Law Review 1140

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Suing a State Government Employer under USERRA

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

***Anstadt v. Board of Regents of the University System of Georgia,* 303 Ga. App. 483, 693 S.E.2d 868 (2010).**

"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." United States Constitution, 11th Amendment (ratified February 7, 1795). Yes, it is capitalized just that way, in the style of the late 18th Century.

"In the case of such an action [to enforce USERRA] 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) (final sentence—added in 1998) (emphasis supplied).

"In the case of an action [to enforce USERRA] against a State (as an employer) commenced by the United States, the district courts of the United States shall have jurisdiction over the action." 38 U.S.C. 4323(b)(1).

"In the case of an action [to enforce USERRA] 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).

Anstadt is another illustration of the difficulty of enforcing the Uniformed Services Employment and Reemployment Rights Act (USERRA) against a State, as employer, because of the 11th Amendment of the United States Constitution.

Dr. Mark P. Anstadt is a physician in the Army Reserve and a distinguished cardiothoracic surgeon. In his civilian capacity, he was hired by the Medical College of Georgia (MCG) in July 2000. The Army called him to active duty from March 6 to June 2, 2003. He returned to work promptly at MCG after his release from active duty, but shortly after his return to work the Chairman of the MCG's Department of Surgery told him "that he was no longer in the plans for MCG's future." He continued to work for MCG until June 30, 2004, when his contract expired and was not renewed.

Dr. Anstadt claimed that MCG's decision not to renew his contract violated section 4311(a) of USERRA, which provides: "A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in the uniformed services shall not be denied initial employment, reemployment, *retention in employment,* promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation." 38 U.S.C. 4311(a) (emphasis supplied).

Dr. Anstadt retained private counsel (John M. Brown, Esq. of Augusta, Georgia) and sued MCG in federal court. There is no indication that he ever sought assistance from the Department of Defense's National Committee for Employer Support of the Guard and Reserve (ESGR) or filed a complaint with the Department of Labor's Veterans' Employment and Training Service (DOL-VETS).

Mr. Brown dismissed his federal complaint (probably because of the 11th Amendment problem) and then filed the case in the Richmond County Superior Court. After the discovery process had been completed, MCG's counsel filed a motion for summary judgment, and the court granted summary judgment on the basis of MCG's sovereign immunity as an instrumentality of the State of Georgia.

On behalf of Dr. Anstadt, Mr. Brown appealed to Georgia's Court of Appeals (the intermediate appellate court below the Georgia Supreme Court in the state court system). The Court of Appeals affirmed the summary judgment on March 25, 2010. Dr. Anstadt applied to the Georgia Supreme Court for *certiorari* (discretionary review). The state's high court denied *certiorari* on October 4, 2010. Dr. Anstadt did not apply to the United States Supreme Court for *certiorari,* and this case is now final.

Although the 11th Amendment speaks to a suit against a state by a citizen of another state, or a foreign state, the Supreme Court held that 11th Amendment immunity also precludes a suit against a state by a citizen of that same state. *Hans v. Louisiana*, 134 U.S. 1 (1890.

As many readers are aware, I had a hand in drafting USERRA while employed as an attorney for the U.S. Department of Labor (DOL). Susan M. Webman, another DOL attorney, and I drafted the interagency task force work product that became USERRA, with some changes in Congress. Ms Webman and I were under the impression, when we drafted the pertinent USERRA language, that Congress could abrogate the 11th Amendment of states, so long as Congress was explicit that it intended to abrogate such immunity.

Our understanding of the 11th Amendment was based on *Reopell v. Commonwealth of Massachusetts*, 936 F.2d 12 (1st Cir. 1991). Ms. Webman and I both participated in drafting the successful appellate brief for Mr. Reopell in the United States Court of Appeals for the First Circuit.

Mr. Reopell was a Massachusetts state police trooper. State Police Regulation 10.83, then in effect, stated that state police officers were not permitted to join any federal or state military organization, other than the Massachusetts National Guard, without the prior written permission of the state police commissioner. Reopell applied for permission and was denied, and then joined the Army Reserve anyway. When his supervisor learned that Reopell had joined the Army Reserve, he brought him up on state police charges. Reopell received a one-month suspension without pay; as a result, he lost pay, vacation time, sick leave, and seniority.

