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

DOJ Sues Alabama DMHMR

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On Dec. 30, 2008, the U.S. Department of Justice (DOJ) filed suit against the Alabama Department of Mental Health and Mental Retardation (DMHMR) in the U.S. District Court for the Middle District of Alabama, alleging that the DMHMR violated the Uniformed Services Employment and Reemployment Rights Act (USERRA) when it failed or refused to reemploy Roy Hamilton upon his release from active duty in April 2005.

After the DMHMR unlawfully denied Mr. Hamilton reemployment, he complained to the U.S. Department of Labor, Veterans' Employment and Training Service (DOLVETS), which investigated his complaint and found it to have merit, and so advised the employer. After the employer refused to comply with USERRA, the agency referred Mr. Hamilton's claim to DOJ, recommending that DOJ sue the DMHMR

I am pleased that DOJ has filed this lawsuit, but I am disappointed that it has proved necessary for the federal government to sue the state of Alabama to make that state reemploy the brave young men and women who temporarily leave state employment for military service in the Global War on Terrorism. I have communicated this concern to the president of ROA's Department of Alabama, and he has shared this concern with the governor, attorney general, and legislature of Alabama.

Mr. Hamilton is a member of the Alabama Army National Guard. He was called to active duty and deployed to Iraq in July 2004. He met USERRA eligibility criteria for reemployment in that he gave prior notice to his civilian employer, was released from active duty without receiving a punitive or other-than-honorable discharge, and made a timely application for reemployment, well within the 90-day deadline after he left active duty in April 2005. Moreover, he has not exceeded USERRA's cumulative five-year limit on the duration of the period or periods of uniformed service.

Mr. Hamilton made a timely application for reemployment, but the employer did not reemploy him. More than two years later, in August 2007, he applied to the DMHMR for a vacant position and was hired as a new employee.

If DOJ prevails in this lawsuit, and it sounds like liability is clear, Mr. Hamilton will be entitled to a court order requiring the DMHMR to treat him as if he had been continuously employed, for seniority and pension purposes, from his initial hire date through the present. Under the "escalator principle," Mr. Hamilton is entitled to be treated as if he had been continuously employed during the nine months (July 2004 through April 2005) that he was on active duty. "The returning veteran does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946). I invite the reader's attention to Law Review 0803 for a detailed discussion of the *Fishgold* case and its implications.

Mr. Hamilton is also entitled to be treated as if he had been continuously employed during the 28 months (April 2005 through August 2007) when he should have been back on the DMHMR payroll but was not, and he is entitled to back pay (with interest) to compensate him for the pay and benefits that he lost during that 28-month period. If his pay in his new DMHMR job, since August 2007, has been less than what his pay would have been if he had been continuously employed since his initial hire date, he is entitled to more back pay, for the difference. If DOJ proves that the DMHMR violated USERRA willfully, the court will order the employer to pay double damages. I invite the reader's attention to Law Review 206, for a detailed discussion of the remedies available in USERRA cases.

The 11th Amendment of the United States Constitution 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." The 11th Amendment was ratified in 1795. In Law Review 89 and Law Review 0848, I discuss in detail the complications that the 11th Amendment raises for USERRA enforcement against state governments as employers.

Mr. Hamilton is a citizen of Alabama. The 11th Amendment, by its terms, bars a suit in federal court against a state by a citizen of *another* state. Unfortunately, the Supreme Court has determined that the 11th Amendment also bars suits against states by citizens of the same state. *See Hans v. Louisiana,* 134 U.S. 1 (1890).

As originally enacted in 1994, USERRA authorized an individual veteran or Reserve Component member to sue a state in federal court, either with his or her own attorney or with DOJ acting as the attorney. In 1998, the U.S. Court of Appeals for the Seventh Circuit held USERRA to be unconstitutional 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 solve the problem created by the *Velasquez* decision. Section 4323(a)(1) of USERRA [38 U.S.C. 4323(a)(1)] now provides that USERRA lawsuits against state governments, as employers, shall be brought by the U.S. attorney general (DOJ) in the name of the United States, as plaintiff. This solves the 11th Amendment problem, because that amendment bars federal court lawsuits against states initiated by individuals. The 11th Amendment does not bar a suit against a state initiated by the attorney general in the name of the United States.

USERRA also 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) (emphasis supplied). In Alabama, the state's Supreme Court has determined that under the Alabama Constitution sovereign immunity is still the rule and that individuals are precluded from suing the state of Alabama in state court to enforce their USERRA rights. *See Larkins v. Department of Mental Health and Mental Retardation,* 806 So.2d 358 (Ala. 2001).

I discuss *Larkins* and its implications in detail in Law Review 89. Mr. Larkins, like Mr. Hamilton, worked for the Alabama DMHMR. When he returned from military service, the DMHMR refused to comply with USERRA. Mr. Larkins sued the DMHMR in federal court, and his suit was dismissed based on the 11th Amendment sovereign immunity of the state. He then sued in state court and lost because of the sovereign immunity of the state under the Alabama Constitution. He was left without a remedy for a serious USERRA violation.

I invite the reader's attention to Law Review 65 ("Letter to DOJ on USERRA Enforcement") and Law Review 148 ("Good News on USERRA Enforcement"). As of October 2004, responsibility for representing USERRA claimants in cases against state and local governments and private employers was transferred from DOJ's Civil Division to DOJ's Civil Rights Division. This important responsibility has gotten much better attention in the Civil Rights Division.

If Mr. Hamilton's employer were a local government or a private employer, he would not have the 11th Amendment problem. In that case, he could sue the employer in federal court, in his own name and with his own lawyer. If he sued in federal court and prevailed, he could get the court to order the employer to pay his attorney fees. *See* 38 U.S.C. 4323(h)(2).

If DOJ had not filed this lawsuit against the Alabama DMHMR, Mr. Hamilton would have been left without a remedy, just as Mr. Larkins was left without a remedy. It is most important that DOJ get involved in USERRA cases against states, and especially in states (like Alabama) where state sovereign immunity is still the rule in state court.