LAW REVIEW 1188

October 2011

You Can Sue a City in Federal Court under USERRA

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

1.1.1.7—Application of USERRA to State and Local Governments

1.1.3.2—Application of USERRA to Regular Military Service

1.3.1.1—Left Job for Service and Gave Prior Notice

1.4—USERRA Enforcement

1.7—USERRA Regulations

1.8—Relationship Between USERRA and other Laws/Policies

Q: I am the City Attorney. Of course, a city is considered to be a political subdivision of a state. Joe Smith left our public works department four years ago. He told us that he was quitting, but he apparently mentioned that he was joining the Army. Recently, he left active duty and applied for reemployment. We turned him down, and he has sued us in federal district court. He never complained to the Veterans' Employment and Training Service of the U.S. Department of Labor (DOL-VETS) or to Employer Support of the Guard and Reserve (ESGR). Other than his application for reemployment, which we rejected, we never heard from anybody before this lawsuit was served on us.

It seems to me that this case cannot be brought in federal court. Section 4323(b)(2) of the Uniformed Services Employment and Reemployment Rights Act (USERRA) provides that, "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).

Section 4303 of USERRA defines 16 terms, including the term "State" which is defined as follows: "The term 'State' means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and other territories of the United States (*including the agencies and political subdivisions thereof*)." 38 U.S.C. 4303(14). (Emphasis supplied.)

That means that a political subdivision, like our city, is a "State" for USERRA purposes, and Joe Smith cannot sue us in federal court. Or am I missing something?

A: You are quoting from USERRA accurately, but you are missing the final subsection of section 4323: "*In this section,* the term 'private employer' includes a political subdivision of a State." 38 U.S.C. 4323(i) (emphasis supplied).

Section 4323 governs enforcement of USERRA, with respect to state and local governments and private employers. This means that Joe Smith can file and maintain his suit against the city in federal court.

Moreover, Joe Smith was not required to "exhaust remedies" through ESGR or DOL-VETS before filing suit, and he does not need a "right to sue letter" like under Title VII of the Civil Rights Act of 1964.

Q: Why are political subdivisions of states treated differently from states with respect to USERRA enforcement?

A: Political subdivisions are treated differently because political subdivisions do not share the 11th Amendment immunity of states. *See Hopkins v. Clemson College,* 221 U.S. 636, 645 (1911); *Morris-Hayes v. Board of Education of the Chester Union Free School District,* 423 F.3d 153 (2d Cir. 2005).

The 11th Amendment of the United States Constitution (ratified in 1795) is as follows: "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 by its terms the 11th Amendment only precludes a suit against a state by a citizen of *another state,* the Supreme Court has held that a suit against a state by a citizen of *that same state* is also prohibited. *See Hans v. Louisiana,* 134 U.S. 1 (1890).

As enacted in 1994, USERRA permitted an individual to sue a state in federal court. In 1998, the United States Court of Appeals for the Seventh Circuit[1] held that USERRA was unconstitutional insofar as it permitted an individual to sue a state in federal court. *See Velasquez v. Frapwell,* 160 F.3d 389 (7th Cir. 1998).

Later in 1998, Congress amended USERRA to address the *Velasquez* problem. As amended, USERRA permits the Attorney General of the United States to sue a state, in the name of the United States (as plaintiff). *See* 38 U.S.C. 4323(a)(1) (final sentence), 4323(b)(1), 4323(c)(1). This solves the 11th Amendment problem, because the 11th Amendment does not forbid a suit against a state by the United States.

Alternatively, the USERRA suit against a state can be brought by the individual plaintiff "in a State court of competent jurisdiction in accordance with the law of the State." 38 U.S.C. 4323(b)(2). If "sovereign immunity" of the state is still the rule, and if individuals cannot sue the state in state court, then the only way to enforce USERRA against the state is by a suit in federal court, initiated by the Attorney General in the name of the United States.

Political subdivisions do not have 11th Amendment immunity, so Congress consciously chose not to give them any slack in USERRA enforcement. Your city's USERRA liability is exactly the same as a private employer would have under similar circumstances.

Q: When Joe Smith notified his supervisor that he was joining the Army, he specifically used the word "resign." Joe does not have reemployment rights because he waived them just before he left and joined the Army, right?

A: Wrong.

