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Enforcing USERRA against a State Government Employer-Good News from Wisconsin

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***Scocos v. State of Wisconsin Department of Veteran Affairs,* 2012 WI App. 81, 343 Wis. 2d 648, 819 N.W.2d 360[1] (Court of Appeals of Wisconsin 2012).**

Introduction

This is a decision by a three-judge panel of Wisconsin's intermediate appellate court. The State of Wisconsin could have appealed to the Wisconsin Supreme Court but did not do so, and the deadline for doing so has passed. The plaintiff was reemployed after military service and fired shortly thereafter. He filed suit in the Wisconsin Circuit Court (trial court), and the State filed a motion to dismiss based on the State's sovereign immunity. The Circuit Court denied the motion. The State appealed to Wisconsin's intermediate appellate court, which affirmed the denial of the motion to dismiss and remanded the case to the Circuit Court for trial. The trial will likely be held later this year unless the parties settle.

This case is important because it shows that, at least in Wisconsin, it is possible to enforce the Uniformed Services Employment and Reemployment Rights Act (USERRA) against a state government agency as employer. As is explained in Law Review 1269[2] (July 2012) and other articles, it has been most difficult in some states to enforce USERRA against state agencies, as employers, because of the ancient common law doctrine of "sovereign immunity" or "the King can do no wrong" and because of the 11th Amendment to the United States Constitution. It is gratifying to see evidence that this will not be a problem in Wisconsin.

Factual background

John A. Scocos is a recently retired Colonel in the Army Reserve and a life member of ROA. In September 2003, he was appointed Secretary of the Wisconsin Department of Veterans Affairs, a state government position. At the time, the Governor appointed members of the Wisconsin Department of Veterans Affairs Board, and the Board appointed the Secretary, and the Secretary served at the pleasure of the Board, meaning that he or she could be removed by the Board with or without cause.[3]

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[1] The citation means that you can find this case in Volume 819 of *Northwest Reporter, Second Series,* starting on page 360.

[2] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 895 articles about 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] The current Governor, Scott Walker (elected in 2010), has changed the method of appointment for this position—now the Secretary is appointed by the Governor directly and serves at the Governor's pleasure.

While serving as Secretary, Colonel Scocos was twice called to active duty, the second time from September 2008 to September 2009.[4] He returned to work as Secretary of the Wisconsin Department of Veterans' Affairs shortly after he was released from active duty in September 2009, but the Board terminated his employment in November 2009. Almost two years later, in October 2011, he returned to the Secretary position, appointed by new Governor Scott Walker, who was elected in November 2010 and took office in January 2011.

Colonel Scocos was entitled to reemployment in 2009

Colonel Scocos was entitled to reemployment in his pre-service civilian position (Secretary) because he met the eligibility criteria set forth in USERRA:

a. He left his civilian position of employment for the purpose of performing service in the uniformed services.
b. He gave the employer prior oral or written notice.
c. He did not exceed USERRA's cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the particular employer relationship for which he sought reemployment.[5]
d. He was released from the period of service without having received the sort of punitive or other-than-honorable discharge that would disqualify him under section 4304 of USERRA, 38 U.S.C. 4304.
e. After release from the period of service, he made a timely application for reemployment.[6]

Because he met the USERRA conditions, John A. Scocos was entitled to reemployment in the position of employment that he would have attained if he had remained continuously employed in the civilian position instead of going on active duty from September 2008 to September 2009, or another position (for which he was qualified) that was of like seniority, status, and pay. *See* 38 U.S.C. 4313(a)(2)(A). There is every reason to believe that Mr. Scocos would have remained in the Secretary position if he had not been called to the colors. Within the Department of Veterans Affairs, there is no other position of like status to the Secretary position, so the employer had the legal obligation, under USERRA, to reinstate Mr. Scocos promptly in that position.

Firing Colonel Scocos shortly after he was reinstated violated section 4316(c) and section 4311(a) of USERRA.

A law that required an employer to reinstate a person like Colonel Scocos, after military service, and then permitted the employer to fire the individual shortly thereafter would be an essentially meaningless law. Accordingly, almost from the very beginning, in 1940,[7] the federal reemployment statute has had a provision granting the reemployed veteran a period of special protection, after reinstatement, during which the employer must prove that any firing is for cause.[8] The current provision reads as follows:

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[4] He served in Iraq for most of that active duty period.

[5] Since the period of service was involuntary, it did not count toward his five-year limit. Please see Law Review 201 (October 2005) for a detailed description of what counts and what does not count toward exhausting USERRA's five-year limit.

