



Department of Justice

STATEMENT FOR THE RECORD

**THE CIVIL RIGHTS DIVISION AND
THE SERVICEMEMBERS AND VETERANS AFFAIRS INITIATIVE
U.S. DEPARTMENT OF JUSTICE**

BEFORE THE

**COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE**

FOR A HEARING ON

PENDING SERVICEMEMBERS AND VETERANS LEGISLATION

PRESENTED

JUNE 29, 2016

Statement for the Record
U.S. Department of Justice
Before the Committee on Veterans' Affairs
United States Senate
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Chairman Isakson, Ranking Member Blumenthal, and distinguished Members of the Committee, thank you for the opportunity to present the views of the Department of Justice (the Department) on legislation currently pending before the Committee. The Department welcomes the Committee's focus on protections for servicemembers and veterans, as we share the priority of protecting the civil rights of our men and women in uniform. The Department especially thanks Senator Blumenthal for his commitment to expanding protections and preventing employment discrimination of our servicemembers through his introduction of legislation amending the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).

Our servicemembers and veterans have made countless sacrifices around the world to ensure our freedom here at home. In return, the Department has the responsibility to protect them from fraud, job discrimination, financial scams, unsafe equipment, and unlawful voting restrictions.

That's why last year the former Attorney General launched the Servicemembers and Veterans Initiative (the Initiative). The Initiative is building a comprehensive legal and support network for servicemembers and veterans so they know their rights and know what to do if they suspect their rights have been violated. The Initiative's goal is to coordinate and expand the Department's existing efforts to protect servicemembers and veterans through outreach, enforcement assistance, and training. In the past year, the Initiative has held outreach events at eight major military installations nationwide and the first convening of the Judge Advocate Generals for all military branches. The Initiative prepared a legal toolkit, provided legal training to Assistant United States Attorneys, and launched a revamped website designed to educate servicemembers, veterans, military family members, and legal practitioners on the military statutes enforced by the Department, as well as the work of the Department's litigating components.

The Department protects servicemembers' rights, among other ways, by vigorously enforcing USERRA, which prohibits discrimination against persons based upon their military service. USERRA entitles servicemembers to return to their civilian employment upon completion of their military service with the seniority, status, and rate of pay that they would have obtained had they remained continuously employed by their civilian employer. Since 2004, we have filed 95 USERRA lawsuits and favorably resolved 151 USERRA complaints either through consent decrees obtained in those suits or through facilitated private settlements. The Department's USERRA program is critically important because the cases typically involve small dollar amounts of back pay, and without the Department's help, many servicemembers would not be able to find or afford private attorneys to take their cases.

The Civil Rights Division has had numerous recent USERRA victories, including on March 13, 2015, when the Department settled its lawsuit with the Missouri National Guard (MNG) alleging that the MNG had violated the USERRA rights of its dual service technicians by forcing them to resign their civilian employment prior to entering into active duty. The Department alleged that MNG's refusal to place dual service technicians on furlough or leave of absence from their civilian jobs, by forcing a separation, resulted in the loss of paid military leave. Under the terms of the settlement agreement, which was approved by the district court, MNG has agreed to rescind its current policy requiring separation in order to enter active duty and to compensate 138 total Missouri National Guardsmen and women over 2000 days of paid leave for past alleged USERRA violations.

On December 9, 2014, the United States secured an appellate ruling in favor of Plymouth Police Department Officer Robert DeLee in *DeLee v. City of Plymouth*, No. 14 – 1970, where the United States Court of Appeals for the Seventh Circuit held that the City of Plymouth, Indiana, violated USERRA when it reduced DeLee's longevity payment while he was serving on active duty military leave. Officer DeLee, who was represented by the Department, initially sued the City in 2012 when it reduced his longevity payment in 2011 because he served time on active military duty. Initially the U.S. District Court for the Northern District of Indiana ruled that the benefit reduction did not violate USERRA because the longevity bonus was not a seniority-based benefit. On an appeal brought by the Department, the Seventh Circuit overturned the district court decision, ruling that the City's ordinance pro-rating the bonus violates USERRA because it fails to place the "servicemember at the 'precise point he would have occupied had he kept his position continuously' while away from the job for his military service."

The Department also has actively participated as *amicus curiae* in appeals involving the important rights of servicemembers, including the Supreme Court case of *Staub v. Proctor Hospital*, the Second Circuit appeal in *Serrichio v. Wachovia Securities*, and the First Circuit appeal in *Rivera-Melendez v. Pfizer Pharmaceuticals, LLC*. The Department also intervened and participated as *amicus curiae* on appeal to defend USERRA's constitutionality and applicability in *Clark v. Virginia Dept. of State Police*, No. 151857 (Vir. S. Ct. 2016), *Weaver v. Madison City Bd. of Educ.*, No. 13-14624 (11th Cir.), filed in 2014, and *Ramirez v. State of New Mexico Youth and Family Services*, No. S-1-SC-34613 (N.M. S. Ct.), filed in 2014. The United States also filed a statement of interest in 2014 in *Joseph v. Virgin Islands*, CV No. ST-11-CV-419, in order to defend Congress's authority to subject territories, like the United States Virgin Islands, to private suits in territorial courts under USERRA.

As part of our effort to grow and strengthen the USERRA enforcement program, the Civil Rights Division has also ramped up partnerships with U.S. Attorneys' Offices (USAOs) as a force multiplier for our efforts, and we have seen tangible results: since mid-2010, at least 46 USAOs have participated in the Department's USERRA/USAO program resulting in 30 of the 62 USERRA lawsuits this Administration has filed.

