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1.1.1.7—Application of USERRA to State and Local Governments
1.4—USERRA Enforcement

Enforcing USERRA against a State—Part 2

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***McIntosh v. Partridge,* 540 F.3d 315 (5th Cir. 2008).**

As I explained in Law Review 89 and other articles, I had a hand in drafting the Uniformed Services Employment and Reemployment Rights Act (USERRA) during the decade that I worked for the U.S. Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the interagency task force work product that President George H.W. Bush presented to Congress, as his proposal, in February 1991. That proposal was not enacted during the 102nd Congress (199192), but it was enacted at the end of the 103rd Congress (199394) and was signed into law (Public Law 103-353) by President Bill Clinton in October 1994. What Congress enacted in 1994 was similar but not identical to what Ms. Webman and I drafted and what President Bush presented to Congress in 1991.

USERRA is a comprehensive recodification of the Veterans' Reemployment Rights (VRR) law, which can be traced back to 1940. The VRR law served the nation reasonably well for more than half a century, but by the 1980s it had become confusing and cumbersome because of numerous piecemeal amendments and sometimes conflicting court decisions. After Congress abolished the draft in 1973 and after the transition from the "strategic reserve" (available only for World War III) to the "operational reserve" (routinely called for military operations) began in the 1980s, it was clear that the reemployment statute needed to be updated.

The reemployment statute has applied to the federal government and to private employers since 1940. In 1974, Congress amended the law to make it apply to state and local governments as well. After that amendment, Florida and some other states challenged the constitutionality (under the 10th and 11th Amendments to the U.S. Constitution) of applying the reemployment statute to the states and their political subdivisions. Those challenges failed. *See Peel v. Florida Department of Transportation,* 600 F.2d 1070 (5th Cir. 1979).

The 11th Amendment (ratified in 1795) reads: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state or citizens or subjects of any foreign state." Although the text of this amendment bars only suits against a state by a citizen of *another* state, the Supreme Court has held that 11th Amendment immunity also bars a suit against a state by a citizen of that same state. *See Hans v. Louisiana,* 134 U.S. 1 (1890).

The term "11th Amendment immunity" is somewhat misleading. A sovereign state's immunity from suit brought by an individual is based on the structure of the Constitution as a whole, and not just the text of the 11th Amendment. The 11th Amendment is the exclamation point, not the sole basis for the immunity.

At the time that Ms. Webman and I drafted the interagency task force work product that later became USERRA, our understanding was that Congress could abrogate the 11th Amendment immunity of states, provided Congress were sufficiently explicit in making clear its intent to abrogate 11th Amendment immunity. Both Ms. Webman and I were involved in the successful argument of *Reopell v. Commonwealth of Massachusetts,* 936 F.2d 12 (1st Cir. 1991).

In that important case, the U.S. District Court for the District of Massachusetts upheld the constitutionality of applying the VRR law to the Massachusetts state police, except with regard to the imposition of prejudgment interest on a back pay award. The District Court held that the 11th Amendment precluded a federal court from requiring a state agency, as employer, to pay prejudgment interest, in the absence of a specific statutory reference to interest. With the help of DOL and the Department of Justice (DOJ), Mr. Reopell appealed to the U.S. Court of

Appeals for the First Circuit. The First Circuit reversed the District Court and held that the VRR law's abrogation of 11th Amendment immunity was sufficiently clear, even as to prejudgment interest.

"A state shall be subject to the same remedies, including prejudgment interest, as may be imposed upon a private employer under this section." 38 U.S.C. 4323(d)(3). Ms. Webman and I drafted this language in order to preclude exactly the argument that the Commonwealth of Massachusetts had made in *Reopell*. The problem is that we did not anticipate later Supreme Court developments in 11th Amendment jurisprudence.

As originally enacted in 1994, section 4323 of USERRA permitted an individual to sue a state (as well as a political subdivision of a state or a private employer) in federal court, with private counsel or through the assistance of DOL and DOJ. Two years later, the Supreme Court decided *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996). That important Supreme Court decision clarified the 11th Amendment. After that decision, Congress can abrogate 11th Amendment immunity *only* when Congress is acting under constitutional authority that came after the states ratified the 11th Amendment in 1795.

For example, the states ratified the 14th Amendment in 1868. The final section of that Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." A civil rights law can constitutionally authorize a suit against a state because the states ratified the 14th Amendment 73 years after the states ratified the 11th Amendment.

The VRR law and USERRA are based upon the "war powers" clauses of Article I, Section 8 of the Constitution. The Constitution predates the 11th Amendment by eight years. Thus, the U.S. Court of Appeals for the Seventh Circuit held (applying *Seminole Tribe*) that USERRA was unconstitutional insofar as it authorized an individual to sue a state in federal court. *Velasquez v. Frapwell,* 160 F.3d 389 (7th Cir. 1998).

Congress reacted to *Velasquez* by amending USERRA later in 1998. The 1998 amendment authorizes the attorney general of the United States to bring a USERRA action against a state (as employer) "*in the name of the United States as plaintiff in the action.*" 38 U.S.C. 4323(a)(1) (final sentence) (emphasis supplied). This solves the 11th Amendment problem, because the 11th Amendment precludes suits against states in federal court brought by individuals. The 11th Amendment does not preclude a lawsuit against a state brought by the attorney general in the name of the United States, as plaintiff. I discuss all of this in great detail in Law Review 89 (May 2003).