[6] After a period of service of 181 days or more (like this period), the returning service member has 90 days to apply for reemployment. *See* 38 U.S.C. 4312(e)(1)(D). Colonel Scocos applied for reemployment and returned to his civilian position well within that deadline.

[7] Congress enacted the Veterans' Reemployment Rights Act (VRRA) in 1940, as part of the Selective Training and Service Act (STSA). The STSA is the law that led to the drafting of millions of young men, including my late father, for World War II. The VRRA has applied to the Federal Government and to private employers since 1940. In 1974, Congress amended the VRRA to expand the application to include state and local governments as well. In 1994, Congress enacted USERRA (Public Law 103-353) as a comprehensive rewrite of the VRRA.

[8] USERRA tinkered with the duration of the special protection period and how the duration is to be determined but did not change the basic terminology and effect of this provision.

"(c) A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause—
(1) within one year after the date of such reemployment, if the person's period of service before the reemployment was more than 180 days; or
(2) within 180 days after the date of such reemployment, if the person's period of service before the reemployment was more than 30 days but less than 181 days."

Title 38, United States Code, section 4316(c) [38 U.S.C. 4316(c)].

USERRA's legislative history and the special protection period

USERRA's 1994 legislative history addresses the special protection provision as follows:
"Section 4315(d) [later renumbered as 4316(d)] would relate the period of special protection against discharge without cause to the length, and not the type, of military service or training. … Under this provision, the protection would begin only upon proper and complete reinstatement. *See O'Mara v. Peterson Sand & Gravel Co.,* 498 F.2d 896, 898 (7th Cir. 1974).

The purpose of this special protection is to ensure that the returning serviceperson has a reasonable time to regain civilian skills and to guard against a bad faith or pro forma reinstatement. As expressed in *Carter v. United States,* 407 F.2d 1238, 1244 (D.C. Cir. 1968), 'cause' must meet two criteria: (1) it is reasonable to discharge employees because of certain conduct and (2) the employee had notice, express or fairly implied, that such conduct would be notice [presumably 'cause' was intended] for discharge. The burden of proof to show that the discharge was for cause is on the employer. *See Simmons v. Didario,* 796 F. Supp. 166, 172 (E.D. Pa. 1992).

The limitation upon the duration of the period of special protection should not be considered to be a limitation upon the duration of other rights under chapter 43 [USERRA]. *See Oakley v. Louisville & Nashville Railway Co.,* 338 U.S. 278, 284-85 (1949). Similarly, the expiration of the period of special protection does not end the protection against discrimination contained in proposed section 4311. It is to be understood, however, that good cause exists if the 'escalator' principle would have eliminated a person's job or placed that person on layoff in the normal course."
House Rep. No. 103-65, 1994 *United States Code Congressional and Administrative News* 2449, 2468.

USERRA regulations and the special protection period

Section 4331(a) of USERRA [38 U.S.C. 4331(a)] gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. In September 2004, the Secretary published proposed USERRA regulations in the *Federal Register.* After considering the comments received and making a few adjustments, the Secretary published the final USERRA regulations in December 2005. The regulations are published in the Code of Federal Regulations (C.F.R.) in Title 20, Part 1002.
The DOL USERRA Regulations provide as follows concerning the special protection period:
"The employee may be discharged for cause based either on conduct or, in some circumstances, because of the application of other legitimate nondiscriminatory reasons. (a) *In a discharge action based on conduct, the employer bears the burden of proving that it is reasonable to discharge the employee for the conduct in question*, and that he or she had notice, which was express or can be fairly implied, that the conduct would constitute cause for discharge. (b) If, based on the application of other legitimate nondiscriminatory reasons, the employee's job position is eliminated, or the employee is placed on layoff status, either of these situations would constitute cause for purposes of USERRA. *The employer bears the burden of proving that the employee's job would have been eliminated or that he or she would have been laid off."*
20 C.F.R. 1002.248 (emphasis supplied).

Applying these principles to Colonel Scotos' case

Because the Department of Veterans Affairs Board terminated Scotos' employment as Secretary well within the one-year period of special protection after his 2008-09 year of active duty, the State of Wisconsin is required to prove that the firing was *for cause.* The State must prove that Scotos *would have been fired anyway* even if he had not been called to the colors from September 2008 to September 2009. It seems most unlikely that the State will be able to prove that.

In the Circuit Court, on its motion to dismiss, and in the intermediate appellate court, the State of Wisconsin argued forcefully that Wisconsin had not waived sovereign immunity with respect to enforcement of USERRA (and specifically the special protection clause in section 4316(c)) against the State. The intermediate appellate court forcefully rejected this assertion, and the State did not appeal to the Wisconsin Supreme Court. The appellate court's holding is considered the "law of the case" because the State failed to appeal to the high court. The State should settle with Colonel Scotos and stop throwing good money after bad.