The Department believes that the amendments to USERRA this Committee is considering would provide the Department with critical enhanced enforcement capabilities and buttress current servicemember protections. Indeed, the dual goals of enhanced enforcement and stronger protections led the Administration in 2015, to formally transmit to Congress a package

of proposals to amend the Servicemembers Civil Relief Act (SCRA) and USERRA, as well as the Military Lending Act (MLA) and the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), which are attached. In addition to our legislative proposals, the Department stands ready to protect the rights of those who make such tremendous sacrifices for our nation and plans to expand our enforcement of USERRA, UOCAVA, and SCRA. The FY 2017 President's Budget request provides an increase of \$587,000 and five positions to support the Department's capacity to effectively address this increased workload. The Department urges the Senate to take action in this Congress on these critical proposals.

In its previous and current servicemembers legislative package, the Department has proposed legislation that would significantly improve USERRA enforcement tools. This legislation is currently included in the proposed bill before the Committee. These proposals to amend USERRA include:

- **Allowing the United States to serve as a plaintiff in all suits filed by the Attorney General.** Presently, the U.S. can serve as a plaintiff only in suits filed against State employers. The proposed legislation also would preserve the right of the aggrieved persons to intervene in such suits, or to bring their own suits where the Attorney General has declined to file suit.
- **Providing the Department with pattern-or-practice authority to enforce USERRA.** The proposed legislation also would strengthen enforcement by granting independent authority to the Attorney General to investigate and file suit to challenge a pattern or practice in violation of USERRA. The pattern or practice language is modeled after Title VII of the Civil Rights Act of 1964 and would provide immediate support to our working servicemembers. On February 1, 2016, in a case brought by the Department, a court found that the Pension Plan of the Ironworkers of New England Pension Fund violated USERRA in *Thomas Shea v. Ironworkers of New England, et al.*, No. 13-12725-NMG (D.Mass.). However, the Department can currently only represent the individual in this case against the Pension Fund. With self-starter authority, the Department could get relief for servicemembers around the country who work with similarly illegal pension plans.
- **Explicitly abrogating state sovereign immunity.** The proposed legislation would allow servicemembers to bring an action against a state employer in state court or federal district court. The United States has filed several *amicus* briefs in state court on this issue. One example of this work is the on-going litigation involving Jonathan R. Clark, a sergeant in the Virginia State Police (VSP) and a Senior Captain in the U.S. Army Reserve in *Clark v. Virginia Dept. of State Police*, No. 151857 (Vir. S. Ct. 2016). From 2008 through 2011, Capt. Clark served in Operation Enduring Freedom. In 2015, Capt. Clark filed a complaint alleging that the VSP had violated USERRA by engaging in a pattern or practice of harassment and discrimination against him related to his military service. Clark alleged that because of his service, VSP members made derogatory statements about his military commitments, filed baseless charges of misconduct against him, and denied him several opportunities for promotion. In response, VSP filed a special plea of sovereign immunity, arguing that because Clark was a state employee

trying to sue the Commonwealth of Virginia in a state court, his USERRA claims were barred by the 11th Amendment. The state court sustained that plea and entered a final order dismissing the action without written opinion on September 9, 2015. Clark then appealed to the Supreme Court of Virginia.

To help protect Capt. Clark's interests, the Department filed an amicus brief attached hereto, which argues that USERRA's jurisdictional provision subjects all states to private suit in their own courts, regardless of whether a state has consented to suit. The brief also argues that Congress has this authority under the War Powers clauses of the Constitution, which give Congress the power to declare war, raise and support an army and navy, and regulate the land and naval forces. Consequently, the state court made a mistake when it sustained VSP's amended special plea of sovereign immunity and dismissed Clark's complaint.

The United States has filed similar briefs in the Fifth and Eleventh Circuit Courts of Appeal and the New Mexico Supreme Court arguing that Congress has authority under its War Powers to authorize private individuals to bring USERRA claims against state employers.

- **Revising pension contribution calculations.** The proposed legislation would revise the pension contribution calculations for servicemembers in service over one year, and whose pension contributions during service are not reasonably certain, so that the servicemember's pension contribution is comparable to the average contribution of similarly-situated employees.
- **Adding compensatory and punitive damages.** The proposed changes to USERRA's damages provisions were reached as a result of negotiation and consideration. By replacing liquidated damages with compensatory and punitive damages, we were seeking to better compensate servicemembers for the losses they suffer from USERRA violations. Frequently servicemembers face non-wage damages from their USERRA violations, including emotional distress, pension and retirement benefit losses ancillary to the USERRA violation (i.e., servicemembers cashing out their benefits in order to replace lost income), and out of pocket medical bills caused by lost insurance. Currently these types of damages are not covered by the USERRA statute. In addition, the amendment allows for punitive damages when the employer acts with reckless indifference to the rights under the statute. This standard is well litigated under Title VII and will provide welcome relief to employees who work for employers who violate the statute in the same manner as liquidated damages did.

With regard to the limits on the damages, this area is also well litigated. Even without statutory limits on damages, courts have imposed equitable limits on compensatory and liquidated damages, and thus the statutory limits provide a guide for courts.

Other helpful provisions that are included in this proposed USERRA legislation clarify the enforceability of arbitration agreements and the employers' burden with regard to latent service related disabilities. This USERRA amendment also provides for civil investigative

demand authority in the Department's USERRA investigations. The Department is especially supportive of the clarifying language regarding forced arbitration. USERRA gives servicemembers the right to enforce their rights under USERRA in federal court and to request legal representation from the Department of Justice. If servicemembers are forced into arbitration through one-sided employment agreements, these rights would be jeopardized.

The Department appreciates the opportunity to submit its views on servicemembers civil rights legislation currently pending before the Committee. We stand ready to provide any technical assistance on the bill discussed above and will strive to work with the Committee in advancing important legislative efforts to strengthen the cornerstone civil rights laws protecting servicemembers' rights.