Joe's "resignation" is of no consequence, so long as he can establish that he resigned for the purpose of service and gave advance notice to his civilian employer. *See Jordan v. Air Products and Chemicals, Inc.*, 2002 WL 31164489, page 2 (C.D. Cal. 2002); *Wrigglesworth v. Brumbaugh*, 121 F. Supp. 2d 1126, 1128-29 (W.D. Mich. 2000); *Winders v. People Express Airlines, Inc.,* 595 F. Supp. 1512, 1518 (D.N.J. 1984), affirmed, 770 F.2d 1078 (3rd Cir. 1985). Please see my Law Review 63.

When Joe enlisted in the Army four years ago, it is likely that his intention was to make the Army his career. When he notified his employer that he was joining the Army, he probably did not intend to return to work for the city upon release from active duty. That does not matter. The reemployment statute keeps Joe's civilian job behind him as an "unburned bridge." *See Leonard v. United Air Lines, Inc.,* 972 F.2d 155 (7th Cir. 1992).[2]

As I explained in Law Review 0766 and other articles, an individual must meet five conditions in order to have the right to reemployment:

a. Must have left a civilian position of employment for the purpose of performing voluntary or involuntary service in the uniformed services. It is clear that Joe met this criterion.

b. Must have given the employer prior oral or written notice. Joe gave adequate notice.

c. Must have been released from the period of service without having exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which the individual seeks reemployment. It is clear that Joe has not exceeded the limit. *All* involuntary service and *some* voluntary service are exempted from the computation of the individual's limit. See Law Review 201 for a definitive description of what counts and what does not count.

d. Must have been released from the period of service without having received a punitive or other-than-honorable discharge. It is clear that Joe served honorably.

e. Must have made a timely application for reemployment, after release from his period of service. Joe applied in a timely manner. After a period of service of 181 days or more, the individual has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

If Joe Smith meets these criteria (and he almost certainly does), he is entitled to prompt (generally, within two weeks after his application) reemployment in the position of employment that he would have attained if he had been continuously employed, or another position for which he is qualified that is of like seniority, status, and pay, regardless of what he may have intended or said about his intentions at the time he left.

Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which goes back to 1940. Under the VRRA, the Reservist or National Guard member was required to give notice to the employer before missing work for active duty, for training (annual training), or for inactive duty training (drills), but there was no prior notice requirement for active duty. USERRA eliminated the VRRA's confusing and cumbersome distinctions among categories of service (active duty, active duty for training, inactive duty training, initial active duty training, etc.). Under USERRA, all of these categories fall within the broad definition of "service in the uniformed services." 38 U.S.C. 4303(13).

Under USERRA, the individual who is leaving a job to perform uniformed service must give prior notice to the employer, regardless of the category of service to be performed. USERRA's legislative history addresses this requirement as follows: "The Committee [House Committee on Veterans' Affairs] does not intend that the requirement to give notice to one's employer in advance of service in the uniformed services be construed to require the employee to decide, at the time the person leaves a job, whether he or she will seek reemployment upon release from active service. One of the basic purposes of the reemployment statute is to maintain a servicemember's civilian job as an 'unburned bridge.' Not until the individual's discharge or release from service and/or transportation time back home, which triggers the application time, does the servicemember have to decide whether to cross that bridge again. *See Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284 (1946): 'He [the returning veteran] is not pressed for a decision immediately on his discharge, but has the opportunity to make plans for the future and readjust himself to civilian life.'" House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2459.

Section 4331 of USERRA (38 U.S.C. 4331) gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. The Secretary's USERRA regulations provide as follows:

§ 1002.88 Is the employee required to tell his or her civilian employer that he or she intends to seek reemployment after completing uniformed service before the employee leaves to perform service in the uniformed services?

No. When the employee leaves the employment position to begin a period of service, he or she is not required to tell the civilian employer that he or she intends to seek reemployment after completing uniformed service. Even if the employee tells the employer before entering or completing uniformed service that he or she does not intend to seek reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment after completing service. The employee is not required to decide in advance of leaving the civilian employment position whether he or she will seek reemployment after completing uniformed service.

20 C.F.R. 1002.88 (bold question in original).

Q: I thought that USERRA was limited to the National Guard and Reserve. Joe Smith was in the Regular Army, not the Army Reserve or Army National Guard. What gives?

A: In recent years, most USERRA cases have involved Reserve and National Guard members, but the reemployment statute has always applied to the regular military, as well as the National Guard and Reserve. Please see Law Review 0719.

---

[1] The 7th Circuit is the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.

[2] I discuss the implications of *Leonard* in detail in Law Review 0857.