

LAW REVIEW 1029

You Can Sue a Political Subdivision Under USERRA

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***Rimando v. Alum Rock Union Elementary School District*, 2009 WL 4837653 (9th Cir. Dec. 15, 2009).**

The United States Court of Appeals for the 9th Circuit has wrought an injustice through its failure to understand the critical distinction between an entity of state government (like the University of Alaska) and a *political subdivision of a state* (like the Alum Rock Union Elementary School District of California). The court erred by treating these two entities as similar, when they are fundamentally different.

The Uniformed Services Employment and Reemployment Rights Act (USERRA) is the 1994 recodification of the Veterans' Reemployment Rights Act (VRRRA), which dates back to 1940. This is the law that gives an individual the right to reemployment in a civilian job that the individual left for the purpose of performing voluntary or involuntary military service. The VRRRA has applied to the Federal Government and to private employers since 1940. In 1974, Congress amended the VRRRA to expand the applicability to include state and local governments as well.

As enacted in 1994, USERRA permits an individual to sue a state, a political subdivision of a state, or a private employer in the United States District Court for any district where the private employer maintains a place of business or where the governmental entity exercises its functions. Four years later, the United States Court of Appeals for the 7th Circuit held that USERRA was unconstitutional (under the 11th Amendment of the United States Constitution) insofar as it permitted an individual to sue a state government entity in federal court. *Velasquez v. Frapwell*, 160 F.3d 389 (7th Cir. 1998). The 7th Circuit held that Indiana University (the employer and defendant in the case) was an entity of the Indiana state government and was immune from suit by individuals in federal court, in accordance with the 11th Amendment.

The 11th Amendment (ratified in 1795) 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." Although the 11th Amendment, by its terms, only precludes a suit against a state by a citizen of *another* state, or a foreign state, the Supreme Court has held that the 11th Amendment immunity also bars a suit against a state by a citizen of the same state. See *Hans v. Louisiana*, 134 U.S. 1 (1890).

In late 1998, Congress amended USERRA to address the *Velasquez* problem. "A person who receives from the Secretary [of Labor] a notification pursuant to section [4322 \(e\)](#) of this title of an unsuccessful effort to resolve a complaint relating to a State (as an employer) or a private employer may request that the Secretary refer the complaint to the Attorney General. Not later than 60 days after the Secretary receives such a request with respect to a complaint, the Secretary shall refer the complaint to the Attorney General. 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, and act as attorney for, 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)(1) (emphasis supplied). The 1998 amendment added this final, italicized sentence.

There are generally two ways to enforce your USERRA rights against a state or local government or private employer. (A different enforcement mechanism, through the Merit Systems Protection Board, applies to cases against federal agencies as employers.) You can make a complaint to the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), which will investigate your

complaint and try to convince the employer to comply. If the DOL-VETS persuasion efforts fail, DOL-VETS will refer the case to the Attorney General of the United States (Department of Justice or DOJ). If DOJ agrees that the claimant is entitled to the USERRA benefits that he or she seeks, DOJ then files suit against the employer in the appropriate federal district court and represents the claimant in the lawsuit, at no charge to the claimant.

Under USERRA and the VRRRA, the named plaintiff in a USERRA case is the individual veteran or National Guard or Reserve member, not the United States, even if DOJ is providing free legal representation. Under the 1998 USERRA amendment, an exception is made for cases against states, as employers. In those cases, the named plaintiff is the United States of America, represented by the Attorney General. This solves the 11th Amendment problem, because that amendment does not bar suits against states brought by the United States. I invite the reader's attention to Law Review 1014 (Feb. 2010), titled "11th Amendment Does Not Bar Suit Against a State Brought by the United States." You can find more than 600 articles about USERRA and other military-related laws at www.roa.org/law_review. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics.

But USERRA has no exhaustion of remedies requirement or "right to sue letter" requirement. If you want free legal help from DOJ, you must go through DOL-VETS. But if you are prepared to file suit in your own name, and with your own lawyer, you can file the suit in the appropriate federal district court without first filing a complaint with DOL-VETS. If you proceed with private counsel and prevail, the court may (in its discretion) award you attorney fees as a part of the relief. "In any action or proceeding to enforce a provision of this chapter by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses." 38 U.S.C. 4323(h)(2).

But if your employer is a state, and you are proceeding in your own name with your own lawyer, you can only bring the lawsuit in state court, not federal court. "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 live in a state (like Alabama or Pennsylvania) where the state constitution precludes suits against the state in state court, you are left without a remedy, unless DOJ is willing to file suit on your behalf.

In the 1998 USERRA amendments, Congress made a clear distinction between a state government entity (like Indiana University in *Velasquez*) and a *political subdivision of a state* (like a county, city, school district, etc.). An individual can sue a political subdivision in federal court, in the individual's own name. An individual cannot sue a state government entity in federal court. In this section, the term 'private employer' includes a political subdivision of a State." 38 U.S.C. 4323(i). The Supreme Court has explicitly held that political subdivisions of states do not have 11th Amendment immunity. See *Hopkins v. Clemson College*, 221 U.S. 636, 645 (1911).

In *Rimando*, the 9th Circuit relied on its earlier decision in *Townsend v. University of Alaska*, 543 F.3d 478 (9th Cir. 2008). In that case, the court decided (correctly in my view) that the 11th Amendment and the 1998 USERRA amendment barred an individual's USERRA suit against the University of Alaska, which is an entity of the Alaska state government, just as Indiana University (in *Velasquez*) is an entity of the Indiana state government.

In its haste to be rid of *Rimando* without oral arguments and without an officially published decision, the 9th Circuit held, "Rimando's arguments are all foreclosed by our decision in *Townsend v. University of Alaska*, 543 F.3d 478 (9th Cir. 2008)." If the three judges on the *Rimando* court had given the case the time and attention that it deserved, they would have realized the critical distinction between the University of Alaska (which cannot be sued in federal court by an individual, under USERRA), and the Alum Rock Union Elementary School District, which can be sued individually in federal court. The University of Alaska is a state government entity. The school district is a political subdivision of the State of California.

USERRA does not define the term "political subdivision of a state." I found a succinct and helpful definition in the *U.S. History Encyclopedia*, "Political subdivisions are local governments created by the states to help fulfill their obligations. Political subdivisions include counties, cities, towns, villages, and special districts such as school districts, water districts, park districts, and airport districts. In the late 1990s, there were almost 90,000 political subdivisions in the United States." Applying this definition, it is clear that the Alum

Creek Union Elementary School District is a political subdivision, not a state government entity. The 9th Circuit got it wrong.

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.