Law Review 13029

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Supreme Court Case Points Way to Effective Enforcement of USERRA against State Government Employers

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

***Central Virginia Community College v. Katz,* 546 U.S. 356 (2006).**

This 2006 Supreme Court case points the way to a solution of the difficult problem of enforcing the Uniformed Services Employment and Reemployment Rights Act (USERRA) against state government agencies as employers.

As originally enacted in 1994, USERRA permitted an individual to sue a state (as employer) in federal court.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,[1] 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."[2]

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[3], we were under the understanding that Congress could abrogate the 11th Amendment immunity of states, provided Congress were sufficiently clear about the intent 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. 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.

The United States Constitution was drafted in the summer of 1787, at the Constitutional Convention in Philadelphia. After the original states ratified the Constitution, George Washington was elected our first President, and the first Congress was elected, and our Federal Government set up shop under the Constitution in 1789, replacing the Articles of Confederation, which had proved unworkable.

During the debate in the states concerning ratification of the Constitution, it was generally agreed that adding a "Bill of Rights" would be an improvement. Accordingly, the First Congress proposed 12 amendments, and ten of them

were quickly ratified by the states—those ten amendments became the Bill of Rights. The 11th Amendment was not one of the 12 amendments proposed by the First Congress. It was proposed by Congress and ratified by the states just a few years later, in 1795.

Article I, Section 8 of the Constitution enumerates the powers of Congress in 18 separate clauses. Of course, these clauses, and the Constitution of which they are a part, pre-date the 11th Amendment by six years. In *Velasquez,* the 7th Circuit relied on the understanding that *Seminole Tribe* means that no federal statute that relies on the 18 clauses of Article I, Section 8 can validly abrogate the sovereign immunity of the states and permit lawsuits against the states in federal court. But *Central Virginia Community College* blows a big hole in that expansive interpretation of *Seminole Tribe*.

Writing for a five-justice majority, Justice John Paul Stevens wrote: "We acknowledge that statements in both the majority and the dissenting opinions in *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996), reflected an assumption that the holding in that case would apply to the Bankruptcy Clause. *See also Hoffman* v. *Connecticut Dept. of Income Maintenance*, 492 U.S. 96, 105, 109 S. Ct. 2818, 106 L. Ed. 2d 76 (1989) (O'CONNOR, J., concurring). Careful study and reflection have convinced us, however, that that assumption was erroneous. For the reasons stated by Chief Justice Marshall in *Cohens* v. *Virginia*, 19 U.S. 264, 6 Wheat. 264, 5 L. Ed. 257 (1821), we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated. *See id.*, at 399-400 ('It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision')." *Central Virginia Community College,* 546 U.S. at 363.

In Law Review 13028, the immediately preceding article in this series, I discussed in detail the *amicus curiae* brief filed by the United States Department of Justice (DOJ) in the New Mexico Court of Appeals, in the case of *Ramirez v. New Mexico Children, Youth & Families Department*. In that brief, DOJ cites *Central Virginia Community College* for the proposition that the 7th Circuit got it wrong in *Velasquez*. Despite *Seminole Tribe,* it really is not unconstitutional for Congress to authorize USERRA lawsuits against state government employers, in federal court or state court.

During the 112th Congress (2011-12), several bills were introduced that would have amended section 4323 of USERRA to authorize suits in federal court against state governments, as employers. Those bills were not enacted in the last Congress, but we will try again in the 113th Congress.

We will keep the readers informed of developments on enforcing USERRA against the states, as employers.

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[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 851 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. I initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012.

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

[3] As I explained in Law Review 104 and other articles, I developed the interest and expertise in reemployment rights 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 intended as a complete rewrite of the Veterans' Reemployment Rights Act (VRRA), which dates back to 1940. President George H.W. Bush presented our work product to Congress, as his proposal, in early 1991. What Congress enacted in 1994 (Public Law 103-353) was about 85% the same as the Webman-Wright draft.