February 12, 2007 Hearing:

United States House of Representatives
Subcommittee on Health, Employment, Labor and Pensions

Protecting American Employees from Workplace Discrimination

Uniformed Services Employment and Reemployment Rights Act

Presented by George R. Wood, Esq.

The following testimony is provided by George R. Wood, Esq., regarding proposed amendments to the Uniformed Services Employment and Reemployment Rights Act ("USERRA") being considered by the United States House of Representatives Subcommittee on Health, Employment, Labor and Pensions (the "Committee"). The testimony provided below is presented as the views of George R. Wood, and is not being presented on behalf of any other person.

INTRODUCTION

USERRA currently provides employees who perform service in the uniformed services with broad protections. If fact, it is one of the broadest federal leave statutes in existence. USERRA currently provides significant rights, benefits and protections to employees regarding military service, including the ability to take up to five (5) years of leave, be reinstated in most instances to the position the employee who have attained had he or she remained continuously employed, obtain benefit protection while on leave, and be protected against discrimination or retaliation on the basis of military service or participation into an investigation regarding a possible USERRA violation.

In my experience, most employers understand the significant sacrifices being made by their employees who, either voluntarily and involuntarily, serve in the uniformed services. To serve our country, these employees are putting their lives on hold, if not also risking their lives for those who remain behind. In recognition of these sacrifices, a number of employers provide benefits to employees on military leave that are not provided to employees on other types of leave, such as supplemental compensation, employer-paid medical benefits and benefit accrual during leave. It has not been my experience that employers seek to shirk their duties and obligations under USERRA, as reasonably interpreted.

The Committee is considering four (4) potential amendments to USERRA: (1) An amendment to the definition of "benefit of employment" found in 38 U.S.C. § 4303(2) to include wages as a benefit of employment[1]; (2) An amendment to 38 U.S.C. § 4311 to explicitly prohibit discrimination against potential applicants for membership in a

[1] This would be accomplished by deleting the phrase " "other than wages or salary for work performed" from the definition of "benefit of employment" found in Section 4303(2).

uniformed service; (3) An amendment to 38 U.S.C. § 4311 to permit covered employees to bring a claim based on a disparate impact analysis; and (4) An amendment to require states receiving federal funding to waive their Eleventh Amendment immunity rights. For the reasons set forth below, I believe that the first three amendments should not be adopted by the Committee. I take no position on the fourth.

SUMMARY OF POSITIONS

1. Amending the definition of "benefit of employment" to include wages as a benefit covered by USERRA would unduly expand the scope of the protections offered under 38 U.S.C. § 4311(a), which currently protects "initial employment," "reemployment," "retention in employment" and "promotion," along with "any benefit of employment," for any person who "applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform services in the uniformed services." Including wages as a "benefit of employment" would hamper an employer's ability to make legitimate distinctions in wages between employees based on valid differences between the work experiences and educational backgrounds of different employees.

2. Amending 38 U.S.C. § 4311 to include "potential applicants" for military service would make the discrimination prohibitions found in USERRA unworkable for employers. It would, in essence, include all persons, ages 18 to 40, within the scope of USERRA's discrimination protections regardless of whether an employee ever truly intends to apply for service in the uniformed services. The current definition properly protects those persons who actually apply for service in the uninformed services and creates a workable and effective prohibition against discrimination that is already effective.

3. Amending 38 U.S.C. § 4311 to include a "disparate impact" analysis is unnecessary. Under the current provisions of USERRA, any employer policy that violates the rights of a covered employee is already governed by USERRA. A disparate impact analysis (which applies to facially neutral policies that have the effect of discriminating against a protected class of persons) would be redundant.

4. As stated above, I take no position with respect to amending USERRA to require states receiving federal funds to waive their Eleventh Amendment immunity rights.

PROPOSED AMENDMENTS TO USERRA

1. Amending the definition of "benefit of employment" found at 38 U.S.C. § 4303(2) to include wages is unnecessary and may deny employers the ability to make legitimate wage distinctions between employees based on valid criteria.

Statement of Position:

USERRA provides that an employer may not deny, among other things, any "benefit of employment" to an applicant or employee based of that person's uniformed service membership, application for membership, performance of service, application for service, or other uniformed service obligation. 38 U.S.C. § 4311(a). The current definition of "benefit of employment" excludes "wages or salary for work performed." 38 U.S.C. § 4303(2); *see also* 20 C.F.R. § 1002. 5(b). The Committee is considering an amendment to the definition of "benefit of employment" to delete the phrase "other than wages or salary for work performed" from the language of Section 4303(2), thereby including wages within that definition. This proposed amendment should not be adopted.

