TESTIMONY OF KATHRYN PISCITELLI, ESQ.

BEFORE THE
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS
COMMITTEE ON EDUCATION AND LABOR
UNITED STATES HOUSE OF REPRESENTATIVES
110th CONGRESS, 2nd SESSION

FEBRUARY 12, 2008

REGARDING USERRA

Testimony of Kathryn Piscitelli
Before the
Committee on Education and Labor
February 12, 2008

Chairman Andrews and Members of the Subcommittee, good afternoon. I am Kathryn Piscitelli, of Orlando, Florida. I am a USERRA practitioner and have taken a special interest in USERRA since its enactment. I am a member of the National Employment Lawyers Association (NELA). In 2004, I served as Chair of NELA's USERRA Task Force, which prepared NELA's comments on the Department of Labor's then-proposed USERRA regulations. I have been active in educating other lawyers about USERRA, including giving seminar presentations on and writing articles and other publications about USERRA, as well as providing guidance to lawyers who represent USERRA claimants.

Since USERRA's enactment in 1994, I have tracked case law and other developments under USERRA and have seen how valuable the statute can be to returning servicemembers. I have also, however, seen a number of ways in which the statute could be strengthened, to provide more comprehensive protection for these employees. I think most people would agree that we should do as much as we can to ensure that the men and women who return to civilian life from Iraq, Afghanistan, and indeed any military service, are able to pick up their lives again with as little disruption as possible. These people have made major sacrifices and should not be subjected to diminished employment opportunities as a result of their lengthy, and sometimes repeated, absences from the workplace.

My remarks today will focus on several issues that I urge the subcommittee to look at to improve USERRA's protection of our servicemembers in civilian employment: (1) mandatory arbitration; (2) disparate impact; (3) federal funding as a "hook" to override state sovereign immunity; (4) wage discrimination; and (5) protection of potential applicants for service. I think that if Congress did these five things, it would strengthen USERRA's protection of servicemembers from discrimination, foster elimination of unnecessary barriers to equal employment opportunity for servicemembers, and help servicemembers who have suffered violations of their rights under USERRA by improving the Act's enforcement and remedial provisions.

Mandatory arbitration

I know that during this hearing you are also taking testimony on the huge problem of employers imposing mandatory arbitration as a condition of employment. Mandatory arbitration is also a major problem for returning servicemembers attempting to get their jobs back under USERRA. In fact, in

2006, the Court of Appeals for the Fifth Circuit held that USERRA claims are subject to mandatory arbitration under the Federal Arbitration Act, despite express language in Section 3402(b) of USERRA prohibiting contracts (among other things) that limit any "right or benefit" provided by the law, "including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit."[1]

However, the Civil Rights Act of 2008 (H.R. 5129), of which you were an original co-sponsor, Chairman Andrews, would solve the mandatory arbitration problem under USERRA. I very much appreciate your leadership in co-sponsoring H.R. 5129, and urge Congress to pass it as soon as possible.

Federal funding "hook"

H.R. 5129 also would improve protection of servicemembers under USERRA in another significant way—by providing a federal-funding hook to trump states' Eleventh Amendment immunity from private suits for monetary relief. USERRA makes available to state employees the same monetary remedies as it does for private and local government employees. Yet, in the wake of Supreme Court decisions narrowing the circumstances under which federal laws can effectively override state immunity, it has become virtually impossible for individuals to bring private actions against states under USERRA. The way out of this conundrum is to amend USERRA to condition states' receipt of federal funding on their waiver of Eleventh Amendment immunity. That is precisely what H.R. 5129 would do. Again, thank you, Chairman Andrews, for your co-sponsorship of this crucial legislation.

Disparate impact

USERRA's prohibition on military-related discrimination would be strengthened by amending USERRA to clarify that the Act protects against employment policies and practices that on their face are nondiscriminatory but have a disparate impact on servicemembers. Although other statutes expressly provide for disparate impact claims, USERRA does not. As a result, there is judicial uncertainty as to whether disparate impact claims are available under USERRA.[2] Amending the statute would remove the cloud of doubt and thereby ensure that servicemembers who are harmed by facially neutral policies and practices will have a remedy under USERRA.

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[1] *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672 (5th Cir. 2006).

[2] *See, e.g.*, *Miller v. City of Indianapolis*, 281 F.3d 648, 651 (7th Cir. 2002) (leaving open the question of "whether a disparate impact claim can be prosecuted under USERRA").

Wage discrimination

Removing or redrafting the exemption of "wages or salary for work performed" from the definition of "benefit of employment" at Section 4303(2) of USERRA is warranted as well. This exemption evidently was included to clarify that USERRA does not require payment of wages or salary to employees when they are away for military service and thus not performing remunerable work for their employers.[3] But the exemption is ambiguous and, as a result, can be and, in fact, has been misconstrued as authorizing pay discrimination against servicemembers.[4] This is surely not an outcome that Congress intended when it enacted USERRA.

Protection of potential applicants for service

In addition, I recommend amending Section 4311(a) to explicitly prohibit discrimination against potential applicants for membership in a uniformed service. In enacting USERRA, Congress clearly intended that potential applicants for the service would fall within the ambit of the Act's ban on service-related discrimination.[5] However, there is no express provision to this effect in the statute. In the absence of express protection for such persons, there is a risk that employers will deter employees from joining the military, and that courts will do nothing to stop them.[6]

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[3] *See* S. Rep. No. 103-58 (1993) at 41 ("[S]ection 4303(2) would define . . . 'benefit of employment' . . . as any advantage, profit, privilege, gain, status, account, or interest *(other than wages or salary for work not performed while absent from employment)* that accrues by reason of an employment contract or an employer practice or custom and includes by way of illustration the various attributes of the employment relationship that might be affected by an absence from employment.") (Emphasis added.)

[4] *See, e.g., Gagnon v. Sprint Corp.*, 284 F.3d 839, 852-53 (8th Cir.) (because "benefit" as defined in USERRA excludes wages or salary for work performed, employee could not bring claim alleging that employer discriminated against him by paying a him lower starting salary because of his military background), cert. denied, 537 U.S. 1001 and 537 U.S. 1014 (2002).

[5] *See* H.R. REP. No. 103-65, pt. 1, at 23 (1993), *as reprinted in* 1994 U.S.C.C.A.N. 2449, 2456 ("Section 4311(a) would reenact the current prohibition against discrimination which includes discrimination against . . . current employees who seek to join Reserve or National Guard units . . . .") (citing *Boyle v. Burke*, 925 F.2d 497 (1st Cir. 1991)). In *Boyle*, a case under USERRA's predecessor legislation, the court found that the law protected against policies that deter employees from joining the reserves. *See Boyle*, 925 F.2d at 502.

[6] *See, e.g., Podszus v. City of Mount Vernon, N.Y.*, No. 06 Civ. 13771, 2007 WL 2230106 (S.D. N.Y. July 12, 2007) (employee's claim alleging that employer violated § 4311(a) by denying him permission to join Navy Reserve was dismissed because as potential, rather than actual, applicant for service, employee was not protected under § 4311(a)).

Conclusion

In conclusion, protection of our servicemembers in civilian employment will be improved if mandatory arbitration is abolished and USERRA is amended by providing for disparate-impact claims; adding a federal-funding hook to override state immunity; clarifying the wage exemption from the benefit-of-employment definition; and explicitly prohibiting discrimination against potential applicants for military service.

It's great that Congress is looking into these issues. I appreciate the opportunity to testify.