

## **LAW REVIEW 1247**

**May 2012**

### **Minnesota Legislature Passes Welcome Legislation on USERRA**

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

1.1.1.7—USERRA applies to state and local governments

1.1.3.3—USERRA applies to National Guard service

1.2—USERRA forbids discrimination

1.3.1.2—Character and duration of service

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

8.0—Veterans preference in employment

State military leave laws--Minnesota

On April 18, 2012, Minnesota Governor Mark Dayton signed S.F. No. 1689, a new law that amends several sections of the Minnesota Statutes (Minn. Stat.) so as to provide better and more enforceable rights to Minnesota veterans and members of the Reserve Components (RC). Below are the new revisions to the Minnesota Statutes.

#### **Waiving sovereign immunity to permit lawsuits to enforce USERRA against the state of Minnesota, as employer**

The most important section of S.F. 1689 is section 1, which amends section 1.05 of Minn. Stat. by adding a new subdivision 5, as follows:

An employee, former employee, or prospective employee of the state who is aggrieved by the state's violation of the Uniformed Services Employment and Reemployment Rights Act [USERRA], United States Code, title 38, sections 4301 to 4333,[\[1\]](#) as amended, may bring a civil action against the state in federal court or another court of competent jurisdiction for legal or equitable relief that will effectuate the purposes of that act.

Section 1 goes on to provide: "This section is effective the day following final enactment and applies to civil actions pending on or commenced on or after that date."

The 11th Amendment to 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." Although

the 11th Amendment speaks to a suit against a state by a citizen of another state, or a foreign state, the Supreme Court held that 11th Amendment immunity also precludes a suit against a state by a citizen of that same state.<sup>[2]</sup>

As originally enacted in 1994, USERRA permitted an individual to sue a state (as employer) in federal court, alleging that the state had violated USERRA. Four years later, the United States Court of Appeals for the Seventh Circuit<sup>[3]</sup> held USERRA to be unconstitutional insofar as it permitted an individual to sue a state in federal court.<sup>[4]</sup> Later in 1998, Congress amended section 4323(b) of USERRA, pertaining to USERRA enforcement against states, as employers.

As amended in 1998, section 4323(b)(1) provides for enforcement of USERRA by a lawsuit against the state filed by the United States Attorney General, in the name of the United States, as plaintiff. This solves the 11<sup>th</sup> Amendment problem, because that amendment does not address the situation of a suit against a state filed by the United States of America.

Alternatively, USERRA can be enforced against a state by a suit brought by an individual against the state in state court, under section 4323(b)(2), which provides:

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 law of the state.* (Emphasis supplied.)

Let us say that Joe Smith is a member of the Minnesota Army National Guard. In his civilian capacity, he works for the Minnesota Department of Health. In May, he learns that his unit is likely to be mobilized in October for deployment to Afghanistan. As directed by his commanding officer, he notifies his civilian supervisor in May of the likely October mobilization. In June, just three weeks after he gave the notice, he is fired from his civilian job. He claims that the firing was motivated by his likely mobilization in just four months. If he can prove that, the firing is a violation of section 4311(a) of USERRA, 38 U.S.C. 4311(a), in that he has been denied retention in employment (i.e., has been fired) on the basis of his performance of uniformed service and obligation to perform service.

In what court can Joe Smith bring such a suit? Minn. Stat. section 1.05(5), as added by S.F. No. 1689, purports to permit Smith to bring his civil action in federal court, but the Minnesota Legislature lacks the constitutional authority to add to the jurisdiction of federal courts—only Congress can do that. Section 4323(b) of USERRA, 38 U.S.C. 4323(b), gives the federal courts jurisdiction of USERRA suits against states, as employers, *only when the suit is filed by the Attorney General in the name of the United States.* Under Article VI, Clause 2 of the United States Constitution (commonly called the “Supremacy Clause”), a federal statute trumps a conflicting state statute or state constitution.

