

LAW REVIEW 1051

Alabama Ordered To Comply with USERRA

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

1.1.1.7—USERRA Application to State and Local Governments

1.4—USERRA Enforcement

In Law Review 1014 (March 2010), I reported on *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). The United States Department of Justice (DOJ) brought suit against the Alabama Department of Mental Health and Mental Retardation (DMHMR) [\[1\]](#) in the name of the United States, as plaintiff, on behalf of employee Roy Hamilton. Now, the trial has been held, and DOJ won.

Mr. Hamilton was hired by the DMHMR on July 13, 1987. He worked for the agency continuously until July 2004, when he was called to active duty by the Alabama Army National Guard and deployed to Iraq. He served honorably and was released from active duty in April 2005, and he promptly applied for reemployment with the state agency. Although he clearly met the eligibility criteria for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA), the state agency failed to reemploy him. More than two years later, he applied to the DMHMR for a vacant position and was hired as a new employee in Aug. 2007.

As I explained in Law Review 89, Law Review 1014, and other articles, enforcing USERRA against a state government employer is complicated by the 11th Amendment of the United States Constitution: "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, the Supreme Court long ago held that the 11th Amendment also bars a suit against a state by a citizen of the *same* state. *Hans v. Louisiana*, 134 U.S. 1 (1890).

As enacted in 1994, USERRA authorized individuals to sue state government employers in federal court, to enforce USERRA. The Seventh Circuit (the federal appellate court for Illinois, Indiana, and Wisconsin) held that USERRA was unconstitutional insofar as it permitted an individual to sue a state in federal court. *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 addressed the *Velasquez* problem by amending USERRA. As amended, USERRA provides for the Attorney General of the United States to bring the suit in the name of the United States, as plaintiff. The 11th Amendment does not bar a suit against a state by the United States.

After he was unlawfully denied reemployment in April 2005, upon his return from active duty, Mr. Hamilton made a formal complaint to the Veterans' Employment and Training Service, United States Department of Labor (DOL-VETS), and that agency investigated his complaint and found it to have merit. DOL-VETS tried to persuade Alabama to comply with USERRA, but the state would hear none of it. DOL-VETS then referred the case file to DOJ, which agreed that the case had merit and filed suit against Alabama in the United States District Court for the Middle District of Alabama, where the case was assigned to Chief Judge Mark E. Fuller.

Alabama sought to have the suit dismissed under the 11th Amendment, contending that Roy Hamilton was the "real party in interest" and that the 11th Amendment barred this suit. In Feb. 2010, Judge Fuller firmly rejected that argument. In a footnote, he firmly rebuked Alabama's attorneys for wasting the court's time with frivolous arguments. I thought that the stern rebuke would get Alabama's attention and that the state would quickly come into compliance and stop wasting further time, but the state insisted on a trial, which was conducted in June 2010. On July 28, 2010, Judge Fuller entered judgment for DOJ.

Judge Fuller awarded Mr. Hamilton \$23,350 in back pay and retirement contributions and \$2,997 in annual and sick leave, and the judge ordered the state to restore Mr. Hamilton's seniority, based on his original 1987 hire date. Under USERRA, Mr. Hamilton is entitled to be treated, for seniority and pension purposes, as if he had been continuously employed during the nine months that he was on active duty and also during the 28 months between his return from military service and application for reemployment and his eventual rehire as a new employee in Aug. 2007.

Because DOJ brought this suit in the name of the United States, not Roy Hamilton, DOJ sought and Judge Fuller ordered broad injunctive relief, for National Guard and Reserve personnel in general, not just Mr. Hamilton. Judge Fuller ordered ADMH to amend its policies and procedures, in accordance with USERRA, and to conduct mandatory training on USERRA for all ADMH managers and personnel officials.

As of this writing, it is unclear whether Alabama will comply, or whether the state will waste more time and money by appealing to the Eleventh Circuit (the federal appellate court for Alabama, Florida, and Georgia). We will keep the readers informed of any future developments in this important case.

In announcing this favorable result, the Honorable Thomas E. Perez (DOJ's Assistant Attorney General for the Civil Rights Division) stated: "Members of our armed forces deserve the comfort of knowing that they will not be sacrificing their civilian careers when they make the choice to serve our nation in the military. Mr. Hamilton will be made whole, and the Department of Justice will continue to seek relief on behalf of other servicemembers for violations of USERRA."

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

[1] Alabama recently renamed this agency the "Alabama Department of Mental Health" (ADMH). The term "mental retardation" is considered archaic and insensitive.