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UNITED STATES SENATE
VETERANS' AFFAIRS COMMITTEE

Hearing On:
VETERANS' EMPLOYMENT DISCRIMINATION

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Chairman Akaka, Ranking Member Burr, and members of the committee, good morning. Thank you for the opportunity to testify today on important matters of concern to our servicemembers, their families, and ultimately our national security.

My name is Jim Byrne and I am Deputy Special Counsel of the U.S. Office of Special Counsel (OSC). I am joined today by Patrick Boulay, chief of the Office of Special Counsel unit that investigates and prosecutes violations of the Uniformed Services Employment and Reemployment Rights Act.

Thirteen years ago this month, Congress enacted and President Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act of 1994, or USERRA, a rewrite of the Veterans' Reemployment Rights (VRR) law of 1940. The VRR law served our nation reasonably well for more than half a century, but over the years numerous piecemeal amendments and sometimes conflicting judicial constructions had made the law somewhat confusing and cumbersome. There were also some loopholes in the VRR law's enforcement mechanism, especially as it applied to the federal government as a civilian employer.

USERRA strengthened the enforcement mechanism for federal employees by giving the Merit Systems Protection Board (MSPB) explicit jurisdiction to adjudicate allegations of USERRA violations by federal executive agencies as employers. USERRA also provided, for the first time, for persons asserting reemployment rights against federal agencies to have the assistance of OSC and the Department of Labor's Veterans' Employment and Training Service (DOL-VETS).

Under section 4322 of USERRA, a person claiming a violation by any employer (federal, state, local, or private sector) is permitted to make a written complaint to DOL-VETS, and that agency is required to investigate and to attempt to resolve the matter. If the DOL-VETS efforts do not result in resolution of the complaint, and the employer is a private employer or a state or political subdivision of a state, the matter may be referred to the Attorney General. If the employer is a federal executive agency, it may be referred to OSC.

The passage of USERRA expanded OSC's role as protector of the federal merit system and

federal workplace rights. However, it established a two-step process in which the DOL-VETS would receive all federal and non-federal sector USERRA claims, to investigate and attempt to resolve with employers. If DOL-VETS is unable to resolve a claim against a federal employer, it is then referred to OSC at the servicemembers' request, as DOL-VETS has no prosecutorial authority.

When OSC is satisfied that the claimant is entitled to relief, we may exercise our prosecutorial authority to represent the claimant before the Merit Systems Protection Board (MSPB) and the U.S. Court of Appeals for the Federal Circuit, if necessary. In addition to obtaining corrective action for the claimant, in our role as protector of the merit system, OSC seeks "systemic" corrective action to prevent future violations by an agency. For example, we would assist an agency to modify its leave policy so it does not violate USERRA, or provide USERRA training to agency managers and HR specialists.

Three years ago, with enactment of the Veterans Benefits Improvement Act of 2004, a USERRA demonstration project was established as Congress sought to determine if OSC could provide better service to federal employees filing USERRA claims. This gave OSC an opportunity to apply our extensive experience investigating and prosecuting federal personnel laws to USERRA. It also eliminated (for some claims) the cumbersome, time-consuming "bifurcated" process whereby federal USERRA claims often bounce around different federal agencies before being resolved.

Under the demonstration project, OSC has exclusive investigative jurisdiction over certain federal-sector USERRA cases. While civilian employees of the federal government represent about ten percent of the National Guard and Reserve, they file a disproportionately greater percentage of claims under USERRA. Considering that the law specifies that the federal government is supposed to be a "model" employer, this is a disturbing trend.

Under this demonstration project, OSC investigates over half of the federal employee cases (those cases in which the claimant has an odd Social Security Number plus the cases in which the claimant's USERRA claim is related to a Prohibited Personnel Practice claim that is otherwise under OSC's cognizance). The results speak for themselves: OSC has obtained corrective action for service members in more than one in four USERRA claims filed with us. This is very high when you consider that the rate of positive findings and corrective action for governmental investigative agencies is usually well under ten percent. Our centralized and straight-line process has ensured that the USERRA claims we receive are resolved efficiently, thoroughly, and, most important, correctly under the law.

Servicemembers returning from Iraq or from other active duty service have benefited from numerous corrective actions we have obtained for them, including back pay, promotions, restored benefits and seniority, time off and case settlements that result in systemic change to make sure future violations of USERRA do not occur where they work.

