

Law Review 1224

February 2012

Alternative Way to Enforce USERRA Against a State Government Employer

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

- 1.1.1.7—USERRA Applies to State and Local Governments
- 1.4—USERRA Enforcement
- 1.8—Relationship between USERRA and other Laws/Policies

Barnes v. Zaccari, 669 F.3d 1295 (11th Cir. 2012).

Barnes v. Zaccari is an important decision of the United States Court of Appeals for the 11th Circuit. The 11th Circuit is the federal appellate court that sits in Atlanta and hears appeals from district courts in Georgia, Florida, and Alabama.

Barnes is not a case arising under the Uniformed Services Employment and Reemployment Rights Act (USERRA). Nonetheless, this precedent-setting case provides another way to enforce USERRA against state government employers.

As enacted in 1994,^[1] USERRA allowed an individual claiming rights under this law to sue a state government employer, just as one could sue a local government or a private employer, in federal district court. In 1998, the 7th Circuit^[2] held USERRA to be unconstitutional insofar as it permitted an individual to sue a state in federal court. *Velasquez v. Frapwell*, 160 F.3d 389 (7th Cir. 1998). The 7th Circuit held that permitting individuals to sue states for alleged USERRA violations violates the 11th Amendment of the United States Constitution, which 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.^[3]

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

In 1998, after the 7th Circuit ruled USERRA to be unconstitutional, Congress amended the law to address the constitutional issue. Congress added a new final sentence to section 4323(a)(1), as follows:

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 the plaintiff in the action.
38 U.S.C. 4323(a)(1) (emphasis supplied).

This approach solves the 11th Amendment problem, because that amendment does not bar a suit against a state *by the United States*. But this means that the USERRA claimant is dependent upon the Department of Labor (DOL) and the Department of Justice (DOJ). DOL

may find the case to be without merit, although the case may in fact have merit. Even if DOL finds the case to have merit and forwards it to DOJ with a positive recommendation, DOJ may decline to file suit for any number of reasons. The rationale for declination is never announced by DOJ.

The 1998 amendment provides an alternative way for an individual to enforce USERRA against a state government employer:

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).

This means that an individual claiming USERRA rights can sue his or her state government employer in state court, *but only if state law permits such suits*. In many states (perhaps a majority) "sovereign immunity" is still the law and the state cannot be sued in state court. Unfortunately, attempts to enforce USERRA against state government employers through state court lawsuits have failed in Alabama, Delaware, and Georgia, based on state sovereign immunity in state court. See *Larkins v. Department of Mental Health and Mental Retardation*, 806 So.2d 358 (Ala. Supreme Court 2001); *Janowski v. Division of State Police, Department of Safety and Homeland Security, State of Delaware*, 981 A.2d 1166 (Del. Supreme Court 2009); and *Anstadt v. Board of Regents of the University System of Georgia*, 303 Ga. App. 483, 693 S.E. 2d 868 (2010).[\[4\]](#)

If the 11th Amendment precludes you from suing your state government employer in federal court and state sovereign immunity precludes you from suing the state in state court, another option is to sue an individual state official in federal court, under the provisions of title 42, United States Code, section 1983, which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution *and laws*, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
42 U.S.C. 1983 (emphasis supplied).

Under section 1983, a state official, acting under color of state law, who violates the rights of an individual under the U.S. Constitution or under a federal statute (like USERRA) can be held *personally liable* in federal court for both money damages and equitable (injunctive) relief. *Personal liability* means that the state official will be required to pay the damages out of his or her own pocket and will not necessarily be reimbursed by the state.

There is a big advantage but also a big disadvantage in seeking personal liability. The advantage is that personal liability has a greater *in terrorem* effect. A state official who is inclined to violate USERRA willfully is likely to fear the possibility of having to pay money

out of his or her own pocket. The official may not care about the possibility that the state will have to pay damages as a result of the official's actions.

The disadvantage is that the individual's pocket may be shallow. If the damages are substantial, paying those damages may be beyond the individual's financial capacity, and the individual will file for bankruptcy and thus avoid paying the successful plaintiff. You cannot get blood from a stone.

Barnes is an important new case demonstrating the possibility of collecting money damages and getting injunctive relief against a state official who willfully violates the federal constitutional or statutory rights of an individual. In 2007, at the time of the Virginia Tech massacre in Virginia, Thomas Hayden Barnes was a student at Valdosta State University in Georgia and Ronald Zaccari was the President of the University. Barnes strenuously objected, on environmental grounds, to Zaccari's plan to build a new parking garage on the campus. In the wake of the Virginia Tech tragedy, Zaccari considered Barnes a threat, but the Dean of Students and other key members of Zaccari's staff counseled that Zaccari was overreacting and that Barnes was not a threat to himself or others.

Over the objections of his own staff, Zaccari "administratively withdrew" Barnes from the university and directed the university police to remove him from his dormitory room. Barnes was not accorded any of the due process normally rendered to a student being expelled or suspended. Since this is a state university, such due process is required by the 14th Amendment to the United States Constitution.

Barnes filed suit in the United States District Court for the Middle District of Georgia. He sued the University System of Georgia (a state government entity) and he also sued President Zaccari personally. The District Court upheld his right to sue the state but threw out his suit against Zaccari. The state appealed from the holding that it could be sued in federal court, and Barnes appealed from the holding that he could not sue Zaccari personally. The 11th Circuit reversed the District Court on both holdings. According to the appellate court, Barnes' suit against the university system was barred by the 11th Amendment of the United States Constitution, but Barnes' right to sue the university president individually was upheld.

Under section 1983, an individual state official acting under color of state law can be held individually liable if he or she violated the *clearly established* federal statutory or constitutional right of the plaintiff—the violation must have been clearly established based on case law in effect at the time of the official's action. The 11th Circuit held that Barnes had a *clearly established* right to due process before he was effectively expelled from Valdosta State University. The 11th Circuit held that Zaccari deprived Barnes of this clearly established right to due process by "administratively withdrawing" Barnes from the campus without due process. Thus, under section 1983 Zaccari can be held personally liable to Barnes.

This precedent offers an alternative means of obtaining redress when a state official, acting for a state government employer, willfully flouts the requirements of USERRA by firing an employee who has been called to the colors or by refusing to reinstate an employee returning from a call to the colors. It should also be noted that USERRA's definition of "employer" includes "a *person*, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities." 38 U.S.C. 4303(4)(A)(i) (emphasis supplied). Thus, if a state-government employer has delegated to a particular supervisor or other official the authority to make hiring and firing decisions, and

if that supervisor or official violates USERRA, the individual official can be sued and can be held personally liable.

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

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

[3] The capitalization is not for emphasis; It is used to follow the style of the late 18th Century. The 11th Amendment was ratified in 1795.

[4] These cases are discussed in [Law Reviews 89](#), [1140](#), and [1149](#).