AMERICANBARASSOCIATION

Ensuring the Employment Rights of America's Citizen-Soldiers

by Matthew B. Tully and Ariel E. Solomon

Responding to the end of the Cold War and the restructuring of the U.S. military, in 1994 the U.S. Congress enacted a statute to encourage noncareer military service. It prohibited employment discrimination against people because of their military service and minimized potential harm to civilian careers and employment. Specifically, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) to protect members of the Reserve, and to "expand, codify, and clarify the employment rights and benefits available to veterans and employees." USERRA reflected a shift in the nation's defense policy, with its new reliance on the "citizen-soldier." The new force structure was later dubbed the Total Force Policy, which unequivocally recognized the Military Reserve and National Guard as integral components of the military and invaluable resources that could be called upon at any time. "The Total Force Policy called for an increased reliance on the reserves and was implemented in an effort to make training 'more meaningful' for these components and boost military manpower." Andy P. Fernandez, *The Need for the Expansion of Military Reservists' Rights in Furtherance of the Total Force Policy: A Comparison of the USERRA and ADA*, 14 ST. THOMAS L. REV. 859, 861 (2002). In 2001, at the start of the war on terror, the 1.3 million men and women serving in the Reserve and Guard made up nearly half of the U.S. Armed Forces. Department of Defense, *Partial Mobilization of National Guard, Reserve Authorized* (Sept. 14, 2001).

The government's dependence on the civilian workforce to fulfill national security initiatives has been more pronounced in the years following September 11, 2001. That attack resulted in the Department of Defense's mobilization of more than 518,000 members of the Guard and Reserve to sustain the U.S.-led war on terrorism. However, the reliance on members of the Reserve and Guard (collectively referred to herein as "service members") has created an unparalleled urgency to confront the unique challenges faced by noncareer soldiers returning home to civilian employment. In April 2008, the U.S. Department of Labor released unemployment rates for veterans who had served in Iraq and Afghanistan that showed a 6.1 percent jobless rate for veterans who have served since September 2001. That compares to a national unemployment rate of approximately 5 percent in April. The jobless rate for veterans ages 18 to 24 was substantially higher, totaling 12 percent, compared to 9.5 percent for nonveterans in the same age group. The federal government also reported that 16,000 formal and informal complaints were filed by service members who encountered problems getting rehired when they returned from military service to their jobs during the years of 2004 and 2005.

The challenges of reintegration are not novel. Veterans benefits statutes designed to assuage the strain of reintegration have a lengthy history, predating the culmination of World War II. USERRA likewise addresses reintegration, effectively rewriting the Vietnam-era Veterans Readjustment Assistance Act of 1974. Lofty in scope and breadth, its congressionally articulated purpose, as delineated in Title 38, Section 4301 of the U.S. Code, is (1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment that can result from that service; (2) to minimize the disruption to the lives of people in the uniformed services, as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of

these people upon their completion of service; and (3) to prohibit employment discrimination against people because of their service in the uniformed services.

Relief Under USERRA

USERRA expressly prohibits employment discrimination based on a person's service in the military. Its remedies include equitable relief, lost wages and benefits, and, in the event of a willful failure to comply with the act, liquidated damages in an amount equal to any award of lost wages and benefits. Courts also have the discretion to award reasonable attorney fees, expert witness fees, and other litigation expenses.

Reemployment rights under USERRA are governed by 38 U.S.C. §§ 4312 and 4313. The statutory paradigm dictates that an employer has an unequivocal obligation to reemploy a service member in the same position or a position of similar seniority, status, and pay in which the person was employed before his or her military service. The protection is tempered however, by Section 4312(d), which permits employers the right to deny service member reemployment requests when individual circumstances render reemployment impossible, unreasonable, or otherwise create an undue hardship to the employer. The burden of proof under Section 4312(d)(2)(c) rests on the employer to show impossibility or undue hardship; however, there remains an overt absence of judicial guidance that might otherwise indicate what constitutes an impossibility or undue hardship.

USERRA was drafted with the explicit intention of facilitating U.S. military service and minimizing the disruption to the lives of all "persons performing service in the uniformed services . . . by providing for the prompt reemployment of such persons upon their completion of [military service]." However, before reemployment rights attach under Section 4312, returning service members must provide advance written or verbal notice of military service to the employer. Further, service members are obligated to return to work on the first regularly scheduled workday following the conclusion of active duty service if the length of service has not exceeded thirty-one days. For military service exceeding thirty-one days but not exceeding 180 days, the reporting time is extended to fourteen days from the last day of active duty service. For lengthier periods of active duty, or tours of service in excess of 180 days, Section 4312 requires returning service members to submit an application for reemployment within ninety days of the completion date of their military service. The application deadline may, however, be extended for a two-year duration in the event illness or injury prevents timely application for reemployment.

The question however remains whether these protections are adequate; many argue that they are not. A recent Department of Labor report indicates that approximately 700,000 veterans have been unemployed in any given month, and the figure will likely increase as service members continue to return to civilian life.

Rights of Those Deployed for Long Periods

Reservists on prolonged or multiple tours are likely to encounter adverse employment actions that may result in unemployment. The most prominent reason for this is the overt lack of information provided to even the most well-intentioned employers. Poorly informed management, coupled with the strain of losing key members of the work force, often dictate undesirable employment decisions for service members.