Congress directed the Comptroller General to evaluate the demonstration project and to provide a report to Congress not later than April 1, 2007. OSC participated in the evaluations conducted by the Government Accountability Office, but we were disappointed that their draft report was not available for review until mid-June, and the final report was published only a week before the

congressional August recess. This left Congress with almost no opportunity to act on USERRA before the demonstration projected concluded on September 30th. We appreciate that Congress enacted an extension of the USERRA demonstration project in the FY2008 Continuing Resolution.

Moreover, the GAO report did not address the central question that the demonstration project was intended to answer: are Federal sector USERRA claimants better served when they are permitted to make their complaints directly to OSC, for both investigation and litigation? We respectfully submit that the answer to that question is "clearly yes."

We of the U.S. Office of Special Counsel are privileged to be engaged in the enforcement of USERRA. Both as Deputy Special Counsel, and as a member of the U.S. Marine Corps Reserve, I am proud of the work we are doing to protect the employment rights of those who give of themselves for our national security. Our specialized USERRA unit is second to none. We employ members of the National Guard and reserve at OSC; four of our last six hires served in the military and are still in the reserve. We also just recruited a nationally-known USERRA expert, Sam Wright, a captain in the Navy Reserve, who helped draft the law and has written and spoken extensively about USERRA throughout his career. He can assist us not only in the prosecution of complex cases but also in outreach and public affairs aspects of our work for veterans and active members of the National Guard and Reserve.

OSC is uniquely suited to assist members of the National Guard and Reserve who, upon their return from active duty, even from combat and with combat-related injuries, are turned away by their federal employers, or not afforded the full protections or benefits to which they are entitled. Because the mission of OSC is to protect the federal merit system, our USERRA unit is staffed with attorneys and investigators who are experts in federal personnel law and have years of experience investigating, analyzing, and resolving allegations of violations of federal employment rights. For this reason, federal sector USERRA investigation and enforcement is a natural "fit" for OSC.

We are proud of the achievements of the office. Since the advent of Scott Bloch's administration of OSC, we have filed the first ever prosecutions by OSC in the law's history, obtaining corrective action in many cases that had been delayed for years and had been essentially given up for lost. Take the case of an Army Corps of Engineers employee who was not reemployed after his active duty with the Air Force. After his case went unresolved elsewhere, OSC prosecuted the case before the MSPB and obtained full corrective action, including \$85,000 in back pay, reemployment in his former position, and full restoration of benefits. Or, the case of the injured Iraq war veteran who returned from duty only to be sent home by his federal employer because he could no longer perform his former job. After OSC became involved, we convinced the agency to find him a suitable job consistent with his physical limitations and back pay for the time he was at home trying to figure out where to turn.

Cases that before took several years to come to no positive conclusion now routinely take well under a year for OSC to investigate and resolve favorably. We are committed to getting as much relief as the law allows for our brave service members, and doing so as quickly as possible. These patriots have given their all in the service of this great nation. They should never be hung out to dry by a long, drawn-out, confusing process. OSC is passionate about obtaining relief for

all who come to us, and no less for the soldiers of our country who also serve in the federal civil service.

Moreover, giving OSC exclusive jurisdiction over USERRA federal sector claims would remove the burden from the Department of Labor Veterans Employment and Training Service to navigate federal personnel law, freeing them to focus on providing their best service to USERRA claimants from the private sector and those in state and local governments. Thus, the benefit to service members would be doubly positive - for federal service members who would benefit from OSC's specialized experience, and for those private sector service members who would benefit from greater attention to their claims at DOL-VETS.

Today, America is in the middle of the largest sustained military deployment in thirty years. That deployment but is not limited to the approximately 200,000 servicemembers in Iraq and Afghanistan at this moment. In recent years, the number of members of the National Guard and Reserve mobilized at one time peaked at more than 212,000. Last week, the Department of Defense reported that 92,971 members of the National Guard and Reserve had been mobilized and were on active duty. It is when these servicemembers end their active duty that they may find they are no longer welcome to return to their civilian jobs and are eligible to file a claim under USERRA.

Right now, with returning war vets a comparative trickle, USERRA claims are in the hundreds. What will happen if and when that trickle turns into a flood? Will we see a "spike" in the number of claims filed by returning servicemembers who have been turned away from their employers? Will the government demonstrate its support for our troops by being fully ready to provide prompt and effective action on these claims?

We don't know when they will start returning home in greater numbers, boosting demand for USERRA enforcement. We believe that adequate information has been developed to support a decision by Congress to assign the task of investigating and enforcing USERRA claims by federal employees to OSC. We are poised to assume this responsibility and to do our part in making their transition back to civilian life as smooth as possible.

Thank you for your attention and I look forward to your questions.