Sovereign immunity and the 11th Amendment complicate enforcement of USERRA against state government employers.

Sovereign immunity or "the King can do no wrong" has been part of the common law tradition of Great Britain and the United States for almost a millennium, but during the 20th Century and so far in the 21st there have been many inroads in sovereign immunity at both federal and state levels. The Federal Tort Claims Act (FTCA), enacted by Congress in 1946, permits individuals to sue the Federal Government and to recover money damages when they suffer property damage, personal injury, or wrongful death caused by the negligent or otherwise wrongful conduct of federal employees (including military personnel) acting in the course and scope of their employment. Similar inroads have been made at the state level through state laws and state constitutional amendments.

The Continental Congress won the American Revolution without any central constitution. In 1781, the 13 original states ratified the Articles of Confederation (AOC), our nation's first constitution. The AOC provided for a very weak central government and a loose confederation of sovereign states. In 1787, delegates from the 13 original states met all summer in Philadelphia and drafted what became the United States Constitution, the greatest governing document ever produced by human beings at a single time and place.

The Constitution was presented to the states for ratification and was quickly ratified, but during the ratification debates it was suggested that a "Bill of Rights" be added. The first President and first Congress were elected and set up shop in 1789. The First Congress proposed 12 constitutional amendments, and ten of them were quickly ratified and became the Bill of Rights.

Sovereign immunity of the states was not discussed in the Bill of Rights, but the issue arose in one of the very earliest decisions of the United States Supreme Court: *Chisholm v. Georgia,* 2 U.S. 419 (1793). The Supreme Court held that Mr. Chisholm (a citizen of South Carolina) could sue the State of Georgia in federal court, in a dispute involving the sale of state land to private parties. There was an immediate and vehement backlash. On March 4, 1794, Congress proposed the 11th Amendment to the states, and they ratified it on February 7, 1795.[9]

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 of Subjects of any Foreign State."[10]

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).
As many readers are aware, I had a hand in drafting USERRA while employed as an attorney for the U.S. Department of Labor (DOL). Susan M. Webman (another DOL attorney) and I drafted the interagency task force work product that President George H.W. Bush presented to Congress, as his proposal, in early 1991. What Congress enacted and President Clinton signed on October 13, 1994 (Public Law 103-353) was about 85% the same as the Webman-Wright draft.
Ms Webman and I were under the impression (when we drafted the pertinent USERRA language) that Congress could abrogate the 11th Amendment immunity of states, so long as Congress was explicit that it intended to

[9] This is very rapid for an era before there were railroads, much less radio or telegraph.
[10] Yes, it is capitalized just that way, in the style of the late 18th Century.

abrogate such immunity. Our understanding of the 11th Amendment was based on *Reopell v. Commonwealth of Massachusetts*, 936 F.2d 12 (1st Cir. 1991). Ms. Webman and I both participated in drafting the successful appellate brief for Mr. Reopell in the United States Court of Appeals for the First Circuit.[11]

Mr. Reopell was a Massachusetts state police trooper. State Police Regulation 10.83, then in effect, stated that state police officers were not permitted to join any federal or state military organization, other than the Massachusetts National Guard, without the prior written permission of the state police commissioner. Reopell applied for permission and was denied and then joined the Army Reserve anyway. When his supervisor learned that Reopell had joined the Army Reserve, he brought him up on state police charges. Reopell received a one-month suspension without pay; as a result, he lost pay, vacation time, sick leave, and seniority.

Reopell sued the Commonwealth of Massachusetts in federal court, with the help of DOL and the Department of Justice (DOJ). We won in Federal District Court on all issues except one. The District Court held that State Police Regulation 10.83 was invalid because it conflicted with the VRR law. The court ordered the commonwealth to reimburse Reopell for $3,260.41 in lost wages, from the one-month suspension, and the court ordered Massachusetts to restore Reopell's lost vacation, sick leave, and seniority. The court ordered Massachusetts to rescind the order requiring Reopell to resign from the Army Reserve and to publish a comprehensive order explaining to state police officers that the court had found the policy embodied in Rule 10.83 to be unlawful under the VRR law and had enjoined its enforcement.

The one remaining issue was the awarding of interest on the back pay. As of February 1990, that interest amounted to $1,788.01, with further interest accruing at the rate of 8 percent. The District Court held that it could not, consistently with the 11th Amendment, award interest on the back pay. The District Court held that there must be a separate congressional abrogation of 11th Amendment immunity, specifically mentioning interest. We appealed and won this one remaining issue in the First Circuit, which held that the VRR law's abrogation of 11th Amendment immunity was sufficiently clear, even as to interest.