Reopell sued the Commonwealth of Massachusetts in federal court, with the help of DOL and the Department of Justice (DoJ). We won in Federal District Court on all issues except one. The District Court held that State Police Regulation 10.83 was invalid because it conflicted with the VRR law. The court ordered the commonwealth to reimburse Reopell for $3,260.41 in lost wages, from the one-month suspension, and the court ordered Massachusetts to restore Reopell's lost vacation, sick leave, and seniority. The court ordered Massachusetts to rescind the order requiring Reopell to resign from the Army Reserve and to publish a comprehensive order explaining to state police officers that the court had found the policy embodied in Rule 10.83 to be unlawful under the VRR law and had enjoined its enforcement.

The one remaining issue was the awarding of interest on the back pay. As of February 1990, that interest amounted to $1,788.01, with further interest accruing at the rate of 8 percent. The District Court held that it could not, consistently with the 11th Amendment, award interest on the back pay. The District Court held that there must be a separate congressional abrogation of 11th Amendment immunity, specifically mentioning interest. We appealed and won this one remaining issue in the First Circuit, which held that the VRR law's abrogation of 11th Amendment immunity was sufficiently clear, even as to interest.

Ms. Webman and I had *Reopell* in mind when we drafted the language now codified at 38 U.S.C. 4323(d)(3): "A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section." We thought that this language, with an accompanying explanation in the legislative history, was sufficient to solve the 11th Amendment problem, even if the District Court, not the First Circuit, had been correct about there being a special rule as to interest. I confess that we did not anticipate the holding of the Supreme Court in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

In *Seminole Tribe*, the Court held that Congress has the authority to abrogate 11th Amendment immunity only when it acts under section 5 of the 14th Amendment: "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." USERRA and the VRR law are based on the "war powers" clauses of Article I, section 8. Accordingly, USERRA is unconstitutional insofar as it authorizes an individual to sue a state in federal court. *See Velasquez v. Frapwell*, 160 F.3d 389 (7th Cir. 1998), citing *Seminole*.

There is a solution to this dilemma, under a 1998 USERRA amendment: "In the case of such an action [to enforce USERRA] against a state (as an employer), the action shall be brought [by the Attorney General of the United States] in the name of the United States as plaintiff in the action." 38 U.S.C. 4323(a)(1) (final sentence, added in 1998).

As I explained in Law Review 1051 and Law Review 1014[1], the Attorney General has successfully sued the State of Alabama to enforce USERRA. Alabama argued that the 11th Amendment barred the suit, but the court firmly rejected that contention. The 11th Amendment precludes a suit against a State by an individual—it does not bar a suit against a State by the United States.

If you want to bring a USERRA lawsuit in your own name and with your own lawyer, you need to bring the suit in State court "in accordance with the laws of

the State." 38 U.S.C. 4323(b)(2). As I understand this provision, USERRA does not give the State court jurisdiction. The State court has jurisdiction, or does not, based on the constitution and statutes, and perhaps case law, of the State.

Sovereign immunity ("The King can do no wrong.") is the common law rule in the United States and the United Kingdom. Since about the middle of the 20th Century, there have been a lot of inroads on sovereign immunity, at both State and federal levels. But some States (including Alabama and apparently Georgia as well) still have strict sovereign immunity rules.

If your employer is a private employer[2] you can bring your suit in federal court, in your own name and with your own lawyer—you do not need to go through DOL-VETS and DOJ.[3] In most cases, I think that you are better off to find a competent lawyer and sue—don't rely on DOL-VETS and DOJ. But if the employer is a State, you are probably better off to go through DOL-VETS to DOJ, because of the 11th Amendment problem. Before you spend a lot of money on a private lawyer to sue a State government employer, ask to see evidence[4] that in your State such lawsuits are permitted. Don't waste a lot of money bringing a case that you cannot possibly win, because of the State's sovereign immunity.

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[1] I invite your attention to www.roa.org/law_review. You will find more than 700 articles about USERRA and other laws that are particularly pertinent to those who serve our nation in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

[2] Political subdivisions of States (counties, cities, school districts, etc.) are treated as private employers for USERRA enforcement purposes. *See* 38 U.S.C. 4323(i).

[3] 38 U.S.C. 4323(a)(3)(A).

[4] A provision in the State constitution, a State statute, or a State Supreme Court decision.