LAW REVIEW 1014

11th Amendment Does Not Bar Suit against a State by the United States

By Captain Samuel F. Wright, JAGC, USN (Ret.)

***United States v. Alabama Department of Mental Health and Mental Retardation,* 2010 WL 447399 and 2010 WL 454905 (M.D. Ala. Feb. 9, 2010 and Feb. 10, 2010).**

1.1.1.7—Application of USERRA to State and Local Governments
1.3.2.2—Continuous Accumulation of Seniority-Escalator Principle
1.4—USERRA Enforcement

Congress' preferred solution to the 11th Amendment problem, in enforcing the Uniformed Services Employment and Reemployment Rights Act (USERRA) against a state (as employer), has not been tested, until now. I am pleased to report that this solution has passed with flying colors.

On Dec. 30, 2008, the U.S. Department of Justice (DOJ) filed suit against the Alabama Department of Mental Health and Mental Retardation[1] (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 (DOL-VETS), 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

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 the 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 appears that 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).

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.

Because the United States is the plaintiff in this case, and not Mr. Hamilton, the plaintiff is seeking broader relief, including an injunction requiring the DMHMR to comply with USERRA in the future, not just with respect to Mr. Hamilton but with respect to veterans and National Guard and Reserve personnel generally. The opportunity to seek broader prospective relief is another advantage of a lawsuit brought by the United States.

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.

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 held 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 held 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 discuss the 11th Amendment problem in suing a state in Law Reviews 89, 0848, 0912, 0918, 0930, 0931, 0936, and 1011. All previous Law Review articles (more than 600) are available at www.roa.org/law_review.

Based on the 1998 USERRA amendment, the Attorney General of the United States brought this action in the name of the United States as named plaintiff. In briefs filed in this case, the DMHMR attorneys repeatedly and mistakenly referred to Mr. Hamilton as the "Plaintiff." Chief Judge Mark E. Fuller of the United States District Court for the Middle District of Alabama rebuked the attorneys[2] for that reference and pointed out that "The United States is the only plaintiff in this action." Footnote 1 in the Feb. 10 decision. Judge Fuller forcefully rejected the DMHMR's argument that sovereign immunity or the 11th Amendment bars this action:

"The plain text of this provision [the 11th Amendment] does nothing to prohibit the United States from bringing suit against a state. It is well-settled that states are subject to suit by the United States. *See, e.g., United States v. Mississippi,*380 U.S. 128 (1965); *Monaco v. Mississippi,* 292 U.S. 313, 329 (1934); *Equal Employment Opportunity Commission v. Board of Supervisors of the University of Louisiana System,* 559 F.3d 270, 272 (5th Cir. 2009); *Chao v. Virginia Department of Transportation,* 291 F.3d 276, 280 (4th Cir. 2002). States, in ratifying the Constitution, did surrender a portion of their inherent immunity by consenting to suits brought by sister states or by the Federal Government. *See, e.g., Alden v. Maine,* 527 U.S. 706, 755 (1999). Indeed, one of the very cases on which the Department [DMHMR] relies for its

contention that the Eleventh Amendment bars this action, in fact, recognizes that the "Federal Government can bring suit in federal court against a State" in order to ensure its "compliance with federal law."*Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 71 n. 14 (1996) (holding that Congress lacked authority under Article I of the Constitution to abrogate the states' Eleventh Amendment immunity from suit by private parties without the states' consent). More specifically, USERRA itself contemplates the filing of this very type of action. If the Attorney General is reasonably satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the Attorney General may appear on behalf of ... the person on whose behalf the complaint is submitted and commence an action for relief under this chapter for such person. *In the case of such an action against a State (as an employer), the action shall be brought in the name of the United States as the plaintiff in the action.* 38 U.S.C. 4323(a) (emphasis supplied).

The Department [DMHMR] argues that the United States is not acting here to protect its interests and that the real party in interest is Hamilton. The Court cannot agree. The United States has a clear interest in protecting the employment rights of members of its armed services upon their return from deployment because these rights are key in promoting enlistment. Additionally, the United States has a real and substantial interest in ensuring compliance with its laws generally as well as with USERRA specifically.

Simply put, there is no merit to the Department's [DMHMR's] contention that sovereign immunity or the Eleventh Amendment shield it from this suit. To the extent that the Department [DMHMR] seeks judgment on the pleadings on this basis, its motion is due to be DENIED. To the extent that the United States seeks judgment as a matter of law on the inapplicability of this defense, its motion is due to be GRANTED."

In Law Review 0918 (May 2009), I reported on the initiation of this lawsuit, and I stated, "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."

I congratulate attorneys Antoinette Barksdale, Esther G. Lander, John M. Gadzichowski, and Sarah C. Blutter of DOJ for initiating and prosecuting this lawsuit and for their success so far. I again call upon the Governor, Attorney General, and Legislature of Alabama to drop their frivolous defenses and immediately come into full compliance with USERRA and other laws enacted to protect the rights of the brave young men and women who are prepared to lay down their lives in defense of our country.

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[1] Sarah Palin, Timothy Shriver, and others have recently criticized the use of the term "mental retardation" as outmoded and unnecessarily demeaning, but this term is utilized by the State of Alabama as part of the name of this state agency.

[2] In a footnote, Judge Fuller stated, "Counsel for the Department is reminded of their obligations under Federal Rule of Civil Procedure 11 and cautioned against practicing in this fashion in this Court."

If you have questions, suggestions, or comments, please contact Captain Samuel F. Wright, JAGC, USN (Ret.) (Director of the Servicemembers' Law Center) at swright@roa.org or 800-809-9448, ext. 730.