

Law Review 13075

Update 2:

On the same day that we added Law Review 13075 to our website, the United States District Court for the Northern District of Alabama rejected the argument of the Madison City Board of Education that it is an “arm of the state” and not a “political subdivision” for purposes of the 11th Amendment to the United States Constitution. In a scholarly 17-page decision, Magistrate Judge T. Michael Putnam cited court decisions by the United States Supreme Court, the Court of Appeals for the 11th Circuit,¹ and district courts in the 11th Circuit, as well as Alabama statutes and decisions of the Alabama Supreme Court, in explaining his decision to deny the defendant’s motion to dismiss the complaint based on lack of subject matter jurisdiction. *Weaver v. Madison City Board of Education*, 2013 U.S. Dist. LEXIS 75107 (N.D. Ala. May 29, 2013).

Michael E. Weaver is the chief financial officer for the Madison City Board of Education and a warrant officer in the Army Reserve. He is not a member of ROA, but we are working on that. He has been called to active duty more than once, interrupting his civilian employment, and he claimed that the school district violated his rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA). We will keep the readers informed of developments in this important case.

We now have a decision of the 7th Circuit² holding that a USERRA claim can be brought against a political subdivision of the State of Illinois. *Sandoval v. City of Chicago*, 560 F.3d 703, 704 (7th Cir.), *cert. denied*, 558 U.S. 874 (2009). We have a decision of the United States District Court for the Western District of Kentucky³ upholding the permissibility of a federal court USERRA lawsuit against a political subdivision of the Commonwealth of Kentucky. *Gentry v. Oldham County*, 2011 U.S. Dist. LEXIS 5935 (W.D. Ky. Jan. 21, 2011). And in *Weaver* we have a decision of a district court in the 11th Circuit permitting federal court USERRA lawsuits against Alabama school districts.

The outlier is the 9th Circuit.⁴ *Rimando v. Alum Rock Union Elementary School District*, 2009 U.S. App. LEXIS 27385 (9th Cir. Dec. 15, 2009), holding that a local school district in California cannot be sued in federal court under USERRA. I discuss and criticize *Rimando* in Law Review 1029. It should be noted that *Rimando* was decided *without oral argument* and that the 9th Circuit panel did not deem the decision worthy of “official” publication in *Federal Reporter Third Series*. The 9th Circuit itself does not consider *Rimando* as a precedent that should be relied on in future cases in the 9th Circuit or elsewhere.

In *Rimando*, the 9th Circuit panel cited and relied on *Townsend v. University of Alaska*, 543 F.3d 478 (9th Cir. 2008). I agree with *Townsend* that the 11th Amendment and the 1998 USERRA amendment preclude a USERRA lawsuit brought by an individual in federal court against the University of Alaska, which is clearly an arm of the State of Alaska and not a political subdivision. The panel, in its haste to deal with a serious backlog, did not give *Rimando* the attention the case deserved and did not consider the possibility that a local school district is distinguishable from a state university for 11th Amendment purposes.

When there is a conflict among the circuits, the appropriate remedy is for the United States Supreme Court to grant *certiorari* the next time the issue arises in a case wherein a party has applied for *certiorari*, and then there will be a definitive nationwide answer to an important legal question. The issue of whether local school districts can be sued in federal court under USERRA may eventually make it to the Supreme Court, but I think that it is more likely that the 9th Circuit, when given the opportunity to consider the issue in more detail, will disavow *Rimando*.

¹ The 11th Circuit is the federal appellate court that sits in Atlanta and hears appeals from district courts in Alabama, Florida, and Georgia.

² The 7th Circuit is the federal appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin.

³ Kentucky is in the 6th Circuit, along with Michigan, Ohio, and Tennessee.

⁴ The 9th Circuit is the federal appellate court that sits in San Francisco and hears appeals from district courts in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, the Commonwealth of the Northern Mariana Islands, Oregon, and Washington.