LAW REVIEW 13066

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Sometimes the Important Dog Is the One Who Does not Bark[1]

By Captain Samuel F. Wright, JAGC, USN (Ret.)

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

***Wang v. New York State Department of Health,* 2013 NY Slip Op. 23143 (New York Supreme Court, Albany County, Feb. 19, 2013).**[2]

Donna L. Wang is a Lieutenant Colonel in the Army Reserve and a life member of ROA. In her civilian capacity, she has worked for the New York State Department of Health (NYSDOH) since January 2001, as a healthcare surveyor. In her Army Reserve capacity, she was called to active duty in early 2008 and released from active duty in July of that year.

Colonel Wang returned to her civilian job after she was released from active duty, but she alleges that she was subjected to significant adverse changes to her work environment after returning to work. She claims that she was assigned a greater volume of cases than her co-workers and that she was allotted less time to complete work assignments. She claims that she was harassed about her Army Reserve service by three co-workers, two of whom were supervisors, and that she was advised that her military duty would negatively impact on her ability to take vacation time. She alleges that the way that she has been treated violates both the Uniformed Services Employment and Reemployment Rights Act (USERRA) and section 242 of the New York State Military Law. In this lawsuit, she is represented by attorney Michael W. Macomber, of the law firm Tully Rinckey PLLC.[3]

USERRA cases are normally filed in federal court, but this case was filed in the New York Supreme Court because the defendant employer is an agency of the state government. Attorney Michael Macomber 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."[4] Although the 11th Amendment speaks to a suit against a state by a citizen of another state, or a foreign state, the Supreme Court has 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).

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[1] The title refers to *Silver Blaze,* the "Sherlock Holmes" mystery by Sir Arthur Conan Doyle. Someone removed the valuable racehorse from its stall, and the critical clue was the fact that the dog did not bark. Sherlock Holmes inferred that the dog did not bark because the dog knew well the man who removed the horse, and Holmes thereby inferred the identity of the thief.

[2] This citation is to a decision by Justice Richard M. Platkin of the New York Supreme Court, in Albany County. In New York, unlike other states, the "Supreme Court" is the trial court and the state's high court is called the Court of Appeals.

[3] By way of full disclosure, I was a partner at Tully Rinckey until I came to the full-time ROA staff, as the first Director of the Service Members Law Center, on June 1, 2009.

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

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.[5]

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 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). 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.* 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.

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).

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).

Fortunately, this is not a problem in New York, our nation's third largest state. Justice Platkin's decision does not discuss jurisdiction or sovereign immunity, because the New York Attorney General (representing the NYSDOH) did not raise these issues. The Attorney General did not raise the issues because in New York, at least, it is clear that a state employee or former state employee is permitted to sue a state government agency (as employer) in state

[5] A later Supreme Court decision shows that this interpretation of *Seminole Tribe* may be too broad, and that only congressional enactments based on the Interstate Commerce Clause are precluded from overriding 11th Amendment Immunity. Please see footnote 7 in Law Review 13056 (April 2013).

court for violating USERRA and section 242 of the New York State Military Law. This is the significant dog that did not bark.

Lieutenant Colonel Wang may not win her case, but at least she will have her day in court. In this decision, Justice Platkin denied Wang's summary judgment motion and granted part but not all of the NYSDOH's summary judgment motion. Justice Platkin's interesting and scholarly discussion of the collateral estoppel doctrine, as applied to USERRA cases, is well worth reading.