LAW REVIEW 1232

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Eleventh Circuit Affirms Judgment Against Alabama for Violating USERRA[1]

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

United States v. Alabama Department of Mental Health, 673 F.3d 1320 (11th Cir. 2012).

A three-judge panel of the United States Court of Appeals for the 11th Circuit[2] has unanimously affirmed a Uniformed Services Employment and Reemployment Rights Act (USERRA) victory for the United States (on behalf of Roy Hamilton) in the United States District Court for the Middle District of Alabama. This is a further development in the same case that I addressed in Law Reviews 0918, 1014, and 1051.[3]

Roy Hamilton worked for the Alabama Department of Mental Health (ADMH) from 1987 until December 2003, when he was called to active duty as a member of the Alabama Army National Guard. For his entire ADMH career up to that point, he worked at the J.S. Tarwater Developmental Center (Tarwater) in Montgomery, Alabama. In the fall of 2003, ADMH decided to close several of its developmental centers, including Tarwater, because of financial problems. ADMH searched for alternative positions for Tarwater staffers (including Hamilton).

As luck would have it, this process of closing Tarwater and finding alternative positions for the Tarwater employees corresponded almost precisely with Hamilton's call to the colors. Hamilton received his Army activation orders on December 23, 2003 and provided copies that same day to his immediate supervisor, to the Tarwater personnel office, and to the Tarwater administrator. Hamilton worked his last day at Tarwater on December 29, 2003 and then immediately reported to active duty. ADMH closed Tarwater permanently on January 15, 2004.

On the eve of his mobilization, Hamilton received an offer from ADMH for a position in Tuscaloosa, Alabama. He turned down the offer, pointing out that his imminent call to active duty would preclude him from reporting to Tuscaloosa. ADMH officials promised to keep looking for a position for Hamilton, but after Hamilton deployed to Iraq ADMH forgot all about him and even lost his personnel file.

Hamilton served honorably and was released from active duty in April 2005, when he made a timely application for reemployment with ADMH. He met the USERRA eligibility criteria for reemployment in that he left his job for uniformed service, gave the employer prior notice, did not exceed the cumulative five-year limit,[4] was released from active duty without a disqualifying bad discharge, and made a timely application for reemployment.

Because Hamilton met the USERRA criteria, ADMH was required to reemploy him promptly "in the position of employment in which the person [Hamilton] would have been employed if

the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status, and pay, the duties of which the person is qualified to perform." 38 U.S.C. 4313(a)(2)(A). If Hamilton had not been called to the colors at the end of 2003, he clearly would have remained employed by ADMH, but not at Tarwater, since ADMH closed Tarwater a few days after Hamilton reported to active duty. The other Tarwater employees did not lose their jobs when Tarwater closed. They were transferred to other ADMH facilities, and it is clear that Hamilton also would have been transferred and would have kept his job.

Hamilton was entitled to prompt reemployment in April 2005, when he returned from active duty and applied for reemployment. For several months, Hamilton attempted to get his job back by making telephone calls and personal visits. Eventually, he was told that ADMH had lost his records and that someone would call him when they located the records, but no one at ADMH contacted Hamilton. Hamilton finally returned to ADMH employment in August 2007, when he applied for a vacancy and was hired, as a new employee. ADMH never tried to make him whole for the pay and seniority he lost due to the USERRA violation.

It is possible that ADMH officials willfully flouted USERRA, based on anti-military animus directed against Hamilton. More likely, the violation can be attributed to ignorance of the law and bureaucratic inefficiency. Either way, the violation resulted in months of turmoil and tens of thousands of dollars of lost earnings for Hamilton.

As originally enacted in 1994, USERRA permitted an individual to sue a state (as well as a private employer) in federal court, in his or her own name and with his or her own lawyer. In 1998, the United States Court of Appeals for the 7th Circuit[5] held USERRA to be unconstitutional insofar as it authorized an individual to sue a state in federal court. *Velasquez v. Frapwell,* 160 F.3d 389 (7th Cir. 1998).

The 7th Circuit held that authorizing individuals to sue states in federal court violates the 11th Amendment, which was ratified in 1795 and 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.[6]

Although the 11th Amendment by its terms 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 *the same state. See Hans v. Louisiana,* 134 U.S. 1 (1890).