Employment issues concerning multiple deployments are compounded by USERRA's statutory cap, which bars protection after a five-year period of active duty service performed under a single employer. Pursuant to Section 4312(a)(2), employers are not bound by the protections afforded under USERRA if a service member's cumulative absence from employment exceeds five years. There are limited exceptions to the cap, including Department of Labor Regulation 20 C.F.R. 1002.103, which applies to service members who are forced to mitigate economic losses suffered as a result of an employer's USERRA violation. In essence, the regulation provides that a service member who remains or returns to the armed services in an attempt to "mitigate economic losses caused by the employer's unlawful refusal to reemploy that person," shall be tolled "against the five-year limit."

Additional loopholes may bar reemployment rights for members of the Guard who are called to state active duty service by their governors, usually to protect, sustain, or rebuild American communities and their infrastructure. These emergency responders are an integral component of our homeland security strategy, as was demonstrated after the September 11 attack and in the wake of Hurricane Katrina. Nonetheless, members of the Guard who serve on active duty for state emergencies do not enjoy the same protections as their federal counterparts. Federal active duty in the Guard, including training commitments and time spent to support critical missions, are all exempt from consideration in calculating a person's Section 4312 time. However, service members ordered to active duty at the state level do not enjoy the same exemption, which strikes many observers and service members as purely arbitrary and patently wrong.

A Flawed Enforcement Process

Perhaps the greatest problem with the rights afforded under USERRA is the gross inefficiency that characterizes the act's enforcement mechanism. Upon inception, USERRA obligated the Department of Labor Veterans' Employment and Training Service (DOL-VETS) to provide assistance to any person entitled to employment and reemployment rights and benefits under the act. Accordingly, the secretary of labor is granted wide authority to use existing federal and state agencies engaged in similarly related activities for this purpose.

Under Section 4322(a), a person claiming USERRA rights as a federal employee or applicant for federal employment is permitted to make a complaint in writing to the DOL-VETS; this is required to investigate the complaint. If the efforts of DOL-VETS do not resolve the complaint, the agency is required to notify the complainant of the results of the investigation and of his or her rights under Section 4324 to request that DOL-VETS refer the case to the Office of Special Counsel (OSC).

The OSC is charged with enforcing USERRA, with respect to federal executive agencies, by initiating formal enforcement proceedings before the Merit Systems Protection Board, the quasi-judicial agency that retains original jurisdiction over all USERRA cases involving federal executive agencies as employers. Over a decade after USERRA was enacted, no USERRA enforcement action had ever been brought before the Merit Systems Protection Board.

In 2004, Congress created the Demonstration Project, which fundamentally altered the manner in which USERRA claims are processed by granting the OSC the authority to receive and investigate claims when the filing service member has a Social Security number ending with an odd integer or the matter relates

to a violation of veterans' preference rights under 5 U.S.C. § 2302(b)(11). The project effectively divided USERRA review between DOL-VETS and the OSC. DOL-VETS was required to investigate all other claims and remained responsible for referring unresolved claimant matters to the OSC or the Department of Justice at the election of a filing claimant. The project went further to renew the requirement that the secretary of labor transmit an annual USERRA report to Congress detailing the number of claims reviewed by that department and including the number referred to the Department of Justice and the OSC. The purpose and intent of the project was to streamline the process and expedite the timely resolution of USERRA complaints, which oftentimes inexplicably endured for periods of approximately two years.

The Demonstration Project ended on December 31, 2007, and Congress has yet to pass legislation that prevents the law from reverting back to its pre-2004 construction. All USERRA complaints are now brought to DOL-VETS for investigation. Over the past two years, the Government Accountability Office has conducted multiple investigations into the efficiency of USSERA enforcement. These reports unanimously conclude that the Departments of Labor and Justice are failing our servicemen and -women in the administration of USERRA. The Government Accountability Office found deficiencies in the manner in which both departments advised claimants, processed claims, and enforced claimants' rights. In July 2007, it issued a report entitled Improved Quality Controls Needed over Service Members' Employment Rights Claims at DOL that criticized DOL-VETS processes and procedures used to enforce USERRA. However, it failed to indicate whether complaints brought directly to the OSC lead to faster and better results.

Congress enacted USERRA to protect veterans from unlawful discrimination in their employment because of their military service. An essential aspect of that protection is ensuring that aggrieved veterans have the ability to enforce those rights. The current enforcement scheme is inadequate and unduly places the onus on the returning veterans to ensure the timely resolution of their employment discrimination claims. The only efficient and effective method of redress under the current statutory scheme requires claimants to retain private counsel to effectively pursue their claims. This places access to affordable, skilled, and experienced legal counsel at a premium. It further begs the question of why USERRA, unlike other statutory employment discrimination schemes, denies successful claimants the mandatory award of attorney fees. Absent such a requirement, victims of a USERRA violation are liable to endure two harms: the initial denial of employment and the subsequent financial burden of enforcing their rights in the face of an unwieldy and inadequate statutory scheme.

Although veterans benefits statutes such as USERRA demonstrate a clear congressional commitment to reducing the detrimental effect realized by service members returning to civilian employment, the rapid onset of Reservists reentering the civilian work force is not without hardship. To date, the U.S. deployment in Afghanistan and Iraq has proven the greatest test of statutory protections afforded under the act. The unambiguous results have demonstrated that USERRA is simply incapable of adequately providing the protections necessary to guard employment rights for the increasingly large numbers of returning veterans.

Mathew B. Tully is a field artillery officer in the New York National Guard and the founding partner of Tully Rinckey PLLC, a law firm in Albany, New York, that primarily handles military law–related litigation.

Ariel E. Solomon is a senior associate in the same firm. She specializes in federal employment law and has successfully litigated numerous claims brought under USERRA.