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Another Case on State Sovereign Immunity under USERRA

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1.1.1.7—Applicability of USERRA to State and Local Governments

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State leave laws—Delaware

Janowski v. Division of State Police, Department of Safety and Homeland Security, State of Delaware, 981 A.2d 1166 (Delaware Supreme Court 2009).

Here is yet another case showing the serious difficulty of enforcing your rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) when your employer is a State government agency.

Keith Janowski is a Lieutenant Colonel in the Army Reserve. He worked for the Delaware State Police as a state trooper from January 1989 until April 2005, when he was fired. In April 2002, he arrested an individual for driving under the influence. He failed to discover two knives and a small caliber handgun until he placed the individual in a holding cell. The state police charged him with violating state police regulations. After a Superintendent's Hearing, the state police imposed a penalty that included a 64-hour suspension, one year probation, and officer safety training coursework. This penalty was imposed in July 2002.[\[1\]](#)

Three months later, the Army called Janowski to active duty. The state police tolled the one-year probation period during Janowski's active duty. That means that the one-year period stopped running when Janowski reported to active duty and started running again when he returned to work.

Janowski claimed that tolling the disciplinary probation period during his military service violated USERRA, and that the one-year period should have kept running.[\[2\]](#) There has been no judicial determination about the validity of Janowski's USERRA argument, because of the jurisdictional problem.

Janowski completed his active duty and applied for reemployment under USERRA. He returned to work with the state police in November 2003. Without the tolling, the disciplinary probation period would have expired in July 2003, but with the tolling the probation period was not scheduled to expire until July 2004.

In February 2004, Janowski arrested another individual for driving under the influence. He arranged for another trooper to transport the vehicle's passenger to "Troop 1" (apparently the state police barracks). When he searched the vehicle, he found two knives and a handgun, but he did not relay this information to anyone until he returned to Troop 1. While searching the passenger at Troop 1, Janowski failed to locate a pack of cigarettes, a butane lighter, toothpicks, a dime bag of cocaine, chapstick, a roll of lifesavers, and a keychain with numerous keys.

Janowski was charged with new violations of state police rules and procedures, while still on probation from the 2002 incident. He was fired. He appealed, and the Divisional Trial Board and the Secretary of the Department of Safety and Homeland Security affirmed the firing.

Janowski filed a USERRA complaint with the Veterans' Employment and Training Service, United States Department of Labor (DOL-VETS), in accordance with sections 4321 and 4322 of USERRA, 38 U.S.C. 4321 and 4322. DOL-VETS conducted an investigation but did not resolve the complaint. Upon Janowski's request, DOL-

VETS referred the case file to the United States Department of Justice (DOJ), which informed Janowski by letter that it would not represent him or initiate a USERRA complaint against the State of Delaware. In accordance with standard DOJ practice, DOJ declined to state the rationale for the declination.

Janowski retained private counsel and filed suit against the state police in the Delaware Superior Court, which dismissed his case for lack of jurisdiction. Janowski appealed to the Delaware Supreme Court, which affirmed the dismissal.

As I explained in Law Review 89, and other articles, sovereign immunity or “the King can do no wrong” has been the law in Great Britain and the United States for many centuries. This means that you cannot sue the sovereign (state or federal) without the sovereign’s consent. Until well into the 20th Century, the sovereign generally withheld such consent. During the 20th Century, Congress and most of the state legislatures waived sovereign immunity for most purposes, but large vestiges of sovereign immunity remain in place.

The Delaware Supreme Court held that, under the Delaware Constitution, any waiver of sovereign immunity by the legislature must be clear, specific, and unambiguous. The Delaware Legislature had passed legislation similar to USERRA that by its terms applies to “any employer.” Through his counsel, Janowski argued that this amounts to a waiver of sovereign immunity, but the Supreme Court of Delaware held that this alleged waiver did not meet the “clear, specific, and unambiguous” requirement. Thus, the Delaware state courts do not have jurisdiction to hear the case, and the Delaware Supreme Court affirmed the dismissal.

The 11th Amendment (ratified 1795) 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.” Yes, it is capitalized just that way, in the style of the late 18th Century.

Although the 11th Amendment by its terms refers to a suit against a state by a citizen of *another* state, the Supreme Court has held that the 11th Amendment also bars suits against a state by a citizen of *the same state*. *See Hans v. Louisiana*, 134 U.S. 1 (1890).

As enacted in 1994, USERRA authorized an individual veteran or Reserve Component member to sue a state, as employer, in federal court. In 1998, the United States Court of Appeals for the 7th Circuit (Illinois, Indiana, and Wisconsin) held USERRA to be unconstitutional, under the 11th Amendment, 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 address this 11th Amendment issue. As amended, USERRA authorizes the Attorney General of the United States to initiate a USERRA case against a state, in the name of the United States, as plaintiff. That solves the 11th Amendment problem, because the 11th Amendment does not prohibit a suit against a state by the United States. The problem is that you cannot force the Attorney General to bring the suit. In this case, the Attorney General declined Janowski’s request to initiate litigation on his behalf. The Attorney General’s decision to decline to take action is not judicially reviewable.

“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). The question of whether the laws of the state authorize such a suit is a state law question, not a federal law question. In *Janowski*, the Delaware Supreme Court decided that Delaware law does not authorize such a suit. On such a question, the decision of the Delaware Supreme Court is final and not reviewable by the United States Supreme Court or any other court.

Because of *Janowski*, veterans with USERRA claims against the State of Delaware, as employer, have no remedy, if DOJ refuses to initiate the case in the name of the United States, as plaintiff. Is *Janowski* of precedential value in other states? I think that its precedential value in other states is very limited, because the statutes and state

constitutional provisions of other states are not similarly worded to the Delaware provisions that the Delaware Supreme Court construed.

[1] All of these facts come from the published decision of the Delaware Supreme Court.

[2] See *Schmauch v. Honda of America Manufacturing, Inc.*, 2003 U.S. Dist. LEXIS 24015 (S.D. Ohio 2003). I discuss *Schmauch* in Law Review 128 (June 2004). I invite your attention to www.roa.org/law_review. You will find more than 750 articles about USERRA and other military-pertinent laws, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.