



# Department of Justice

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**STATEMENT**

**OF**

**DAVID C. IGLESIAS  
UNITED STATES ATTORNEY FOR THE DISTRICT OF NEW MEXICO  
DEPARTMENT OF JUSTICE**

**BEFORE THE**

**COMMITTEE ON VETERANS AFFAIRS  
UNITED STATES HOUSE OF REPRESENTATIVES**

**CONCERNING**

**THE UNIFORMED SERVICES  
EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT**

**PRESENTED ON**

**JUNE 23, 2004**

Statement of  
The Honorable David C. Iglesias  
United States Attorney for the District of New Mexico  
Department of Justice

Before The  
House Veterans Affairs Committee  
United States House of Representatives

Concerning the Uniformed Services  
Employment and Reemployment Rights Act

June 23, 2004

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to appear before you today to discuss the Department of Justice's ("DOJ's") representation of service members pursuant to the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). USERRA provides the fundamental right to reinstatement to civilian employment (under specified conditions) following non-career military service. USERRA also includes a broad anti-discrimination provision, prohibiting discrimination or acts of reprisal against an employee or prospective employee based upon past, current, or future military obligations. The Committee's interest in this important area is especially timely in light of the large number of Reserve and National Guard members serving on active duty in the Persian Gulf and elsewhere.

In this statement, we address first the procedures we follow in handling USERRA claims. Next, we provide pertinent data on the number and disposition of claims we received during FY 2002, FY 2003, and the first half of FY 2004. Finally, we identify the steps the Department of Justice has taken recently to provide guidance to our attorneys handling USERRA cases and to publicize to employers their obligations under the law.

## I. Procedures

Members of the uniformed services alleging a violation of USERRA may obtain representation by DOJ, provided that the member first submits a complaint to the Department of Labor's ("DOL's") Veterans Employment and Training Service ("VETS") and VETS is unable to successfully resolve it.

Where DOL is unable to resolve a complaint and the service member requests referral of his or her claim for consideration of representation, DOL, through its Regional Solicitors ("RSOL"), refers the claim to DOJ's Civil Division. Each referral includes the VETS investigative file, a memorandum prepared by VETS, and a letter or memorandum to DOJ from the RSOL analyzing the merits of the claim based upon the facts and the law and providing a recommendation as to whether DOJ should or should not represent the claimant.

DOJ's Civil Division serves as the gateway for DOL's USERRA referrals. Based upon its review of the investigative file, the VETS memorandum, the RSOL's memorandum, and its own analysis, the Civil Division either forwards the case to a United States Attorney's Office ("USAO") for appropriate action or declines representation and returns the matter to the RSOL because the claim lacks merit. When we return a claim, DOL informs the service member of our decision against representation and reminds the claimant that he or she remains free to pursue the claim through private counsel. Our determination not to provide representation nearly always accords with DOL's conclusion that the claim lacks merit.

When the Civil Division refers a claim to a USAO, the United States Attorney assigns the matter to an Assistant United States Attorney ("AUSA"), who reviews the investigative file and the VETS and RSOL memoranda and then interviews the claimant and potential witnesses.

The AUSA may recommend that the United States Attorney decline to represent the service member because further review and investigation demonstrates that the claim lacks merit. If the AUSA determines that the claim is meritorious, and the United States Attorney agrees, the USAO represents the service member. Where representation is provided, the AUSA will typically contact the employer and attempt to resolve the matter without litigation. If this proves impossible, the AUSA will file a complaint against the employer in Federal district court.

Once suit is filed, a USERRA case proceeds much like any other litigation. After the complaint is filed, discovery may be undertaken, dispositive motions may be filed, and a trial and subsequent appeal may occur. Alternatively, a settlement may be negotiated at any stage of the litigation.

One type of case is somewhat unusual: a suit against a State. Recent case law curtailed employee suits against State governments based upon Federal law because of the immunity provisions of the Eleventh Amendment to the Constitution. *E.g., Velasquez v. Frapwell*, 160 F.3d 389 (7th Cir. 1998) (affirming dismissal of USERRA claim brought by employee against State employer as barred by Eleventh Amendment), *vacated in part*, 165 F.3d 593 (7th Cir. 1999). In response, Congress amended USERRA in 1998, to allow DOJ to sue States in the name of the United States on behalf of State employees. (Alternatively, USERRA allows a service member represented by private counsel to sue in his or her own name in State court, in accordance with the laws of the State.) As set forth below, DOL referrals involving claims against States represent a relatively small percentage of total referrals in recent years, and in many of those cases DOL recommended against representation.

## II. Statistics

### FY 2002 and 2003.

The number of USERRA claims DOL referred to DOJ annually has increased approximately 20 percent since September 11, 2001. During FY 2002, DOJ received 52 cases; 14 were referred to USAOs and 38 were returned to DOL because the facts were insufficient for action. During FY 2003, DOJ received 53 cases; 12 were referred to USAOs and 41 were returned to DOL due to a lack of merit. By way of comparison, during FY 2001 and 2000, DOJ received 45 and 43 cases, respectively.

