

Vets Winning Job Suits: New Rulings Empower Vets Seeking Jobs, Promotions

William Jolley wouldn't strike most as the rebellious type: Ten years enlisted in the Air Force in the 1950s, then a long career in federal civil service culminating with his current job as a GS-15 overseeing policy and programs at the Jacksonville, Fla., field office of the Housing and Urban Development Department.

But he's a rebel all right. After being excluded from applying for another federal job two years ago, he mounted a legal challenge. And last month, he overturned a federal hiring policy that had been excluding some veterans from being considered for certain federal jobs.

Jolley is one of the latest of a growing cadre of veterans taking aim at — and toppling — hurdles they face as they seek federal jobs, promotions and transfers. And case by case, ruling by ruling, they are fast changing the federal employment landscape to be more in favor of veterans.

Now, government leaders and employment experts are warning federal managers to take notice — those who infringe on those expanding veterans' rights and preferences could land themselves and their agencies in big trouble.

"I beg you, please don't let your managers manipulate the hiring process to get the person they want instead of the veteran," said Naomi Earp, chairwoman of the Equal Employment Opportunity Commission at a conference on federal employment law this month.

Earp and heads of other agencies charged with enforcing laws protecting veterans' rights in the federal workplace — the Merit Systems Protection Board (MSPB) and the Office of Special Counsel (OSC) — all say they are seeing increases in the number of discrimination cases coming from veterans.

Follow the law, not guidance

One of the problems with the rapidly changing law is that managers are finding they can't always rely on guidance from the Office of Personnel Management as they implement personnel decisions.

Take the Jolley case, for example. He applied for a supervisory law enforcement position at the Federal Law Enforcement

Training Center in Glynco, Ga. The center advertised the job as open to federal employees already working at the site and to veterans within proximity of the facility.

The center declined to consider Jolley's application for two reasons: One, he worked across the state border and outside the geographic area; and, two, he was a federal employee and thus not covered by the hiring protections of the 1998 Veterans'

Employment Opportunities Act.

In a ruling last month, MSPB sided with Jolley. Now veterans inside and outside government can compete for job openings no matter where they live.

The ruling reverses OPM guidance and a widely held interpretation among personnel specialists of the law. Newly hired vets rights

In another example, OPM incorrectly instructs managers in its guidance that they can more easily fire or discipline newly hired veterans who are still on probation.

In fact, some veterans in a probationary period have the same protections and rights as other employees when it comes to being disciplined or fired under rulings of the U.S. Court of Appeals for the Federal Circuit in 1999 and 2003, according to a January MSPB report.

Specifically, some veteran employees in probationary status must be given at least 30 days' written notice before being terminated; must be given at least seven days to answer a termination; have the right to attorney representation; must be given a written and specific decision on termination at the earliest practical date; and have the right to appeal to MSPB.

OPM needs to amend its regulations or provide guidance to agencies on how to navigate between the statute and the court decisions, MSPB recommended in its report.

An OPM spokesperson said the agency is studying the decisions. But OPM guidance changes can take years. That's why the Army tells its human resources specialists to follow the court rulings instead.

"Agencies must proceed with caution before terminating an employee they believe to be a probationer," said William Wiley, formerly chief counsel to the MSPB chairman, at the Federal Employment Law Training Group forum on March 7.

Pay attention to detail

Federal employment lawyers say they've noticed an uptick in the number of veterans' hiring cases brought before MSPB. In one, an Army human resources assistant failed to input a veteran's application into the database. After realizing its error, the Army wanted to just give the candidate priority consideration on the next job. But MSPB said the agency had to reconstruct the hiring process. The higher penalty was because the agency violated the Veterans' Employment Opportunities Act.

"This case shows the significance of keeping your personnel office up to date on the law," Peter Broida, an attorney who represents employees and unions before MSPB, said at the March 7 forum.

Some hiring rules are evolving. In October, the federal circuit court ruled that the Small Business Administration didn't violate veteran Charles Light's rights when it did not select him for an attorney position. MSPB ruled that the agency hadn't picked Light on account of his negative previous work experience and inability to get along with others. Though the agency won the ruling, attorneys suggest that hiring managers specifically note whether they considered veterans status when not selecting a candidate.

Rights expand as vets return

On March 7, the federal circuit court issued a momentous ruling that makes it easier for federal employees to pursue cases against the government alleging job discrimination based on their military service. Any National Guard member or reservist who claims that a federal agency has violated his right to return to his job after being mobilized for active duty is guaranteed an MSPB hearing. And all veterans will have more lenient appeal rights.

That means agency conflicts with veterans, guardsmen and reservists could be more difficult and protracted, attorneys said.

"I think we're seeing a change in the tide of veterans' rights because MSPB is bound by federal circuit, and their rulings are going in favor of veterans," said Mathew Tully, an attorney who specializes in providing free legal assistance to federal employees with claims related to their military service.

MSPB Chairman Neil McPhie told agency attorneys March 7 that he expects more veteran-related issues in front of the board because of the recent ruling and the return of service members from duty.

"The sheer numbers of veterans returning from Iraq and Afghanistan may be a harbinger of increased caseload," he said.

"That's just a matter of practicality."

Rights protecting reservists

Enforcement of the Uniformed Services Employment and Reemployment Rights Act (USERRA), which protects jobs and promotion opportunities for guardsmen and reservists when they are mobilized for active duty, also is getting tougher.

The federal government is the biggest employer of reservists — 160,000 are on the payroll — and the Office of Special Counsel has seen a spike in the number of USERRA complaints lodged by federal employees in the last couple years.

"I employ reservists and sometimes it's difficult," said Special Counsel Scott Bloch, who is charged with enforcing the law. "But like a lot of things in life that are difficult, you just have to learn what's right and do it."

Since February 2005, OSC has run a pilot project investigating half of all USERRA complaints filed by federal employees — those for veterans whose Social Security number ends in an odd digit. It also gets cases where USERRA violations are combined with other prohibited personnel practices. The remainder goes through the Labor Department.

In 2006, OSC took on 168 cases and closed 126. This was up from 115 cases it took on the previous year, when it closed 57. Agencies were required to take corrective action in more than 50 cases.

"We've put our money where our mouth is in terms of enforcement," Bloch told agency attorneys.

But OSC is using a carrot as well as a stick with federal agencies. Three levels of USERRA training and an information hot line help get managers familiar with the basics of the law.

The most important things for federal managers to remember, OSC says:

Agency promotion plans must consider guardsmen and reservists absent on military service.

OPM helps agencies who are struggling to find jobs for returning service members.

Injured service members have additional rights.

Managers must inform service members of their rights and obligations under the law.

Agencies must keep records on how a service member's career would have progressed if he or she hadn't been called up.

Managers may also go to Labor's Veterans Employment and Training Service and the Defense Department's Employer Support of the Guard and Reserve (ESGR) for help.

ESGR provides training upon request and will send out a training DVD to federal agencies this spring, according to communications director Maj. Robert Palmer. The training

encourages managers, guardsmen and reservists to communicate with and trust each other. "It's the simplest answer in the world, but sometimes it's not the easiest," Palmer said.