Law Review 1269

July 2012

DOJ Sues Commonwealth of Pennsylvania to Enforce USERRA and Secures a Great Settlement

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Settlement announced

On July 9, 2012, the Department of Justice (DOJ) announced that it had reached a settlement with the Pennsylvania Department of Corrections (PDC), resolving a lawsuit that DOJ filed against PDC on October 27, 2011, in the United States District Court for the Middle District of Pennsylvania, on behalf of Army Reservist David C. Fyock. Under the terms of the settlement, Fyock will receive a promotion to corrections officer 2 (sergeant) as well as back pay and other benefits.

In announcing the settlement, the Honorable Thomas E. Perez (Assistant Attorney General for DOJ's Civil Rights Division) said: "The Civil Rights Division is committed to protecting the reemployment rights of the men and women who serve our country in uniform. No service member should have to forego an opportunity for advancement in his or her civilian career due to military service."

Enforcing USERRA against the Commonwealth of Pennsylvania

It is most fortunate the DOJ brought this suit on behalf of Fyock, because if he had brought the lawsuit in his own name, with his own lawyer, in federal court, his lawsuit would have been dismissed under the 11th Amendment of the United States Constitution (ratified 1795), 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." Yes, it is capitalized just that way, in the style of the late 18th Century.

Although the 11th Amendment speaks to a suit against a state by a citizen of *another* state, the Supreme Court long ago 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).

Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA)[1] in 1994, as a long-overdue replacement of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940.[2] As enacted in 1994, USERRA permitted an individual to sue a state (as employer) in federal court, but in 1998 the 7th Circuit[3] held that USERRA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), *citing Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996).

Later in 1998, Congress amended USERRA to address the *Velasquez* problem. "In the case of such an action [to enforce USERRA] against a State (as an employer), the action shall be brought [by DOJ] in the name of the United States as plaintiff in the action." 38 U.S.C. 4323(a)(1) (final sentence, added in 1998).[4]

Fyock filed a complaint against the PDC with the Veterans' Employment and Training Service, United States Department of Labor (DOL-VETS), alleging that his USERRA rights had been violated. DOL-VETS investigated

Fyock's complaint and found it to have merit. DOL-VETS contacted the PDC and urged the agency to come into compliance with USERRA, but the state agency refused to do so. At Fyock's request, DOL-VETS referred the case file to DOJ, in accordance with 38 U.S.C. §4323(a)(1). DOJ agreed that Fyock's case had merit, and DOJ filed suit against the PDC, in the name of the United States (as plaintiff), in accordance with the final sentence of §4323(a)(1). Fyock was the intended beneficiary of the lawsuit, but he was not the named plaintiff.

As I explained in Law Review 1232 (March 2012),[5] DOJ sued the Alabama Department of Mental Health (ADMH), to enforce the USERRA rights of Roy Hamilton, who was working for the ADMH in December 2003, when he was called to active duty as a member of the Alabama Army National Guard.[6] As in *Fyock,* the named plaintiff was the United States of America, not the individual USERRA claimant. Nonetheless, ADMH argued that the "real party in interest" was Hamilton and not the United States of America, and that the 11th Amendment barred the lawsuit. Both the United States District Court for the Middle District of Alabama and the 11th Circuit[7] firmly rejected that argument.

Because DOJ brought the suit on behalf of Fyock, the 11th Amendment issue was resolved. The 11th Amendment does not forbid a lawsuit against a state by the United States of America, as plaintiff. This probably explains why the PDC agreed to settle this case.

If Fyock had filed this suit in his own name, with his own counsel, his case would have been thrown out under the 11th Amendment. *See McIntosh v. Partridge,* 540 F.3d 315 (5th Cir. 2008).

There is one other way that an individual state employee or former employee or prospective employee can enforce his or her USERRA rights against a state government agency, 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 can sue a state in state court *but only if the state law permits such suits*. Unfortunately, Pennsylvania is one of the states where sovereign immunity (no suits against the state) is still the rule in state court.[8]

The specific USERRA issue involved

Fyock worked for the PDC at the State Correctional Institution Mercer in Mercer, Pennsylvania, as a "corrections officer 1" (the entry level position). Promotion to "corrections officer 2" was based on an officer's score on a written examination that was offered only infrequently. Fyock missed the May 2007 examination, because he was on active duty at the time.

Fyock met the USERRA eligibility criteria for reemployment, in that he left his PDC job for military service and gave prior notice to the PDC. He was released from the period of service without having exceeded the five-year cumulative limit under USERRA and without receiving the sort of other-than-honorable discharge that would disqualify him under §4304, 38 U.S.C. 4304. After release from service, he made a timely application for reemployment at the PDC facility in Mercer.

