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USERRA and the State of New Mexico—Part 2

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I congratulate New Mexico attorney Rosario Vega Lynn for her imaginative, diligent, and successful (so far at least) representation of Sergeant First Class (SFC) Phillip Ramirez, Jr., of the New Mexico Army National Guard. Ms. Vega Lynn discussed this case in [Law Review 1144](#), published earlier this year.^[1]

SFC Ramirez was called to active duty and deployed to Iraq. He has suffered from Post-Traumatic Stress Disorder (PTSD) as a result of his intensely distressing experiences in Iraq combat. He left a job with the New Mexico Children, Youth & Families Department (NMCYFD) when he was called to the colors. After his deployment, Ramirez met the eligibility criteria for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA), and returned to work for the NMCYFD in January 2007.

SFC Ramirez returned to work reasonably promptly after he returned from Iraq, but he was not properly reinstated in the position of employment that he would have attained if he had been continuously employed or in another position of like seniority, status, and pay. His NMCYFD supervisors harassed him about his exercise of his USERRA rights and about his PTSD. Ultimately, NMCYFD fired him on March 25, 2008.

SFC Ramirez contacted the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), claiming that his USERRA rights had been violated. The New Mexico representative of DOL-VETS refused to get involved and told SFC Ramirez that he had no valid claim under USERRA. SFC Ramirez then found Ms. Vega Lynn, and she filed suit on his behalf in May 2008. The case finally went to trial in 2011.

As originally enacted in 1994,^[2] USERRA permitted an individual (like SFC Ramirez) to sue a state, as employer, in federal court. In 1998, the United States Court of Appeals for the Seventh Circuit^[3] 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 Circuit 1998).

In *Velasquez*, the 7th Circuit held that permitting an individual to sue a state in federal court violates the 11th Amendment of the United States Constitution, which provides 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."^[4]

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 the 11th Amendment also precludes a suit against a state by a citizen of that same state. *Hans v. Louisiana*, 134 U.S. 1 (1890).

Later in 1998, Congress addressed the *Velasquez* problem by amending USERRA. As amended, USERRA provides for enforcing USERRA against a state by means of a lawsuit in federal court, brought by the Attorney General of the United States in the name of the United States, as plaintiff.^[51] This solves the 11th Amendment problem, because the 11th Amendment does not preclude a suit against a state by the United States.

This approach, relying on the Attorney General to sue the state, has had some success, but it would not help SFC Ramirez because the only way to get to the Attorney General is through DOL-VETS^[52] and that agency had already rejected SFC Ramirez' request for assistance.

As amended in 1998, USERRA provides an alternative means for enforcing USERRA against a state, as employer: "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). This means that an individual state employee, former employee, or prospective employee claiming USERRA rights can sue the state in state court *if the state law permits such a lawsuit.*

In the common law of Great Britain and the United States, sovereign immunity or "the King can do no wrong" has been the rule for many centuries. In recent decades, there have been major inroads on sovereign immunity at both the state and federal levels, but large vestiges of sovereign immunity remain in some states. The following are prime examples:

- The Alabama Supreme Court has held that the State of Alabama is immune, under the Alabama Constitution, from a suit brought in state court, by an employee or former employee, to enforce USERRA. *See Larkins v. Department of Mental Health and Mental Retardation*, 806 So.2d 358 (Ala. 2001). I discuss *Larkins* in detail in [Law Review 89](#).
- Similarly, the Delaware Supreme Court has held that the State of Delaware is immune from a USERRA suit in state court. *See Janowski v. Division of State Police, Department of Homeland Security, State of Delaware*, 981 A.2d 1166 (Del. 2009). I discuss *Janowski* in detail in [Law Review 1149](#).
- Georgia's intermediate appellate court held that the State of Georgia is immune from USERRA enforcement in state court. *See Anstadt v. Board of Regents of the University System of Georgia*, 303 Ga. App. 483, 693 S.E.2d 868 (2010). I discuss *Anstadt* in detail in [Law Review 1140](#).

Because the 11th Amendment and the 1998 USERRA amendment precluded her from filing suit in federal court, Ms. Vega Lynn filed suit on behalf of SFC Ramirez in state court. Judge Camille Martinez Olgun presided over a jury trial. The jury found that the NM CYFD violated USERRA when it fired SFC Ramirez. Judge Olgun entered a judgment, based on the verdict, and awarded him \$36,000 in back pay. The case is not over. The judgment can be appealed to New Mexico's intermediate appellate court, and perhaps ultimately to the New Mexico Supreme Court.

The State of New Mexico has already paid almost \$450,000 for outside counsel (a prestigious law firm), trying to avoid compensating SFC Ramirez \$36,000 for violating USERRA by firing him. I call upon New Mexico Governor Susana Martinez to end this madness. Pay SFC Ramirez his money and drop the appeal. The Governor should order state agencies to comply with USERRA in their dealings with state employees who are members of the National Guard or Reserve.

In 2004, the New Mexico Legislature enacted legislation incorporating USERRA into state law, but in the *Ramirez* case the State of New Mexico is arguing that this law does not apply to the state itself, as an employer. Remember that "do as I say and not as I do" has always been a losing argument.

"And why beholdest thou the mote that is in thy brother's eye, but considerest not the beam that is in thine own eye?" *Matthew 7:7 (King James Bible).*

[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 900 articles about laws that are particularly pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

[2] Congress enacted USERRA in 1994 (Public Law 103-353) as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which goes back to 1940.

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

[4] Yes, it is capitalized just this way, in the style of the late 18th Century.

[5] *See* 38 U.S.C. 4323(b)(1) and 4323(c)(1).

[6] *See* 38 U.S.C. 4323(a)(1).