Minn. Stat. 1.05(5), as added by this new law, also authorizes a suit like Joe Smith’s, against the State of Minnesota as an employer, to be filed in “another court of competent jurisdiction.” This means that Joe Smith can file his lawsuit, to enforce USERRA against the Minnesota Department of Health, in Minnesota state court. This provision is most welcome, as it gives a person like Joe Smith a remedy, even if the United States Department of Labor (DOL) and Department of Justice (DOJ) decline to act on his complaint.

### **Affirmative action in hiring veterans—state agencies as employers**

Section 2 of S.F. No. 1689 amends Minn. Stat. 43A.09. As amended, the pertinent sentence reads as follows:

Special emphasis shall be given [by state agencies hiring employees] to recruitment of veterans and protected group members to assist state agencies in meeting affirmative action goals to achieve a balanced work force.

Section 2 of S.F. No. 1689 added the underlined “veterans and” language. This amendment may be helpful to veterans seeking employment with Minnesota state government agencies.

### **Right to unpaid leave of absence for convalescing from injury or illness incurred during active military service**

Section 3 of S.F. No. 1689 amends Minn. Stat. 192.261, subdivision 1. The amendment gives employees of the state and its political subdivisions the right to an unpaid leave of absence while convalescing from an injury or disease incurred during active military service. This is an example of a state law that gives state and local government employees *greater or additional rights* and therefore is not preempted by USERRA. See 38 U.S.C. 4302(a). As is explained in [Law Review 0965](#) and [Law Review 1234](#),<sup>[5]</sup> USERRA’s definition of “service in the uniformed services” does not include time required to be away from one’s civilian employer for medical treatment or convalescence for an injury or disease incurred in the line of duty, although there have been efforts to amend USERRA to add this circumstance to USERRA’s definition of uniformed service.

### **Reemployment rights for persons employed in Minnesota who are National Guard members in other states**

Minn. Stat. section 192.261, subdivision 6, requires private employers in Minnesota to give reemployment rights to members of the Minnesota Army National Guard and Air National Guard after *state active duty*. Section 4 of S.F. No. 1689 amends this provision to expand the entitlement to include members of the National Guard in other states who leave Minnesota jobs for state active duty in other states. This closes a loophole through which some National Guard members have fallen. Please see my [Law Review 45](#).

For example, let us consider Mary Adams, who works in southwestern Minnesota<sup>[6]</sup> but is a member of the Army National Guard of South Dakota. The South Dakota Governor calls her to state active duty to deal with the consequences of flooding in that state. Until now, Mary’s civilian job was at risk. USERRA did not apply, because this was state active duty, not authorized or paid for by the Federal Government. The Minnesota law did not apply because she was not a member of the Minnesota National Guard, and the South Dakota law did not apply since South Dakota’s legislature lacks the power to regulate the activities of a Minnesota employer. The enactment of S.F. No. 1689 means that folks like Mary are now protected.

### **Uping the ante in veterans’ preference**

Under Minn. Stat. section 197.455, subdivisions 4 and 5, non-disabled veterans have been entitled to an additional five points, added to the score received on the competitive examination for applicants for state employment, and disabled veterans have been entitled to an additional ten points. Sections 5 and 6 of S.F. No. 1689 have increased these

additional points to ten for non-disabled veterans and 15 for those who are disabled. This will help some additional veterans to get state jobs.

*Readers: Please let us know if you are aware of new state laws that help those who are serving or have served our nation in uniform.*

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[1] USERRA now goes through section 4335, but this typographical error is of no particular significance.

[2] *Hans v. Louisiana*, 134 U.S. 1 (1890).

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

[4] *Velasquez v. Frapwell*, 160 F.3d 389 (7<sup>th</sup> Cir. 1998).

[5] I invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find 747 articles about USERRA and other 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.

[6] It does not matter where Mary lives. She can live in Minnesota but be a member of the South Dakota National Guard, or she could live in South Dakota and commute daily across the state line to her job in Minnesota.