Because Fyock met the USERRA eligibility criteria, he was entitled to be reemployed "in the position of employment in which the person [Fyock] would have been employed if the continued 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). Fyock was reemployed as a corrections officer 1, the same level that he occupied when he was called to the colors. Fyock's contention is that if his PDC career had not been interrupted by uniformed service he would have been promoted to corrections officer 2. If he can show with reasonable certainty that he would have been promoted, but for his period of service, he is entitled to the promotion upon reemployment.

USERRA [38 U.S.C. §4331(a)] gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL-VETS published proposed USERRA regulations, for notice and comment, in September 2004. After considering the comments received,

DOL-VETS made some adjustments and published the final regulations in December 2005. The regulations are published in title 20 of the Code of Federal Regulations, Part 1002 (20 C.F.R. Part 1002). Here is the pertinent subsection:

"If an opportunity for promotion, or eligibility for promotion, that the employee missed during service is based on a skills test or examination, then the employer should give him or her a reasonable amount of time to adjust to the employment position and then give a skills test or examination. No fixed amount of time for permitting adjustment to reemployment will be deemed reasonable in all cases. However, in determining a reasonable amount of time to permit an employee to adjust to reemployment before scheduling a makeup test or examination, an employer may take into account a variety of factors, including but not limited to the length of time the returning employee was absent from work, the level of difficulty of the test itself, the typical time necessary to prepare or study for the test, the duties and responsibilities of the reemployment position and the promotional position, and the nature and responsibilities of the service member while serving in the uniformed service. If the employee is successful on the makeup exam and, based on the results of that exam, there is a reasonable certainty that he or she would have been promoted, or made eligible for promotion, during the time that the employee served in the uniformed service, then the promotion or eligibility for promotion must be made effective as of the date it would have occurred had employment not been interrupted by uniformed service."

20 C.F.R. §1002.193(b).

Based on this provision, Fyock took a make-up examination after he returned to work, following his period of uniformed service. His score was higher than any of the 13 corrections officers who were promoted from 1 to 2 based on the May 2007 examination. Accordingly, Fyock was entitled to promotion from 1 to 2, with an effective date of the date of the first promotion that was based on the May 2007 examination. His score on the make-up examination shows, with reasonable certainty, that he would have been promoted from 1 to 2 if his PDC career had not been interrupted by service.

In police and fire departments and corrections departments these examinations are offered infrequently. Consequently, missing an examination can delay for years the individual's promotion to the next grade. Some public employers, however, insist that public employees who have been called to active duty should take the promotion examination on the same day that the other employees take it, even if that means administering the test in a place like Afghanistan. That is not the right answer.

We do not want service members at the tip of the spear to be studying for and taking promotion examinations for their civilian employers back home. When the individual is on active duty, and especially when he or she is deployed to the tip of the spear, that individual should be devoting his or her full time and attention to the military duties. This is a safety issue, for the individual service member and for his or her colleagues. If I am in the Humvee next to Fyock, I should not have to worry that he is not paying attention to his sector of the perimeter because he is studying for the corrections officer promotion exam.

We recognize that offering make-up examinations can be burdensome on employers, and that giving an individual like Fyock a retroactive promotion can disappoint the expectations of a fellow corrections officer who was promoted while Fyock was deployed. If the number of persons allowed promotion are limited then the fellow employee now may have to give up the promotion, at least temporarily, to make room for Fyock to be promoted. But the sacrifices that employers and fellow employees are asked to make need to be balanced against the sacrifice of the service members who routinely and voluntarily serve as the ¾ of 1% of our nation's population who serve our country in uniform and who may return disabled or not at all. We all serve the nation by abiding by USERRA.

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[1] Uniformed Services Employment and Reemployment Rights Act, Pub. L. No. 103–353, 108 Stat 3149 (1994).

[2] Veterans Reemployment Rights Act, Pub. L. No. 76-783, 54 Stat. 885, 890 (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] Pub.L. 105-368, Title II, § 211(a), Nov. 11, 1998, 112 Stat. 3329

[5] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find 768 articles about USERRA and other laws that are especially 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] *See United States v. Alabama Department of Mental Health and Mental Retardation*, 673 F.3d 1320 (11th Cir. 2012). The time for Alabama to apply for a rehearing *en banc* or to apply to the Supreme Court for *certiorari* (discretionary review) has expired, so this case is final.

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

[8] See 1 Pa. Cons. Stat. Ann. § 2310 (West 2012).