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Please see Law Review 16081 (August 2016) for further developments in this case.

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Good News from Rhode Island on Enforcing USERRA against a State Agency as Employer

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1.1.1.7—USERRA applies to state and local governments
1.4—USERRA enforcement
1.8—Relationship between USERRA and other laws/policies

***Panarello v. State of Rhode Island Department of Corrections,* 185 L.R.R.M. 3225 (Rhode Island Superior Court Jan. 22, 2009).[1]**

As originally enacted in 1994, USERRA permitted an individual to sue a state (as employer) in federal court. As I explained in Law Review 89 and other articles,[2] the 11th Amendment of the United States Constitution presents serious problems regarding USERRA enforcement against state government employers. The 11th Amendment 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]

Although the 11th Amendment speaks to a suit against a state by a citizen of *another* state, the Supreme Court has held that a suit against a state by a citizen of *the same state* is also barred by the 11th Amendment. *See Hans v. Louisiana,* 134 U.S. 1 (1890).

When Susan Webman and I drafted what became USERRA in the early 1990s[4], we were under the understanding that Congress could abrogate the 11th Amendment immunity of states, provided Congress were sufficiently clear about it in the legislation it enacted. Our understanding was based on the case law at the time, including *Reopell v. Commonwealth of Massachusetts,* 936 F.2d 12 (1st Cir. 1991). Ms. Webman and I both participated in the drafting of the brief for Mr. Reopell in the 1st Circuit.[5] Relying upon the case law in effect at the time, Ms. Webman and I drafted language for USERRA in which Congress unambiguously expressed its intent that a state, as employer, should be subject to USERRA, just like a private employer, and we thought that this solved the problem.

Ms. Webman and I did not anticipate an important Supreme Court decision that came out several years later. *See Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996). The Supreme Court held that Congress can constitutionally abrogate 11th Amendment immunity *only* when Congress is acting under constitutional authority that came after the 11th Amendment, which was ratified in 1795.

Relying on the *Seminole Tribe* precedent, the 7th Circuit[6] found USERRA to be 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). The problem is that USERRA is based on the war powers clauses of Article I, Section 8 of the Constitution, and the Constitution was ratified several years before the 11th Amendment.

Later that same year (1998), Congress responded to *Velasquez* by amending section 4323 of USERRA. As amended, USERRA provides for a suit against a state, in federal court, filed by the Attorney General of the United States, in the name of the United States (as plaintiff). *See* 38 U.S.C. 4323(a)(1) (final sentence).

Alternatively, USERRA permits an individual to sue a state government employer in state court. "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 the individual can bring such an action in state court *if the state law permits such suits,* but if the state law does not permit such suits this option (suing the state in state court) is not available.

The problem is that in most of the states that have addressed this issue, state courts have held that the common law doctrine of sovereign immunity bars USERRA lawsuits in state court against the state government, as employer. The Alabama Supreme Court has held that the Alabama Constitution bars a USERRA suit against a state agency. *Larkins v. Department of Mental Health and Mental Retardation,* 806 So.2d 358 (Ala. 2001).[7] Similarly, the Delaware Supreme Court has held that a USERRA suit in state court, against a state agency, is impermissible. *Janowski v. Division of State Police, Department of Homeland Security, State of Delaware,* 981 A.2d 1166 (Del. 2009).[8] Georgia's intermediate appellate court has held that a USERRA suit cannot be maintained in state court against the state university system. *Anstadt v. Board of Regents of the University System of Georgia,* 303 Ga. App. 483, 693 S.E.2d 868 (2010).[9] Just recently, Tennessee's intermediate appellate court held that sovereign immunity precludes a USERRA suit against a state agency in state court. *Smith v. Tennessee National Guard,* No. M2012-00160-CAO-R3-CV (Tennessee Court of Appeals August 8, 2012).

In Pennsylvania, there is a state statute that clearly precludes suits against the state. *See* 1 *Pennsylvania Consolidated Statutes Annotated* section 2310 (West 2012). I discuss this Pennsylvania statute in Law Review 1269 (July 2012).

In *Panarello,* the Rhode Island Superior Court (trial court) held: "[I]t is clear that the General Assembly waived the State's sovereign immunity by necessary implication when it incorporated USERRA, without reservation, within its general laws." The State of Rhode Island had the opportunity to appeal this decision to the Rhode Island Supreme Court but apparently chose not to do so.

In this Law Review column, we have urged the states to enact legislation requiring state agencies, as employers, to comply with USERRA and providing an effective enforcement mechanism when state agencies flout USERRA. Please see Law Review 1299 (October 2012), by Robert E. Goodman, Esq. Readers—please follow up with your state legislatures on this critical issue.

In Law Review 1195 (by myself) and Law Review 1144 (by Rosario Vega Lynn, Esq.), we have discussed the case of *Ramirez v. New Mexico Department of Children, Youth & Families*. Rosario Vega Lynn filed suit in New Mexico state court against a state agency, on behalf of Phillip Ramirez, Jr., a Sergeant First Class (SFC) in the New Mexico Army National Guard. SFC Ramirez found it necessary to leave his state job when he was called to active duty and deployed to Iraq. When he was released from active duty, the state government violated his USERRA rights.

Ms. Vega Lynn brought the lawsuit in state court because the 11th Amendment to the United States Constitution precluded her from bringing the lawsuit in federal court. She won in the state trial court, both on sovereign immunity and on the merits. In an unreported decision that is remarkably similar to *Panarello,* the trial judge held that the New Mexico Legislature had waived sovereign immunity by necessary implication when it enacted legislation requiring all New Mexico employers (including state agencies) to comply with USERRA.

The State of New Mexico has appealed to the state's intermediate appellate court, and this case will likely go eventually to the New Mexico Supreme Court. ROA is preparing an *amicus curiae* (friend of the court) brief, in support of Phillip Ramirez, Jr. and his argument (through Ms. Vega Lynn) that the New Mexico Legislature has waived sovereign immunity to permit lawsuits of this kind. It is also likely that we will be given a few minutes of oral argument time, as *amicus*. We will keep the readers informed of developments in this important case.

[1] This citation means that you can find the *Panarello* case in Volume 185 of Labor Relations Reference Manual (L.R.R.M.) starting on page 3225. L.R.R.M. is an unofficial reporting system for federal and state cases relating to labor relations, including cases not published anywhere else. L.R.R.M. is published by The Bureau of National Affairs, Inc.

[2] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 815 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week.

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

[4] I worked for the United States Department of Labor (DOL) from September 1982 to September 1992. Together with Ms. Webman, another DOL attorney, I largely drafted the interagency task force work product that President George H.W. Bush presented to Congress, as his proposal, in early 1991. What Congress enacted in 1994 was about 85% the same as the Webman-Wright draft.

[5] The 1st Circuit is the federal appellate court that sits in Boston and hears appeals from federal district courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.

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

[7] This citation means that you can find the *Larkins* case in Volume 806 of Southern Reporter, Second Series, starting on page 358. I discuss the *Larkins* case in some detail in Law Review 89 (September 2003).

[8] This citation means that you can find the *Janowski* case in Volume 981 of Atlantic Reporter, Second Series, starting on page 1166. I discuss this case in Law Review 1149.

[9] This citation means that you can find the *Anstadt* case in Volume 693 of Southeast Reporter, Second Series, starting on page 868. I discuss this case in Law Review 1140.

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