The Committee's consideration of an amendment to Section 4303(2) is apparently based on the Eight Circuit Court of Appeals' decision in *Gagnon v. Sprint Corp.*, 284 F.3d 839, 852-53 (8th Cir. 2002). In *Gagnon,* the plaintiff claimed discrimination under Section 4311(a) based on a $1,000 difference in pay between himself and another employee. *Id.* The District Court granted the defendant summary judgment on this claim, holding that there was no basis for a claim of discrimination due to this slight pay differential. The Eighth Circuit affirmed this ruling, properly noting that wages are not included within the definition of "benefit of employment" under Section 4303(2). Significantly, however, no evidence of discrimination based on wages existed in *Gagnon.*

To amend the definition of "benefit of employment" to include wages would unduly impair an employer's ability to make legitimate distinction in wages between employees. Employers seeking to make legitimate wage distinctions would be faced with the prospect of a claim under USERRA every time a USERRA covered employee is involved. Congress' initial passage of USERRA recognized this potential impact on employers by protecting employment (along with reemployment, advancement and termination from employment and employment benefits), while steering clear of specifically mandating wage protections for covered employees. To include wages with the definition of "benefit of employment" under Section 4303(2) would vastly alter the legal landscape for employers with respect to wage distinctions. The result of this amendment is likely to be that employers will be forced to pay USERRA covered employees the same as non-covered employees (regardless of legitimate differences in education or experience) in order to avoid disputes over this issue. Thus, rather than creating a level playing field for covered employees, USERRA would create a benefit for covered employees not provided to non-covered employees. This change would not be in keeping with the purposes of USERRA, one of which is to "eliminate disadvantages to

civilian careers which can result from" uninformed service. The amendment would, in effect, create an advantage for uniformed service that is not available to other employees.

The power of this amendment should not be ignored. Faced with potential litigation over pay disputes, employers may be forced to pay covered employees more and create an inequitable scale vis-a-vis other employees. To do otherwise would subject employers to expensive and time consuming litigation over the issue of a pay distinction between several employees. This is true regardless of whether the pay differential is based on legitimate criteria.

It also may be reasonably anticipated that the amendment would lead to additional litigation in our already overburdened federal courts regarding, as in *Gagnon*, a wage distinction as small as $1,000.

The present discrimination prohibitions in Section 4311(a) (including protection for employment, reemployment, advancement and retention of employment) properly and adequately protect covered employees against all proper forms of discrimination, without unduly impacting an employer's legitimate decisions regarding wages. The Committee should recommend against adoption of the amendment.

2. Amending 38 U.S.C. § 4311 to explicitly prohibit discrimination against "potential" applicants for membership in a uniformed service.

Statement of Position:

USERRA currently protects from discrimination or retaliation 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. 38 U.S.C. § 4311(a). The Committee is considering an amendment to Section 4311(a) that would broad the scope of these protections to include persons who are "potential" applicants for service membership. Section 4311(a) should not be expanded to apply to "potential" applicants for uniformed service, for good and practical reasons.

The proposed amendment to extend USERRA protections to "potential" applicants for uniformed service is premised upon a single case arising in the Southern District of New York. In *Podszus v. City of Mount Vernon, N.Y.*, No. 06-cv-13771, 2007 U.S. Dist. LEXIS 57868 (S.D. N.Y. July 12, 2007), the court held that an individual who chose not to submit an application for membership in a uniformed service (allegedly due to urgings of his employer) was not entitled to protection under Section 4311(a). In so ruling, the court noted that USERRA does not extend to ***potential*** applicants to uniformed service.

The proposed amendment to extend USERRA's protections to "potential" applicants for uniformed service disregards the purposes of USERRA and presents a significant dilemma for practical application.

First, contrary to the implication of the proposed amendment, the Congressional purpose of USERRA is not to advocate membership in a uniformed service by protecting the potential for such service. *See* 38 U.S.C. § 4301(a). Rather, the purpose of USERRA is to provide protections to those persons who actually choose to participate in military service. *See id.* The distinction is not without a difference as it relates to the proposed amendment. Protecting "potential" applicants under USERRA would, in effect, create a Congressional preference for military service. This is not USERRA's intent. *Id.*

