LAW REVIEW 13056

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California University of Pennsylvania Sued for Violating USERRA

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1.1.1.7—USERRA applies to state and local governments
1.1.2.1—USERRA applies to part-time, temporary, probationary, and at-will employees
1.2—USERRA forbids discrimination
1.4—USERRA enforcement
1.8—Relationship between USERRA and other laws/policies

On April 18, 2013 attorney Timothy P. O'Brien[1] filed suit on behalf of Pennsylvania Army National Guard 1LT Zackary Dawson[2] in the Washington County (Pennsylvania) Court of Common Pleas. The defendant is California University of Pennsylvania (CUP), which is part of Pennsylvania's state university system. The complaint alleges that CUP violated the Uniformed Services Employment and Reemployment Rights Act (USERRA), which is codified in title 38, United States Code, sections 4301 through 4335 (38 U.S.C. 4301-4335).

Dawson was already a full-time physical therapist and a part-time instructor[3] at CUP when he decided to join the Pennsylvania Army National Guard in 2011. Dawson earned two undergraduate degrees at CUP and then a doctorate in physical therapy from Chatham University. In 2010, he began practicing therapy by day and teaching one course at CUP at night. He was named CUP's 2010 Health Sciences Alumnus of the Year.

When CUP officials terminated his part-time employment, they told him: "We cannot risk going with you for another semester because of your military obligations." That statement seems to constitute "smoking gun" evidence that the termination violated section 4311(a) of USERRA, which provides: "A person who is a member of, applies to be a member of, performs, applies to perform, or has an obligation to perform service in the uniformed services shall not be denied initial employment, reemployment, *retention in employment,* promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation." 38 U.S.C. 4311(a).[4]

Attorney Timothy P. O'Brien filed this case in state court, rather than federal court, because the 11th Amendment of the United States Constitution at least arguably precluded him from filing the suit in federal court. The 11th Amendment (ratified in 1795) 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."[5] Although the 11th Amendment speaks to a suit against a

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[1] Mr. O'Brien is a retired Major of the Army National Guard and a member of ROA.
[2] Lieutenant Dawson is not a member of ROA, but we are working on that.
[3] USERRA most assuredly applies to part-time as well as full-time employment. Please see Law Review 1254 (May 2012). I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 875 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. We added 122 new articles in 2012.
[4] Under section 4311(c), Dawson is not required to prove that the firing was motivated *solely* by his military service and obligations—he only needs to prove that his service and obligation to perform service were *a motivating factor* in the employer's decision. If he proves that (and the statement certainly proves it), the burden of proof shifts to the employer (CUP) to prove that it *would have fired Dawson anyway* even in the absence of these protected factors.
[5] Yes, it is capitalized just that way, in the style of the late 18th Century.

state by a citizen of another state, or a foreign state, the Supreme Court held that 11th Amendment immunity also precludes a suit against a state by a citizen of that same state. *Hans v. Louisiana*, 134 U.S. 1 (1890).[6]

As originally enacted in 1994, section 4323 of USERRA permitted an individual to sue a state (as well as a political subdivision of a state or a private employer) in federal court, with private counsel or through the assistance of DOL and DOJ. Two years later, the Supreme Court decided *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996). That important Supreme Court decision clarified the 11th Amendment. After that decision, Congress can abrogate 11th Amendment immunity *only* when Congress is acting under constitutional authority that came after the states ratified the 11th Amendment in 1795.[7]

For example, the states ratified the 14th Amendment in 1868. The final section of that Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." A civil rights law can constitutionally authorize a suit against a state because the states ratified the 14th Amendment 73 years after the states ratified the 11th Amendment.

Relying on this broad interpretation of *Seminole Tribe,* the United States Court of Appeals for the Seventh Circuit[8] held USERRA to be unconstitutional insofar as it permitted an individual to sue a state in federal court. *Velasquez v. Frapwell,* 160 F.3d 389 (7th Cir. 1998).[9] Later in 1998, Congress reacted to *Velasquez* by amending USERRA.

