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CATEGORY: USERRA Enforcement

Recent Ohio Supreme Court Case on USERRA Enforcement

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State ex rel. Turner v. Houk, Warden, et al., 112 Ohio St. 3d 561, 2007 Ohio 814, 2007 Ohio LEXIS 521 (Ohio Supreme Court, March 14, 2007).

Harry C. Turner III is an enlisted Navy Reservist and an employee of the Ohio State Penitentiary in Youngstown, Ohio. At the time he left for a period of active duty, he held the civil service grade of “administrative assistant 2.” When he returned from active duty, he was placed in a “business administrator” position, which he asserted was “two pay ranges below” the position he had held and the position to which he was entitled under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

Mr. Turner brought a *writ of mandamus* action in the Ohio Supreme Court, seeking to have that court compel the respondents (the Ohio Department of Corrections, its director, and the warden of the prison where he worked) to reinstate him in his previous position. The Ohio Supreme Court dismissed the action “because relator [Turner] has or had an adequate remedy in the ordinary course of law to challenge his alleged reduction in pay and demotion by way of a civil-service appeal.”

I address the enforcement of USERRA against a state (as employer and defendant) in Law Review 89 (September 2003). As enacted by Congress in 1994, USERRA authorized an individual to sue a state (or any other employer) in federal court in the individual's own name (as plaintiff). The U.S. Court of Appeals for the Seventh Circuit held USERRA to be unconstitutional, under the 11th Amendment, insofar as it authorized an individual to sue a state in federal court. See *Velasquez v. Frapwell*, 160 F.3d 389 (7th Cir. 1998), citing *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

Later in 1998, Congress amended USERRA to the court's ruling. As amended, 38 U.S.C. 4323(a)(1)(final sentence) provides: “In the case of such an action [to enforce USERRA] against a state (as an employer), the action shall be brought [by the attorney general of the United States] in the name of the United States as plaintiff in the action.” This amendment solves the 11th Amendment problem, because that amendment only bars suits against States *by individuals*. The downside is that the individual loses the right to bring his or her own action, at his or her own discretion, with his or her own attorney.

To sue a state in federal court under USERRA, you must first complain to the U.S. Department of Labor's Veterans' Employment and Training Service (DOL-VETS), which will conduct an investigation and then, if the matter is not resolved, refer the matter to the attorney general. If the attorney general (actually the Employment Litigation Section in the Justice Department's Civil Rights Division) is reasonably satisfied that you are entitled to the benefits you seek, the attorney general will sue the state for your benefit, but not in your name. This process can take a long time, even before the lawsuit is ever filed.

(If your employer is a private employer or even a political subdivision of a state, such as a county or city, you can initiate the suit in federal court directly, with such counsel as you may retain.)

The 1998 USERRA amendment also provides that “the action may be brought in a state court of competent jurisdiction *in accordance with the laws of the State.*” 38 U.S.C. 4323(b)(2) (emphasis supplied). If you are going to bring your action in state court, you must be familiar with the laws of that state and bring the action at the right time, in the correct court. That is where Mr. Turner's suit failed; he tried to bring the action in the State Supreme Court directly, without exhausting remedies that he had “in the ordinary course of law.”

Mr. Turner acted as his own attorney in this action, which is usually a bad idea. Abraham Lincoln said, “A man who represents himself has a fool for a client. I recognize that it is most difficult to find a lawyer who knows anything about USERRA—you won’t find a ”USERRA” category in the attorney list in your local *Yellow Pages*—but that is one of the purposes of ROA’s Law Review column, to educate lawyers about this important law.