Number 89, September 2003:
Enforcing USERRA against a State

By CAPT Samuel F. Wright, JAGC, USNR*

Readers of the Law Review column may get the incorrect impression that the Reserve Component member always wins in cases arising under the Uniformed Services Employment and Reemployment Rights Act (USERRA), Title 38 United States Code (U.S.C.) 4301-4333. Unfortunately, that is not the case. This article deals with a recent Alabama Supreme Court case involving a serious USERRA violation that went unremedied because of a jurisdictional problem. Larkins v. Department of Mental Health and Mental Retardation, 806 So.2d 358 (Ala. 2001).

Wallace M. Larkins was an Air Force Reservist and a police officer for the Alabama Department of Mental Health and Mental Retardation. In July 1994, while on Air Force Reserve training duty, he suffered a serious foot injury, which the Air Force characterized as having been suffered "in the line of duty." Because of physical limitations resulting from the injury, he was unable to go back to work as a police officer until March 1996. The employer denied Larkins' repeated requests for an accommodation—putting him in a "light duty" status. After exhausting his accrued annual leave, he received no pay from the employer until he finally returned to work, almost two years later.

In its opinion, the Alabama Supreme Court incorrectly assumed that USERRA applied to Mr. Larkins' situation. In fact, the Veterans' Reemployment Rights (VRR) law (formerly codified at 38 U.S.C. 2021-2026) applied because Larkins completed his period of service and sought re-employment before USERRA's effective date (12 December 1994). USERRA's transition rules are not codified, but you can find them in a note following 38 U.S.C. 4301 in United States Code Annotated.

Larkins initiated his lawsuit, with private counsel, in the United States District Court for the Middle District of Alabama, which dismissed the suit, based on the 11th Amendment to the United States Constitution. That amendment provides: "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 by Citizens or Subjects of any Foreign State." (Capitalized just that way, in the 18th century style.)

Although the 11th Amendment speaks to a suit against a state by a citizen of another state, or a foreign state, the Supreme Court held that 11th Amendment immunity also precludes a suit against a state by a citizen of that same state. Hans v. Louisiana, 134 U.S. 1 (1890)."Eleventh Amendment immunity" is a somewhat misleading shorthand. The immunity of a sovereign state from being hauled into federal court by an individual citizen, without the state's consent, is based on the structure of the Constitution itself. The

11th Amendment is the exclamation point, not the sole basis for this immunity.

As many readers are aware, I had a hand in drafting USERRA while employed as an attorney for the U.S. Department of Labor (DoL). Susan M. Webman, another DoL attorney, and I drafted the interagency task force work product that became USERRA, with some changes in Congress. Ms Webman and I were under the impression, when we drafted the pertinent USERRA language, that Congress could abrogate the 11th Amendment of states, so long as Congress was explicit that it intended to abrogate such immunity.

Our understanding of the 11th Amendment was based on Reopell v. Commonwealth of Massachusetts, 936 F.2d 12 (1st Cir. 1991). Ms. Webman and I both participated in drafting the successful appellate brief for Mr. Reopell in the United States Court of Appeals for the First Circuit.

Mr. Reopell was a Massachusetts state police trooper. State Police Regulation 10.83, then in effect, stated that state police officers were not permitted to join any federal or state military organization, other than the Massachusetts National Guard, without the prior written permission of the state police commissioner. Reopell applied for permission and was denied, and then joined the Army Reserve anyway. When his supervisor learned that Reopell had joined the Army Reserve, he brought him up on state police charges. Reopell received a one-month suspension without pay; as a result, he lost pay, vacation time, sick leave, and seniority.

Reopell sued the Commonwealth of Massachusetts in federal court, with the help of DoL and the Department of Justice (DoJ). We won in Federal District Court on all issues except one. The District Court held that State Police Regulation 10.83 was invalid because it conflicted with the VRR law. The court ordered the commonwealth to reimburse Reopell for $3,260.41 in lost wages, from the one-month suspension, and the court ordered Massachusetts to restore Reopell's lost vacation, sick leave, and seniority. The court ordered Massachusetts to rescind the order requiring Reopell to resign from the Army Reserve and to publish a comprehensive order explaining to state police officers that the court had found the policy embodied in Rule 10.83 to be unlawful under the VRR law and had enjoined its enforcement.