Of the 105 cases DOJ received during FY 2002 and 2003, 16 (or approximately 15 percent) involved claims against States. We declined representation in 12 of the 16 cases because we agreed with DOL's conclusion that the claims lacked merit. Of the 4 claims against States referred to USAOs, DOJ agreed to represent 3 of the claimants and has since settled 2 of those 3 claims without litigation. The fourth case was returned to DOL by agreement between DOL and the USAO.

Of the 26 cases the Civil Division referred to USAOs during FY 2002 and 2003 (including the 4 involving States), the USAOs agreed to represent the claimants in 12 cases and declined representation in 11 cases. 2 cases are under review at the USAOs and no representation decisions have yet been made. The remaining case was returned to DOL by agreement. In the 12 cases where representation was provided, the USAOs settled 4 of the claims without litigation and 4 after filing suit; 3 cases are pending and 1 was closed due to the claimant's failure to cooperate with the USAO. In the 11 cases where representation was declined, 7 declinations were due to a lack of merit, 3 due to the claimant's failure to cooperate,

and 1 due to mootness. A summary of the status or disposition of the 26 cases referred to USAOs during FY 2002 and 2003 is attached. Attachment A.

First Half of FY 2004. During the first six months of FY 2004, DOJ received 31 USERRA claims (12 of the 31 claims presented a similar legal issue and they were referred as a group). The Civil Division referred 5 claims to USAOs and declined representation in 26 because they lacked merit (the 26 declinations included the 12 claims referred as a group). Of the 5 cases referred to USAOs, the USAOs declined representation in 3 and the remaining 2 are presently under review. 14 of the 31 FY 2004 referrals – almost 50 percent – involved claims against States. The percentage is skewed because the 12 referred as a group were against States. Of the 14 claims against States, the Civil Division declined representation in 13 and a USAO declined 1.

One factor which may affect the number of referrals to DOJ is USERRA's new provision permitting the district court to award (in addition to other relief) attorney fees, expert witness fees, and other litigation expenses to a service member who prevails in the litigation and is represented by private counsel. This may provide greater incentives for the private bar to provide representation and also motivate private employers to comply voluntarily to avoid additional costs. On the other hand, members incur no cost when being represented by the Department of Justice. The fee provisions may encourage litigation that could otherwise be avoided. Claimants may choose to retain private counsel and institute lawsuits, rather than seek the assistance of DOL, which historically has had a high rate of success in resolving these disputes amicably and obtaining employers' voluntary compliance with the law.

### III DOJ's Recent Proactive Efforts

DOJ recognizes the important role it plays in enforcing USERRA. We are committed to working closely with DOL in these matters and to representing vigorously USERRA claimants with meritorious claims. In addition to promptly processing USERRA referrals, the Civil Division and the United States Attorneys have taken the following recent steps in this area:

- \* The most recent edition of DOJ's *Federal Civil Practice Manual* (February 2003) includes a new chapter on USERRA.
- \* In April 2003, because of the mobilization of Reserve and National Guard members, the Military Issues Working Group of the Attorney General's Advisory Committee sent to all United States Attorneys a memorandum on USERRA to highlight the importance of USERRA cases and provide guidance in handling such claims.
- \* In June 2003, in a collaborative effort, lawyers from DOJ (both the Civil Division and the United States Attorneys) and DOL presented a Justice Television Network program entitled "A Practical Legal Guide to USERRA for AUSAs." The program was broadcast to United States Attorneys' offices nationwide from our National Advocacy Center.
- \* In September 2003, a Civil Division lawyer participated in the "USERRA Compliance Assistance" program at DOL headquarters. The program was held for DOD and DOL employees, as well as private employers interested in learning about USERRA.

- \* Several United States Attorneys have conducted press conferences, lectured at Chamber of Commerce meetings, written articles and, in general, got the word out to the business community and the Guard and Reserve communities that DOJ is taking this issue very seriously.

**Summary of Status or Disposition, By Category, of 26 USERRA Cases  
Referred to USAOs during FY 2002-2003**

**As of June 9, 2004**

<u>Category</u>		<u>Number of Cases</u>
Representation granted		12
a) settled without litigation	4	
b) settled after filing complaint	4	
c) pending (pre-filing)	3	
d) closed due to failure to cooperate	<u>1</u>	
	Total:	12
 Representation declined		 11
a) due to lack of merit	7	
b) due to failure to cooperate	3	
c) due to mootness	<u>1</u>	
	Total:	11
 Under review (no representation decision made)		 2
 Returned to DOL by agreement		 1
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<b>Total Cases:</b>		<b>26</b>