

LAW REVIEW 89 - REV

CLARIFICATION TO LAW REVIEW 65 AND LAW REVIEW 89

(June 2008)

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Law Review 65 (published by ROA in the March-April 2003 issue of The Officer) is a copy of a letter from Jayson L. Spiegel (then the Executive Director of ROA) to the Honorable John Ashcroft (then the Attorney General of the United States). The letter (which I drafted for Mr. Spiegel) contains the following sentence: "It is particularly important that DOJ [Department of Justice] act as attorney [for the individual claiming reemployment rights] 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." I also quoted that sentence in Law Review 89 ("Enforcing USERRA Against a State"), which was published in September 2003.

It has come to my attention that the quoted sentence is not always correct. The Uniformed Services Employment and Reemployment Rights Act (USERRA) provides, "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).

If you have a USERRA cause of action against a state (as an employee, former employee, or prospective employee of that state), you can retain your own attorney and file suit against the state in state court (not federal court), to enforce your USERRA rights, provided the state has enacted legislation permitting individuals to sue the state in matters of that kind. You will be required to comply with the state statute of limitations and any conditions precedent to filing suit (like presenting a formal written request for relief to the Governor) that the state law imposes.

In recent decades, most states have enacted legislation or constitutional amendments waiving sovereign immunity as to most kinds of claims. As I described in Law Review 89, Alabama has not yet waived sovereign immunity and does not permit individuals to sue the state in state court. If your claim is against the State of Alabama or another state that has not waived sovereign immunity, your only way to get USERRA relief is to go through the Department of Labor and the Department of Justice, and to get the Attorney General of the United States to sue the state, in the name of the United States, in accordance with 38 U.S.C. 4323(b)(1).