The problem is that to get your case to the attorney general you must go through DOL, and that can take a long time. If DOJ does not agree that your claim has merit, or if DOJ is too busy to bring the case on your behalf, you are likely to be left without a remedy.

"In the case of an action against a state (as an employer) by a person, 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). This means that you can bring your USERRA action in state court, in your own name and with your own lawyer, *if your state has waived sovereign immunity to permit suits of that kind*.

As I explained in Law Review 0830 (June 2008), "the King can do no wrong" is the common law rule in Great Britain and the United States. This means that you cannot sue the sovereign (federal or state) without the sovereign's consent, and until recent decades the sovereign largely withheld that consent. In the decades since World War II, the Congress and most (but certainly not all) state legislatures have enacted laws permitting suits against federal and state government entities for most but not all causes of action. Sovereign immunity is still a bar to suit in some states and with respect to some causes of action.

For example, in Law Review 89 I discussed *Larkins v. Department of Mental Health and Mental Retardation,* 806 So.2d 358 (Alabama Supreme Court 2001). Wallace M. Larkins, a Reservist and an employee of an Alabama state agency, was denied reemployment after he returned from military service. He sued in federal court, but his case was dismissed based on the 11th Amendment. He then sued in state court. His case was dismissed based on sovereign immunity under the Alabama Constitution. He was left without a remedy.

Jonathon McIntosh, DDS, worked for the Richmond State School (RSS) in Richmond, Texas. The RSS is an agency of the state of Texas. Dr. McIntosh was the director of dentistry for the RSS, a home for people with mental and

physical disabilities. He was responsible for treating the dental needs of the residents. His direct supervisor was David Partridge, MD, also a state employee and the medical director of the RSS.

Dr. McIntosh was also a member of the Navy Reserve, and he was called to active duty for a year (October 2004 to October 2005). The RSS retained another dentist to treat the residents during Dr. McIntosh's military duty. That other dentist reported to Dr. Partridge that the dental needs of many of the residents had been neglected during Dr. McIntosh's tenure as the RSS dentist. The RSS brought in still another dentist to audit the dental care of RSS residents, and that audit found that decisions by Dr. McIntosh had resulted in poor dental care for many RSS residents.

Dr. McIntosh completed his active duty and made a timely application for reemployment at the RSS in the fall of 2005. He met the eligibility criteria for reemployment under USERRA, but the RSS refused to reemploy him based on the findings of poor dental care before his military service. Dr. McIntosh filed suit against the RSS in the United States District Court for the Southern District of Texas, seeking to enforce his USERRA rights. (He also sued Dr. Partridge and others under several causes of action unrelated to USERRA.)

The District Court held, and the United States Court of Appeals for the Fifth Circuit affirmed, that Dr. McIntosh could not maintain his USERRA lawsuit against the RSS (a state agency) in federal court and that his USERRA cause of action should be dismissed for want of jurisdiction. This result is not surprising to me. It is entirely consistent with what I wrote in Law Review 89 more than five years ago.

Dr. McIntosh could have brought his suit in state court, if Texas law permits such suits. Alternatively, he could have complained to DOL, which could have referred the matter to DOJ, and DOJ could have brought the suit (if it chose to do so) in federal court, in the name of the United States as the plaintiff. After the 1998 USERRA amendment and the *Velasquez* case, Dr. McIntosh was precluded from bringing his USERRA complaint in federal court in his own name and with his own lawyer.

Just recently, Sen. Robert Casey (DPa.) introduced S.3432, the proposed Servicemembers Access to Justice Act of 2008 (SAJA). Senator Casey introduced this bill on behalf of himself, Sen. Edward Kennedy (DMass.), and Sen. Barack Obama (DIll.). Section 2 of the SAJA would amend section 4323 again and would authorize individuals to bring USERRA actions against states in either state or federal court. The SAJA would also provide: "A state's receipt or use of federal financial assistance for any program or activity of a state shall constitute a waiver of sovereign immunity, under the 11th amendment to the Constitution or otherwise, to a suit [under USERRA]."

This waiver of sovereign immunity would only apply to employees of the state agency or program receiving the federal assistance, or applicants for such positions, or persons seeking to return to such positions after uniformed service. Some state agencies (like the transportation department) typically receive a great deal of federal financial assistance and could not afford to turn it down in order to avoid getting sued under USERRA. Other state agencies (like the taxation department) receive little or no federal financial assistance.

It should also be noted that the Supreme Court has held that political subdivisions of states (counties, cities, school districts, etc.) *do not have 11th Amendment immunity*. *See Hopkins v. Clemson College,* 221 U.S. 636, 645 (1911). "In this section, the term 'private employer' includes a political subdivision of a state." 38 U.S.C. 4323)(j). This means that if your employer is a political subdivision of a state, rather than the state itself, you can bring your lawsuit against the political subdivision in federal court, in your own name and with your own lawyer.