to the terms, conditions or privileges of employment *on the basis of* race, color, religion, sex (including pregnancy), national origin, age (40 or over), disability, genetic information, marital status, or political affiliation. Discrimination *on these bases* is prohibited by one or more of the following statutes: 5 U.S.C. 2302(b)(1), 29 U.S.C. 206(d), 29 U.S.C. 631, 29 U.S.C. 633a, 29 U.S.C. 791, 42 U.S.C. 200e-16, 42 U.S.C. 12101, and Public Law 110-233.⁵

The No FEAR Act does not mention discrimination based on membership in a uniformed service, application to join a uniformed service, performance of service, or application or obligation to perform service, and it does not mention USERRA. Congress could have and should have referred to USERRA in the No FEAR Act, and it could have and should have included No FEAR Act sanctions for discrimination on these USERRA bases, but Congress did not do so. I will discuss with ROA’s Legislative Director and Executive Director these congressional oversights, which call out for a statutory amendment.

This is not to say that discrimination based on membership in a uniformed service or performance of service is lawful. Such discrimination is unlawful under section 4311(a) of USERRA, which provides:

A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership,

³ Public Law 107-174, 116 Stat. 566. The citation means that this was the 174th new Public Law enacted during the 107th Congress (2001-02), and the law can be found in Volume 116 of *Statutes at Large*, starting on page 566. The No FEAR Act is codified in title 5 of the United States Code, as a note following section 2301 (5 U.S.C. 2301 note).

⁴ GAO is the investigative arm of Congress.

⁵ See <https://www.gao.gov/about/workforce/nofear.html> (emphasis supplied).

application for membership, performance of service, application for service, or obligation.⁶

Q: What remedy is available in a USERRA case against a federal executive agency?

A: Section 4324 of USERRA provides for the enforcement of this law against federal executive agencies as employers. The pertinent subsection of section 4324 is as follows:

If the [Merit Systems Protection] 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.⁷

If you prove that your supervisors have been harassing you because of your military service and obligations, you can get the MSPB to order the agency to stop the supervisors from harassing you. The MSPB cannot order the agency to pay you money damages for harassment, unless the harassment resulted in *pecuniary* damages—actual loss of money.

Q: In several of your “Law Review” articles you have written about courts ordering employer-defendants to pay double damages for violating USERRA willfully. Does USERRA provide for the awarding of double damages when a federal agency violates USERRA willfully?

A: No. Section 4323 of USERRA provides for enforcement of USERRA against state and local governments and private employers. Section 4323 provides that a federal district court can award double damages when it finds that a state or local government or private employer has violated USERRA willfully.⁸ Section 4324 provides for enforcement of USERRA against federal executive agencies, as employers. Unlike section 4323, section 4324 does not provide for double damages. No matter how willfully a federal agency violates USERRA, it cannot be ordered to pay more than the actual pecuniary damages.

Q: I have been offered another federal civilian job, with another agency, that pays a little more than what I am making at my current agency. Although I have not lost money because of the employer harassment, I have found the harassment to be increasingly intolerable. If I

⁶ 38 U.S.C. 4311(a).

⁷ 38 U.S.C. 4324(c)(2) (emphasis supplied).

⁸ 38 U.S.C. 4323(d)(1)(C).

take the job offer from the new agency, what effect will that have on my USERRA case against my current agency?

A: Taking that job offer will render your USERRA case moot, meaning that if you file such an action in the MSPB the case will be summarily dismissed. In that situation, you cannot get injunctive relief from the MSPB, and you cannot get money damages. If there is no relief that the MSPB can award, the MSPB will dismiss the case as moot. This is not to say that I think that you should turn down the better job offer with another agency.

Q: What is the solution?

A: In Law Review 15089 (October 2015), I make 16 proposals for improvements to USERRA. Several of the proposals would address weaknesses in USERRA's enforcement mechanism, especially for federal agencies as employers. ROA is working to get these proposals enacted, but there is no magic wand and this is a long-term effort.