As amended in 1998, USERRA provides for two ways to enforce USERRA against a state government employer. The first way is to file a formal complaint with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). That agency will investigate the complaint and (if it is not resolved) will refer the case file to the United States Department of Justice (DOJ). If DOJ agrees that the case has merit, it may file suit against the state government employer in the appropriate federal district court *in the name of the United States as plaintiff.*[10] Filing suit in the name of the United States solves the 11th Amendment problem because that amendment does not preclude a suit against a state by the United States.[11]

The problem with this approach is that most of the DOL-VETS investigators are not well trained and well motivated. All too often, they simply accept the employer's assertions about the facts and the law and close the case as "without merit" even when it does have merit.

The alternative way to enforce USERRA against a state government employer is provided by section 4323(b)(2) of USERRA, which provides: "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).

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[6] This citation means that you can find the *Hans* case in Volume 134 of *United States Reports,* starting on page 1.

[7] Our understanding of *Seminole Tribe,* after the case came out, was that Congress cannot, through legislation enacted pursuant to Article I, Section 8 of the Constitution, abrogate the 11th Amendment of states. As explained below, a later Supreme Court case now causes us to reconsider this broad interpretation of *Seminole Tribe*. Now, perhaps a better interpretation of *Seminole Tribe* is that Congress cannot abrogate the 11th Amendment immunity of states when enacting legislation under Article I, Section 8, Clause 3 (the Interstate and Indian Commerce Clause). In *Central Virginia Community College v. Katz,* 546 U.S. 356 (2006), the Supreme Court upheld the constitutionality of a federal statute (enacted pursuant to the bankruptcy clause of Article I, Section 8, Clause 4.

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

[9] This citation means that you can find the *Velasquez* case in Volume 160 of *Federal Reporter, Third Series,* starting on page 389.

[10] *See* 38 U.S.C. 4323(a)(1)(final sentence).

[11] *See United States v. Alabama Department of Mental Health,* 673 F.3d 1320 (11th Cir. 2012). I discuss that case in detail in Law Review 1232 (March 2012).

What does the phrase "in accordance with the laws of the State" mean in this context? Until recently, I believed that we must look to state law to determine whether a suit against the state in state court to enforce USERRA is permissible. If this is a state law question, Dawson's suit will be dismissed for want of jurisdiction, because Pennsylvania law clearly provides that the Commonwealth of Pennsylvania is immune from being sued in state court.[12]

As I explained in Law Review 13028 (February 2013), DOJ filed an excellent *amicus curiae* brief in the New Mexico Court of Appeals, arguing that section 4323(b)(2) means that state courts have jurisdiction to hear and must hear USERRA claims against state government employers *regardless of what the state law may provide.*

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.

If this issue is left up to the states, most state government employers will hide behind hoary doctrines of sovereign immunity and avoid accountability for violating USERRA. State supreme courts and intermediate appellate courts in four states have found that the state (as employer) is immune from being sued for violating USERRA. ALABAMA: *Larkins v. Alabama Department of Mental Health & Mental Retardation,* 806 So.2d 358 (Alabama Supreme Court 2001); DELAWARE: *Janowski v. Division of State Police, Department of Safety & Homeland Security, State of Delaware,* 981 A.2d 1166 (Delaware Supreme Court 2009); GEORGIA: *Anstadt v. Board of Regents of the University System of Georgia,* 303 Ga. App. 483, 693 S.E.2d 868 (Georgia Court of Appeals 2010); and TENNESSEE: *Smith v. Tennessee National Guard,* No. M2012-00160-CAO-R3-CV (Tennessee Court of Appeals August 8, 2012).

In Rhode Island, the state trial court held that the state department of corrections is not immune from being sued in state court for violating USERRA. *Panarello v. State of Rhode Island Department of Corrections,* 185 L.R.R.M. 3225 (Rhode Island Superior Court January 22, 2009).

In New Mexico, the state trial court has held that the state is not immune and found for a former state employee claiming that a state government department had violated USERRA when the individual returned from active duty

[12] *See* 1 Pa. Cons. Stat. Ann. Section 2310 (West 2012).

in Iraq. The State of New Mexico has appealed to the state's intermediate appellate court, and ROA filed an *amicus curiae* brief in favor of holding the state accountable for violating USERRA. The issue is currently pending in New Mexico's intermediate appellate court, and the oral argument will likely be held in late summer 2013. Please see Law Review 13027 (February 2013).

We will keep the readers informed of new developments in this important case.