

## **Inbound for TSA Security Screeners: USERRA Rights**

By Mathew B. Tully

Transportation Security Administration screeners will finally be protected from supervisors who discriminate against them because of their military service. Under legislation signed into law

by President Barack Obama in August of 2012, the protections already afforded to most federal employees by the Uniformed Services Employment and Reemployment Rights Act will now be extended to TSA security screeners and supervisory security screeners.

I have been an advocate of extending USERRA rights for many years. In 2007, I testified before the U.S. Senate Committee on Veterans' Affairs and told lawmakers that such changes "are pivotal in advancing our national defense interests and achieving parity and equity in the workplace."

As of May 2012, 10,000 of TSA's 50,000 employees were veterans, according to Rep. Sheila Jackson Lee, chairwoman of the Homeland Security Subcommittee on Transportation Security and Infrastructure Protection. That means TSA employs more veterans than agencies such as the Departments of Commerce, Education, Energy, Labor, Health and Human Services, and Justice, according to an Office of Personnel Management report on veterans employment.

TSA security's screeners' exclusion from USERRA originated with the Aviation and Transportation Security Act, which President George W. Bush signed in the wake of the Sept. 11, 2001 attacks. This law contained a loophole that granted the undersecretary of transportation for security authority to employ, appoint, discipline, and terminate, screeners, in addition to fixing the compensation, terms, and conditions of their employment "[n]otwithstanding any other provision of law."

In 2004, the U.S. Court of Appeals for the Federal Circuit ruled in *Vincent Conyers v. Merit Systems Protection Board*

that this "notwithstanding" clause meant the undersecretary was not bound to statutes such as USERRA with respect to employment actions involving TSA screeners. The legislation enacted by President Obama this year — H.R. 3670 — closed this loophole by striking the word "notwithstanding" from statute and specifying that the undersecretary must adhere to the provisions of USERRA.

Even before the enactment of this law, TSA adopted policies

based on many of USERRA's provisions. However, at my federal employment law practice I

frequently see cases involving supervisors who disregard agency policies. Although TSA voluntarily permitted the Office of Special Counsel and Department of Labor to investigate USERRA violation claims, according to a Government Accountability Office report

, more was needed to help unprotected screeners. These employees needed the MSPB to hold their agencies' feet to the fire when policies are ignored.

The law takes effect 270 days after enactment, or on May 13, 2013. Now that TSA screeners are due to receive their long-fought protections under USERRA, it is crucial that they know what their rights are and how to assert them. Chief among these rights are:

The right to reemployment, upon application, after returning from active uniformed service;

The right to the seniority, pay, status, and benefits of seniority the service member would have received had he or she not left their civilian job for active uniformed service;

Protections against discrimination on the basis of military service in hiring, firing, promotion, demotion, and reemployment actions.

Protections against retaliation for asserting their USERRA rights.

These USERRA rights are available to service members — including those in the National Guard and Reserves — so long as they served honorably and their cumulative periods of service did not exceed five years. There are also important pre- and post-deployment notification deadlines. Federal employees who believe their USERRA rights have been violated should immediately contact a federal employment law attorney.