Law Review 13027

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ROA Files USERRA *Amicus* Brief in NM Appellate Court

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

ROA brief filed

On January 14, 2013, ROA and the American Civil Liberties Union of New Mexico filed an *amicus curiae* (friend of the court) brief in the New Mexico Court of Appeals (NMCOA), the state's intermediate appellate court, in the case of *Ramirez v. State of New Mexico Children, Youth & Families Department,* NMCOA No. 31820.[1] In this "Law Review" column, we have addressed *Ramirez* previously in Law Review 1144 (July 2011), Law Review 1195 (November 2011), and Law Review 12115 (November 2012).[2]

ROA thanks attorneys Thomas G. Jarrard, Matthew Z. Crotty, and Robert Mitchell for their *pro bono* work in drafting this excellent brief. Mr. Jarrard is a Warrant Officer in the Marine Corps Reserve and a life member of ROA, while Mr. Crotty is a Lieutenant Colonel in the Washington Army National Guard and also a life member. Mr. Mitchell is an enlisted veteran of the Marine Corps and not eligible for ROA membership under our current constitution, but we wish he were.

Background of the *Ramirez* case

Sergeant First Class (SFC) Phillip G. Ramirez, Jr., of the New Mexico Army National Guard (NMARNG), was working for the New Mexico Children, Youth & Families Department (NMCYFD) when he was called to active duty and deployed to Iraq. He served in combat and suffered Post-Traumatic Stress (PTS). He was released from active duty and returned to his civilian job in January 2007.

In his lawsuit, SFC Ramirez alleges that NMCYFD violated the Uniformed Services Employment and Reemployment Rights Act (USERRA) in several ways. First, the employer denied him reemployment in the appropriate position of employment, the position that he would have attained if continuously employed. Moreover, Ramirez' supervisors unlawfully harassed him about his exercise of USERRA rights and his PTS and failed to make legally required accommodations for the PTS, a disability that he incurred on active duty. Ultimately, the employer fired him on March 25, 2008. SFC Ramirez contends that the firing was unlawful because it was motivated by his membership in the NMARNG, his exercise of USERRA rights, his performance of uniformed service, and his obligation to perform further service.

Shortly after he was fired by NMCYFD, SFC Ramirez contacted the New Mexico office of the Veterans' Employment and Training Service, United States Department of Labor (DOL-VETS). A DOL-VETS employee discouraged SFC Ramirez from filing a formal complaint against NMCYFD with DOL-VETS, and SFC Ramirez found Rosario Vega Lynn, Esq. She agreed to represent him and has done so most imaginatively, diligently, and effectively.

The 11th Amendment problem

As is explained in Law Review 104 and other articles, Congress enacted USERRA (Public Law 103-353) and President Clinton signed it into law on October 13, 1994. USERRA was the long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which dates back to 1940. I have been dealing with the VRRA and USERRA since 1982. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the interagency task force work product that President George H.W. Bush presented to Congress, as his proposal, in early 1991. The law that President Clinton signed on October 13, 1994 was about 85% the same as the Webman-Wright draft.

Like the VRRA, USERRA applies to almost all employers in this country, including the Federal Government, the states and their political subdivisions, and private employers regardless of size. While USERRA most definitely applies to state government agencies as employers, the 11th Amendment of the United States Constitution presents enormous practical difficulties in enforcing USERRA against the states. We have discussed those difficulties in detail in Law Reviews 89, 0848, 0912, 0918, 0930, 0931, 0936, 1011, 1014, 1029, 1051, 1119, 1140, 1144, 1149, 1158, 1175, 1201, 1232, 1269, 12115, 12120, and 12122.

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, 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, we were under the understanding that Congress could abrogate the 11th Amendment immunity of states, provided Congress were sufficiently clear about the intention to abrogate in the legislation Congress 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.[4] 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 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.[5]

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).[6]

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.[7] 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). 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). 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). 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).

How we got to New Mexico's intermediate appellate court

Represented by Rosario Vega Lynn, Esq., SFC Ramirez filed suit against NMCYFD in the 11th Judicial District Court in McKinley County, New Mexico. The case was assigned to Judge Camille Martinez-Olguin. In an unpublished decision, she held that her court had jurisdiction to hear and adjudicate SFC Ramirez' USERRA case against NMCYFD. She held that legislation enacted by the New Mexico Legislature amounted to a sufficient waiver of the sovereign immunity of the state. SFC Ramirez' case was tried to a jury, which rendered him a favorable verdict, which Judge Martinez-Olguin affirmed.

NMCYFD appealed on jurisdictional grounds to New Mexico's intermediate appellate court, and ROA's brief urges that court to affirm Judge Martinez-Olguin's decision. In our brief, we pointed out that if the New Mexico state courts do not have jurisdiction to hear and adjudicate USERRA cases against New Mexico state agencies as employers, then persons like SFC Ramirez are left without a remedy.

Where we go from here

The NMCOA will likely hold oral argument in late spring or early summer, and ROA will be given the opportunity, as *amicus,* to make an oral presentation. The NMCOA decision will likely come out late this year or early next year. Regardless of the outcome in the NMCOA, the New Mexico Supreme Court will almost certainly agree to hear this case, because it involves important public policy questions. We will keep the readers informed of developments in this interesting and important case.

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[1] On January 10, 2013, the United States Department of Justice (DOJ) filed a separate *amicus curiae* brief in this case. I will address that excellent brief in Law Review 13028.

[2] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 853 articles about the Uniformed Services Employment and Reemployment Rights Act (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. We added 122 new articles in 2012.

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

[4] The United States Court of Appeals for the First Circuit is the federal appellate court that sits in Boston and hears appeals from district courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.

[5] Article I, Section 8 of the United States Constitution includes 18 separate clauses enumerating the powers of Congress, and of course the Constitution predates the 11th Amendment by about six years. In *Velasquez,* the 7th Circuit inferred that the 11th Amendment bars suits by individuals against states under legislation enacted pursuant to all 18 clauses of Article I, Section 8. A later-decided decision of the Supreme Court casts doubt on this broad reading of *Seminole Tribe*. *See Central Virginia Community College v. Katz,* 546 U.S. 356 (2006). I will address this important question in Law Review 13029.

[6] This option was effectively foreclosed to SFC Ramirez when a DOL-VETS employee in New Mexico strongly discouraged him from filing a complaint with DOL-VETS.

[7] In its brief, referred to in footnote 1, DOJ argued that section 4323(b)(2) of USERRA in fact *requires* (not merely permits) state courts to hear and adjudicate USERRA cases against state government agencies as employers. I will address that important issue in Law Review 13028.