Ms. Webman and I had *Reopell* in mind when we drafted the language now codified at 38 U.S.C. 4323(d)(3): "A State shall be subject to the same remedies, *including prejudgment interest*, as may be imposed upon any private employer under this section." (Emphasis supplied.) We thought that this language, with an accompanying explanation in the legislative history, was sufficient to solve the 11th Amendment problem, even if the District Court, not the First Circuit, had been correct about there being a special rule as to interest. I confess that we did not anticipate the holding of the Supreme Court in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). *Seminole Tribe* dealt with a federal statute (enacted pursuant to Article I, Section 8, Clause 3) that permitted an Indian tribe (like the Seminole Tribe of Florida) to sue a state in federal court. The Supreme Court held that statute to be unconstitutional under the 11th Amendment. A federal statute enacted pursuant to Article I, Section 8, Clause 3 (ratified along with the rest of the Constitution in 1789) cannot override the 11th Amendment, which was ratified in 1795.

Article I, Section 8 has 18 separate clauses enumerating the broad but not unlimited powers of Congress. In the years, following *Seminole Tribe,* a common interpretation of the Court's holding was that any federal statute based on any of the 18 clauses of Article I, Section 8 cannot override the 11th Amendment and permit lawsuits in federal court against the states, because all of those clauses predate the 11th Amendment by six years. A more recent Supreme Court case seems to indicate that this is too broad a reading of *Seminole Tribe,* focusing solely on the 1789 ratification of the Constitution and the 1795 ratification of the 11th Amendment.

I invite the reader's attention to *Central Virginia Community College v. Katz,* 546 U.S. 356 (2006). The Supreme Court held that a federal statute enacted pursuant to Article I, Section 8, Clause 4 (the bankruptcy clause) could abrogate the 11th Amendment immunity of states and permit lawsuits against states in federal court.[12]

Applying *Seminole Tribe* (and without the benefit of *Katz* which was not decided until eight years later), the United States Court of Appeals for the Seventh Circuit[13] held USERRA to be unconstitutional insofar as it permitted an

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[11] The 1st 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.

[12] I discuss the implications of *Katz* in detail in Law Review 13029 (February 2013).

individual to sue a state in federal court. *Velasquez v. Frapwell,* 160 F.3d 389 (7th Cir. 1998). Later in 1998, Congress amended USERRA to address the *Velasquez* problem.[14]

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.*[15] 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.[16]

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).

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. 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 law professor Bryan A. Garner. This impressive new book lays out in great detail the canons of statutory interpretation that courts in Great Britain and the United States have developed over the centuries. On page 174, Justice Scalia and Professor 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 seeking to sue a state government agency in state court must look to state law to

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

[14] I believe that *Velasquez* interpreted *Seminole Tribe* too broadly, but for the time being we are stuck with the statutory amendments that Congress made in 1998.

[15] 38 U.S.C. 4323(a)(1) (final sentence, added in 1998).

[16] Please see *United States v. Alabama Department of Mental Health,* 673 F.3d 1320 (11th Cir. 2012) (discussed in detail in Law Review 13056 in April 2013) and *United States v. Nevada,* 817 F. Supp. 2d 1230 (D. Nev. 2011) (discussed in detail in Law Review 13031 in February 2013).

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.[17]

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)[18]; DELAWARE: *Janowski v. Division of State Police, Department of Safety & Homeland Security, State of Delaware,* 981 A.2d 1166 (Delaware Supreme Court 2009)[19]; 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)[20]; 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).[21]

In New York, a state court remedy is available for USERRA violations by state agency employers. *Wang v. New York State Department of Health,* 2013 NY Slip Op. 23143 (New York Supreme Court, Albany County, Feb. 19, 2013).[22]

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 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).

Scocos is good news. It shows that there is a way forward for National Guard and Reserve personnel in Wisconsin to sue state agencies and prevail in state court. We will keep the readers informed of new developments on this important issue.

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[17] Wisconsin's intermediate appellate court did not discuss this argument (which was apparently not raised) in *Scocos.*

[18] I discuss *Larkins* in detail in Law Review 89

[19] I discuss *Janowski* in detail in Law Review 1149.

[20] I discuss *Anstadt* in detail in Law Review 1140.

[21] Please see Law Review 12115 (November 2012) for a detailed discussion of *Panarello.*

[22] I discuss *Wang* in detail in Law Review 13066.