The one remaining issue was the awarding of interest on the back pay. As of February 1990, that interest amounted to $1,788.01, with further interest accruing at the rate of 8 percent. The District Court held that it could not, consistently with the 11th Amendment, award interest on the back pay. The District Court held that there must be a separate congressional abrogation of 11th Amendment immunity, specifically mentioning interest. We appealed and won this one remaining issue in the First Circuit, which held that the VRR law's abrogation of 11th Amendment immunity was sufficiently clear, even as to interest.

Ms. Webman and I had Reopell in mind when we drafted the language now codified at 38 U.S.C. 4323(d)(3): "A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section." (Emphasis supplied.) We thought that this language, with an accompanying explanation in the legislative history, was sufficient to solve the 11th Amendment problem, even if the District Court, not the First Circuit, had been correct about there being a special rule as to interest. I confess that we did not anticipate the holding of the Supreme Court in Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

In Seminole Tribe, the Court held that Congress has the authority to abrogate 11th Amendment immunity only when it acts under section 5 of the 14th Amendment: "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." USERRA and the VRR law are based on the "war powers" clauses of Article I, section 8. Accordingly, USERRA is unconstitutional insofar as it authorizes an individual to sue a state in federal court. See Velasquez v. Frapwell, 160 F.3d 389 (7th Cir. 1998), citing Seminole.

After the United States District Court for the Middle District of Alabama dismissed Larkins' lawsuit, based on the 11th Amendment, he refiled his claims against the Alabama Department of Mental Health and Mental Retardation in the Montgomery Circuit Court (state court). The department did not assert sovereign immunity in the Circuit Court, but it filed a motion for summary judgment. The department relied on Monroe v. Standard Oil Co., 452 U.S. 549 (1981). The department claimed that Monroe supports its argument that the employer was not required to make accommodations for Larkins' Air Force Reserve duties and for the temporary disability resulting from the injury he suffered in the line of duty.

The Montgomery Circuit Court granted the department's summary judgment motion and Larkins appealed to the Alabama Supreme Court. The State Supreme Court did not reach the merits. Instead, the Supreme Court held that Larkins' suit against a state agency was precluded by Article I, section 14 of the Alabama Constitution (absolute, unwaiveable sovereign immunity). Although the Department of Mental Health and Mental Retardation did not assert immunity under the state constitution in the Circuit Court, and asserted such immunity only imprecisely in the Supreme Court, the high court held that the sovereign immunity had not been waived and could not be waived. Thus, Larkins was left without a remedy.

There is a solution to this dilemma, under a 1998 USERRA amendment: "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." 38 U.S.C. 4323(a)(1)(final sentence, added in 1998). In January of this year, Mr. Jayson Spiegel (then executive director of ROA) sent a letter to Attorney

General Ashcroft, asking DoJ to act diligently to enforce USERRA (Law Review 65). Mr. Spiegel's letter included this sentence: "It is particularly important that DoJ act as attorney in those cases where the defendant (employer) is a state, because in those cases there is literally no remedy if your department does not get involved." The Larkins precedent is further evidence of the need for DoJ enforcement of USERRA, especially in those cases where the employer is a state.

Note: "In this section, the term 'private employer' includes a political subdivision of a state." 38 U.S.C. 4323(j). Political subdivisions include counties, cities, etc. If your employer is a political subdivision, you can sue that employer, under USERRA, in Federal District Court, in your own name and with your own lawyer. You do not have an 11th Amendment problem because the Supreme Court has held that "neither public corporations nor political subdivisions are clothed with that immunity from suit which belongs to the State alone by virtue of its sovereignty." Hopkins v. Clemson College, 221 U.S. 636, 645 (1911).

*Military title used for purposes of identification only. The views expressed in these articles are the personal views of the author and are not necessarily the views of the Department of the Navy, the Department of Defense, the Department of Defense or the U.S. government. You can contact CAPT Wright by e-mail, at **swright@roa.org**. You can also write to him in care of ROA.