Law Review 13028

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DOJ Files Amicus Brief in NM Court of Appeals

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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

What is the meaning of this subsection: "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*." Title 38, United States Code, section 4323(b)(2) [38 U.S.C. 4323(b)(2)]. *Emphasis supplied.*

On January 10, 2013, the United States Department of Justice (DOJ) filed an *amicus curiae* (friend of the court) brief in the New Mexico Court of Appeals (NMCOA), in the case of *Ramirez v. New Mexico Children, Youth and Families Department,* NMCOA No. 31820. We are attaching a copy of the DOJ brief at the end of this article. I discuss the *Ramirez* case in detail in Law Review 13027, the immediately preceding article in this series.

Sergeant First Class (SFC) Phillip G. Ramirez, Jr. was a member of the New Mexico Army National Guard (NMARNG) and an employee of the New Mexico Children, Youth & Families Department (NMCYFD) when he was called to the colors and deployed to Iraq. After he was released from active duty, he claimed that the NMCYFD violated the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301-4335.

Rosario Vega Lynn, Esq. represented SFC Ramirez and filed suit against the NMCYFD in the 11th Judicial District Court in McKinley County, New Mexico. The NMCYFD vigorously defended, both on jurisdictional grounds and on the merits. The NMCYFD argued that the state court did not have jurisdiction because the New Mexico Legislature had not effectively waived sovereign immunity to permit lawsuits of this nature against state government agencies like the NMCYFD.

Judge Camille Martinez-Olguin rejected the NMCYFD arguments. She held that the Legislature had effectively waived sovereign immunity. Questions of fact were tried to a jury, which ruled in favor of SFC Ramirez. Judge Martinez-Olguin affirmed the jury verdict, and the NMCYFD appealed to the NMCOA.

SFC Ramirez, through his counsel, asked ROA to file an *amicus curiae* brief in the NMCOA, and we have done so. In our brief, we pointed out that if an individual like SFC Ramirez is precluded from filing a suit of this nature in state court, he or she is left without a remedy for a serious USERRA violation. We argued that the New Mexico Legislature had effectively waived sovereign immunity to permit lawsuits like the one that SFC Ramirez had filed. We urged the NMCOA to affirm Judge Martinez-Olguin.

In its well-researched and well-written brief, DOJ has taken an entirely different tack. DOJ asserts that section 4323(b)(2) of USERRA subjects *all states* (as employers) to private suits in state court to enforce the USERRA rights of state employees, former state employees, and unsuccessful applicants for state employment. DOJ also argued that Congress had the valid power to make states subject to private USERRA suits in state court, under the War Powers Clauses (United States Constitution, Article I, Section 8, Clauses 11-16).

In Law Review 12115 (December 2012), I wrote: "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."

As a result of the DOJ brief and the legal authority cited therein, I have reconsidered my position about the meaning and effect of section 4323(b)(2) and hereby revise it. I now believe that every state must permit USERRA lawsuits against state government agencies, in state court, *regardless of what the state law may provide*. Under Article VI, Clause 2 of the Constitution (commonly called the "Supremacy Clause"), a federal statute like USERRA trumps conflicting state statutes and state constitutions.

The West Publishing Company recently published *Reading Law: The Interpretation of Legal Texts,* by Supreme Court Justice Antonin Scalia and legal scholar Bryan A. Garner. This impressive new book lays out in great detail the canons of statutory construction that courts in Great Britain and the United States have developed over the centuries. On page 174, Justice Scalia and Mr. Garner set forth the "surplusage canon" as follows: "If possible, every word and every provision [of a statute] is to be given effect. None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence."

Under the interpretation of section 4323(b)(2) that I have followed until now, this subsection *permits* but does not require a state (through its own laws) to authorize a suit in state court against a state government agency as employer to enforce USERRA rights. Rethinking the issue, I now see that this interpretation causes section 4323(b)(2) to have no consequence. If state law permits such a suit in state court, a federal law permitting such suits makes no difference, because it is clearly within the power of the state to permit such suits. Under the surplusage canon, an interpretation that causes a subsection to have no consequence is to be disfavored.

What, then, is the meaning of "in accordance with the laws of the State" in section 4323(b)(2)? This language means that a private party (like SFC Ramirez) seeking to sue a state government agency in state court must look to state law to determine *in which state court* to file the suit and to determine the proper drafting of the complaint in state court. But federal law gives state courts jurisdiction and state law cannot deprive them of that jurisdiction.

We will keep the readers informed of developments on this important and interesting issue.

UPDATE:
Phillip Ramirez v. State of New Mexico Children Youth and Families Department