After the 7th Circuit held USERRA to be unconstitutional as applied to state government employers, Congress amended the law to address the *Velasquez* problem. As amended in 1998, USERRA provides two alternative ways to enforce USERRA against a state, as employer:

> In the case of an action [lawsuit] against a State (as an employer), the action may be brought in a State court of competent jurisdiction in accordance with the law of the State.
> 38 U.S.C. 4323(b)(2) (emphasis supplied).

This alternative is not available to an individual like Hamilton because the Alabama Supreme Court has held that, under the Alabama Constitution, the State of Alabama is immune from

suit in state court. *See Larkins v. Department of Mental Health and Mental Retardation,* 806 So.2d 358 (Ala. 2001). I discuss the implications of *Larkins* in detail in Law Review 89 (September 2003).

For a person like Hamilton, the only way to enforce USERRA against a state government employer is through section 4323(a)(1) of USERRA, which provides:

> A person who receives from the Secretary [of Labor] a notification pursuant to section 4322(e) of this title of an unsuccessful effort to resolve a complaint relating to a State (as an employer) or a private employer may request that the Secretary refer the complaint to the Attorney General. Not later than 60 days after the Secretary receives such a request with respect to a complaint, the Secretary shall refer the complaint to the Attorney General. If the Attorney General is reasonably satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the Attorney General may appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action for relief under this chapter for such person. In the case of such an action 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) (emphasis supplied).[7]

In February 2008, Hamilton became aware of his USERRA rights and filed a written complaint against ADMH with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). That agency found Hamilton's complaint to have merit and urged ADMH to correct the USERRA violation by properly reemploying Hamilton and paying him back pay. After ADMH ignored the DOL-VETS entreaties, DOL-VETS referred the case to DOJ, in accordance with 38 U.S.C. 4323(a)(1). DOJ agreed with DOL-VETS that the case had merit, so DOJ initiated this lawsuit in December 2008, in the name of the United States (as plaintiff).

When DOJ brings a USERRA case on behalf of an individual veteran or Reserve Component member, the named plaintiff is the individual, *unless the defendant employer is a state,* in which case the named plaintiff is the United States of America. This solves the 11th Amendment problem, because that amendment does not preclude a suit against a state by the United States. Alabama has strenuously argued that the 11th Amendment precludes this suit because the "real party in interest" is Roy Hamilton, not the United States. The District Court and now the Court of Appeals have firmly rejected this argument.

This dispute is now seven years old, as Hamilton returned from active duty and applied for reemployment in April 2005. Unfortunately, this case is not yet over, and in our federal appellate system there are two more steps available to the State of Alabama. Alabama can ask the 11th Circuit for *rehearing en banc.* If granted (and it will likely be denied), this would mean that all the active judges of the 11th Circuit would read new written briefs and hear new oral arguments by DOJ and the State of Alabama. If the 11th Circuit denies rehearing *en banc,* or if the 11th Circuit *en banc* affirms the panel's decision (as is most likely), the final step would be for the State of Alabama to apply to the United States Supreme Court for *certiorari.* In my opinion, the 11th Circuit panel decision is well written and clearly correct as a matter of constitutional law. I predict that the panel decision will be upheld.

Updated 7/16/2012: The time to appeal this decision has expired, so the case is final.

[1] This is not my first article this month (March 2012) about a situation wherein it has been necessary for the United States Department of Justice (DOJ) to sue the State of Alabama to force the state to comply with federal law concerning the rights of the brave young men and women from Alabama who serve our country in uniform. In Law Review 1226 (March 2012), I discussed the case of United States v. Alabama, Civil Action No. 2:12cv719-MHT (M.D. Ala. Feb. 28, 2012). DOJ sued Alabama and proved that the State violated the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), by the untimely mailing of absentee ballots for the March 13 primary, thus disenfranchising Alabamans serving in places like Afghanistan. The Federal District Court found for DOJ and ordered Alabama to extend the deadline from March 13 to March 31 for receipt of absentee ballots mailed in from outside the United States.

[2] The 11th Circuit is the federal appellate court that sits in Atlanta and hears appeals from federal district courts in Alabama, Florida, and Georgia.

[3] Please see www.servicemembers-lawcenter.org. You will find 731 articles about federal 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.

[4] Because he was called to active duty involuntarily, this 15-month period of service does not count toward exhausting his five-year limit. Please see Law Review 201 for a detailed discussion of what counts and what does not count toward exhausting the limit.

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

[6] Capitalization included in the style of the 18th century.

[7] The final sentence was added by the 1998 amendment.