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You Can Sue a Political Subdivision in Federal Court under USERRA

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

***Sandoval v. City of Chicago,* 560 F.3d 703, 704 (7th Cir.), *cert. denied,* 558 U.S. 874 (2009).**

***Gentry v. Oldham County,* 2011 U.S. Dist. LEXIS 5935 (W.D. Ky. Jan. 21, 2011).**

As is explained in Law Review 13056[1] (April 2013) and other articles, the 11th Amendment of the United States Constitution enormously complicates the process of enforcing the Uniformed Services Employment and Reemployment Rights Act (USERRA) against state government employers, but *this is not a problem when the employer-defendant is a political subdivision of a state.*

USERRA does not define the term "political subdivision of a state." I found a succinct and helpful definition in the *U.S. History Encyclopedia, "*Political subdivisions are local governments created by the states to help fulfill their obligations. Political subdivisions include counties, cities, towns, villages, and special districts such as school districts, water districts, park districts, and airport districts. In the late 1990s, there were almost 90,000 political subdivisions in the United States."

As enacted in 1994, USERRA permitted an individual to sue a state, a political subdivision of a state, or a private employer in the United States District Court for any district where the private employer maintains a place of business or where the governmental entity exercises its functions. Four years later, the United States Court of Appeals for the 7th Circuit[2] held that USERRA was unconstitutional (under the 11th Amendment of the United States Constitution) insofar as it permitted an individual to sue a state government entity in federal court. *Velasquez v. Frapwell,* 160 F.3d 389 (7th Cir. 1998). The 7th Circuit held that Indiana University (the employer and defendant in the case) was an entity of the Indiana state government and was immune from suit by individuals in federal court, in accordance with the 11th Amendment.

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." Although the 11th Amendment, by its terms, only precludes a suit against a state by a citizen of *another* state, or a foreign state, the Supreme Court has held that the 11th Amendment immunity also bars a suit against a state by a citizen of the same state. *See Hans v. Louisiana,* 134 U.S. 1 (1890).

In late 1998, Congress amended USERRA to address the *Velasquez* problem. The 1998 amendment provides two alternative ways to enforce USERRA against a state government employer. Under section 4323(a)(1), the Attorney General of the United States can sue the state in federal court, in the name of the United States as plaintiff. Alternatively, under section 4323(b)(2), an individual USERRA plaintiff can sue a state government employer in state court, in accordance with the law of the state.

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[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 897 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.

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

But when the defendant employer is a political subdivision of a state, the suit can be filed in federal court in the name of the individual USERRA claimant by private counsel or by the Attorney General of the United States. The final subsection of section 4323 of USERRA provides as follows: "*In this section,* the term 'private employer' includes a political subdivision of a State." 38 U.S.C. 4323(i) (emphasis supplied).

As is explained in Law Review 104 and other articles, Congress enacted USERRA (Public Law 103-353) in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA).[3] Section 4303 of USERRA defines 16 terms used in this statute, including the term "State," which is defined as follows: "The term 'State' means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and other territories of the United States (*including the agencies and political subdivisions thereof)*." 38 U.S.C. 4303(14) (emphasis supplied).

Congress has amended USERRA multiple times since it was enacted in 1994, including in 1996, 1998, 2000, 2004, 2008, 2010, 2011, and 2012. Congress has amended section 4303 (the definitions section), but it has not amended subsection 14 of section 4303—that subsection has remained unchanged since 1994. But section 4323(i), providing that a political subdivision is to be treated as a private employer, was enacted in 1998.

There is an apparently irreconcilable conflict between section 4303(14), which provides that a political subdivision is a "State" for purposes of USERRA, and section 4323(i), which provides that a political subdivision is to be treated as a private employer for purposes of section 4323 (USERRA enforcement). How is this conflict to be resolved?

The new definitive scholarly treatise on statutory interpretation is *Reading Law: The Interpretation of Legal Texts,* by Supreme Court Justice Antonin Scalia and law professor Bryan A. Garner, published by the West Publishing Company in 2012. Justice Scalia and Professor Garner set forth in great detail the canons of statutory interpretation that have been developed over the centuries by courts in Great Britain, the United States, and other common law countries like Canada, Australia, and New Zealand. At pages 183-88 of their book, they discuss at length the "general/specific canon" which they summarize as follows: "If there is a conflict between a general provision and a specific provision, the specific provision prevails."

Applying this canon to the conflict between section 4303(14) and section 4323(i), it is clear that section 4323(i) deals with the more specific question of how a political subdivision is to be treated *for purposes of USERRA enforcement.* Thus, section 4323(i) controls, and you can sue a political subdivision in federal court, in your own name and with your own lawyer.

It should also be noted that section 4303(14) dates from 1994 and section 4323(i) was enacted four years later. The law does not favor implied repeal, but to the extent that these two subsections irreconcilably conflict the later-enacted provision must prevail.

I invite the reader's attention to *Sandoval v. City of Chicago,* 560 F.3d 703, 704 (7th Cir.), *cert. denied,* 558 U.S. 874 (2009)[4] and *Gentry v. Oldham County,* 2011 U.S. Dist. LEXIS 5935 (W.D. Ky. Jan. 21, 2011). *Sandoval* held that the City of Chicago (as a political subdivision of the State of Illinois) is subject to suit in federal court, as if it were a private employer. *Gentry* holds the same with respect to Oldham County, Kentucky.

Political subdivisions of states are treated differently from the states themselves because more than a century ago the Supreme Court held that political subdivisions do not have 11th Amendment immunity. *See Hopkins v. Clemson College,* 221 U.S. 636, 645 (1911).

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[3] The STSA is the law that led to the drafting of millions of young men, including my late father, for World War II.

[4] The "*cert. denied"* means that the Supreme Court declined to grant *certiorari* (discretionary review) and thus made the case final.