Second, the proposed extension of USERRA's protections to "potential" applicants presents problems for practical application as the amendment. Who qualifies as a "potential" applicant? What minimum affirmative steps toward membership does one have to take to qualify as a "potential" applicant? What remedies does a "potential" applicant qualify for under USERRA (since the "potential" applicant has never applied for leave and has never been denied any benefits)? It would be difficult, if not impossible, to practically and properly define when an individual qualifies as a "potential" applicant or the circumstances of a "potential" application. As a practical matter, anyone of military service eligible age, i.e., 18 to 40 years of age, could claim USERRA protections as a "potential" applicant. In addition, USERRA entitles service members to the equitable relief of restoration to prior civilian employment status or damages to compensate for wages or benefits lost in connection with the civilian employment. USERRA does not provide damages to compensate an individual for some anticipated (and speculative) loss of service benefits or other damages resulting from the alleged inability to join the service. Such was not the intent of USERRA. To amend USERRA to include "potential" applicants would expand its reach beyond reasonable bounds. (For example, the Age Discrimination in Employment Act protects persons ages 40 to 70, not those persons who have the "potential" of reaching age 40.)

The existing USERRA definitions make clear that in situations when an individual has not yet applied for service, he or she is simply not eligible for USERRA's statutory protections. There is no ambiguity in this definition; it is both clear and workable in practical application and it neither encourages nor discourages application for membership in the uniformed services. This definition is working well, and is not in need of amendment.

3. Amending 38 U.S.C. § 4311 to explicitly prohibit employer policies, procedures and practices that have a "disparate impact" on service members and others who are protected by USERRA is unnecessary.

Statement of Position:

Extending the already broad protections of USERRA to include a disparate impact analysis sometimes used under other discrimination statutes in unnecessary. USERRA's current protections are appropriately analyzed under the standard "disparate treatment" legal analysis. In fact, given that any employer policy that has the actual effect of discriminating against a covered employee is already within the scope of USERRA, no disparate impact analysis is required.

While the proposed amendment seeks to include protections from facially neutral policies that have a "disparate impact" on uniformed service members, this largely dormant theory is rarely used and will be difficult to apply in USERRA circumstances. The disparate impact theory applies where a facially neutral policy has a significant adverse impact on a protected class of employees. *See Griggs v. Duke Power Co*., 401 U.S. 424 (1971). If protected class employees prove that a neutral practice causes a disparate impact on them, the employer may demonstrate that the practice "is job related for the position in question and consistent with business necessity."

Unlike other statutes such as Title VII of the Civil Rights Act of 1964, there is under USERRA only one class of protected persons—those meeting the criteria set forth in Section 4311. Thus, an employer's treatment of such persons through various policies need not to be analyzed as a "disparate impact," since the disparate treatment analysis already exists and is applicable.

Moreover, it is difficult, if not impossible to envision a situation where an employer's policies are not already be governed by the disparate treatment analysis already applicable under USERRA. For example, a facially neutral employer policy requiring two (2) seeks advanced notice before taking a leave of absence would already be governed by 38 U.S.C. § 4312(a)(1). Similarly, a policy limiting the amount of unpaid leave an employee may take would be governed by 38 U.S.C. § 4312(c). I cannot envision an employer policy that would not be already fall within the scope of the disparate treatment analysis used under USERRA if the policy attempts to alter the already specific and detailed requirements of the statute.

Finally, it will be difficult and impracticable to apply a disparate impact analysis to situations involving alleged USERRA violations. Individual employers do not typically have significant numbers of USERRA covered employees compared to the employer's entire employee population, let alone a statistically significant population of such employees. Because a disparate impact analysis typically requires the use of experts and sophisticated statistical methods and findings, for any given employer, it will be difficult to obtain a sufficient statistical group upon which to apply the analysis for purposes of USERRA. *See El v. SEPTA*, 479 F.3d 232 (3d Cir. 2007)(dismissing employee's disparate impact claim where employer's policy barred the hiring of persons who had conviction records); *Malave v. Potter*, 320 F.3d 321 (2d Cir. 2003)(employer may defend disparate impact claim by showing the statistical sample used by the employee is too small to establish an inference of discrimination); *Shutt v. Sandoz Crop Protection Corp*., 923 F.2d 722 (9th Cir. 1991)(statistical disparities must be sufficiently substantial in order to raise an inference of causation, and the statistical evidence may not be probative if the data is small or incomplete).

Given the current breadth of existing USERRA statutory protections under the disparate treatment analysis, there is no need to extend disparate impact protections to covered employees under USERRA. Current statutory protections, therefore, are appropriately analyzed under the "disparate treatment" theory of discrimination (which requires

evidence of actual discriminatory intent). No appropriate basis exists to include a disparate impact analysis.

4. Amending USERRA to require States to waive their Eleventh Amendment immunity rights in order to seek federal funding.

Statement of Position:

I take no position with respect to this issue.

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