LAW REVIEW 13156
November 2013

Counties and other Political Subdivisions Are Not Immune- Western District of Virginia Gets it Wrong

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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

***Huff v. Office of the Sheriff,* 2013 WL 6018988 (W.D. Virginia Nov. 13, 2013).**

In this very recent decision of the United States District Court for the Western District of Virginia failed to understand the critical distinction between a *state* (like Virginia) and a *political subdivision of a state* (like Roanoke County). *Political subdivisions are not immune. Individuals can sue political subdivisions in federal court,* under laws like the Uniformed Services Employment and Reemployment Rights Act (USERRA). Judge Glen E. Conrad, the Chief Judge of the Western District of Virginia, clearly got it wrong. We (the Reserve Officers Association and its Service Members Law Center) will file an *amicus curiae* brief in the United States Court of Appeals for the Fourth Circuit.[1]

Pamela Ennis Huff is a member of the Army Reserve. She has been called to active duty at least three times, most recently in March 2010. She deployed to Afghanistan for a 400-day combat tour, during which she suffered significant physical injuries. She was released from active duty in May 2011. Prior to her release, she was also diagnosed with post traumatic stress disorder (PTSD) and major depressive disorder.

Ms. Huff was hired by the Sheriff's Office in November 2001. She worked as a Deputy Sheriff for about five years before she was promoted to Deputy Sheriff Bailiff. She was working in that capacity when she was called to active duty in March 2010.

As I explained in Law Review 1281[2] and other articles, an individual must meet five conditions to have the right to reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA):[3]

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[1] The 4th Circuit is the federal appellate court that sits in Richmond, Virginia and hears appeals from district courts in Virginia, West Virginia, Maryland, North Carolina, and South Carolina. If Huff appeals to the 4th Circuit, we will support her with an *amicus* brief.

[2] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 979 articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a

a. Must have left a civilian position of employment for the purpose of performing voluntary or involuntary service in the uniformed services.
b. Must have given the employer prior oral or written notice.
c. Cumulative period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment, must not have exceeded five years.[4]
d. Must have been released from the period of service without having received a disqualifying bad discharge enumerated in section 4304 of USERRA, 38 U.S.C. 4304.
e. Must have made a timely application for reemployment after release from the period of service. After a period of service of 181 days or more, the individual has 90 days to apply for reemployment.[5]

It seems clear that Ms. Huff met these five conditions when she was released from active duty in May 2011. She returned to work for the Sheriff's Office in July 2011.

"In the instant action, Ms. Huff claims that her absences from work to fulfill her military service requirements, *and to treat her service-related impairments,* resulted in a continuous pattern of discrimination and harassment that ultimately culminated in her termination. Ms. Huff also claims that the defendants failed to accommodate her service-related disabilities, and that they retaliated against her for exercising her rights under USERRA." (I am quoting from the court decision, emphasis supplied.)

Unfortunately, USERRA does not give an individual the job-protected right to be absent from a civilian job for medical *treatment* necessitated by an illness or injury sustained in connection with military service. USERRA applies to the person who is absent from his or her civilian job for the purpose of *service in the uniformed services.* Section 4303 of USERRA defines 16 terms that are used in this law, including that term, which is defined as follows:

"The term 'service in the uniformed services' means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an *examination* to determine the fitness of the person to perform any such duty,

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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 and another 157 so far in 2013.

[3] As is explained in Law Review 104 and other articles, Congress enacted USERRA (Public Law 103-353) on October 13, 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, 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 private employers since 1940. In 1974, Congress amended the VRRA to make it apply to state and local governments as well.

[4] Please see Law Review 201 (August 2005) for a definitive discussion of what counts and what does not count toward exhausting an individual's five-year limit. The shorthand is that *all* involuntary service and *some* voluntary service are exempted from the computation of the five-year limit.

[5] 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32."

38 U.S.C. 4303(13) (emphasis supplied).

Absence from a civilian job for the purpose of an *examination* to determine fitness for military service fits within the definition of "service in the uniformed services," but absence from work for medical *treatment* is not covered, even if the treatment was necessitated by wounds or injuries sustained in military service. As I explained in Law Review 0965, during the 111th Congress (2009-10) Representative Lloyd Doggett of Texas introduced H.R. 466, the proposed "Wounded Veteran Job Security Act." If enacted, that bill would have amended USERRA to expand protection to include absence from civilian jobs for medical treatment necessitated by military service. Unfortunately, that bill was not enacted, and no similar bill has been enacted in the 112th Congress or the 113th Congress.

As is explained in Law Review 0854 (November 2008) and other articles, a person who returns to work after service in the uniformed services with a disability incurred or aggravated during the period of service is entitled to *reasonable accommodations* by the employer, to enable the individual to return to the job despite the disability. If Ms. Huff's service-connected disabilities precluded her from returning to work in the bailiff job, even with reasonable accommodations, the employer[6] was required to reemploy her in some other position for which she is qualified, or can become qualified with reasonable employer efforts, and that provides like seniority, status, and pay, or the closest approximation consistent with the circumstances of her case.[7]

I believe that Ms. Huff likely had an excellent USERRA case on the merits, but Judge Glen E. Conrad never reached the merits—he held that the Office of the Sheriff of Roanoke County is immune from suit in federal court under the 11th Amendment of the United States Constitution.

The 11th Amendment (ratified in 1795) reads: "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."[8] Although the text of this amendment bars only suits against a state by a citizen of *another* state, the Supreme Court has held that 11th Amendment immunity also bars a suit against a state by a citizen of that same state. *See Hans v. Louisiana,* 134 U.S. 1 (1890).

The term "11th Amendment immunity" is somewhat misleading. A sovereign state's immunity from suit brought by an individual is based on the structure of the Constitution as a whole, and not just the text of the 11th Amendment. The 11th Amendment is the exclamation point, not the sole basis for the immunity.

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[6] The employer was Roanoke County, not just the Sheriff's Office.

[7] 38 U.S.C. 4313(a)(3).

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

Just seven years ago, the Supreme Court firmly rejected the argument that counties are immune from suit under the 11th Amendment or under the "residual immunity" of the sovereign states under the Constitution. *Northern Insurance Co. v. Chatham County, Georgia,* 547 U.S. 189 (2006).[9]

Chatham County operated the Causton Bluff Bridge, a drawbridge over the Wilmington River in Georgia. On October 6, 2002, James Ludwig requested that the bridge be raised to allow his boat to pass. The bridge malfunctioned, and a portion of it fell and collided with Mr. Ludwig's boat. Mr. Ludwig and his wife incurred damages in excess of $130,000. The Ludwigs were compensated for their damages by Northern Insurance Co., in accordance with the insurance policy that they had purchased.

Northern brought an admiralty action against the county in the United States District Court for the Southern District of Georgia. The district court granted the county's motion for summary judgment, based on the county's alleged constitutional immunity from suits of this kind. Northern appealed to the United States Court of Appeals for the Eleventh Circuit[10] affirmed the District Court. Northern applied for *certiorari* (discretionary review), which the Supreme Court granted.

In a scholarly decision that was joined by all eight of his colleagues, Justice Clarence Thomas wrote: "…this Court has repeatedly refused to extend sovereign immunity to counties. *See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391, 401 (1979); … *Workman v. New York City,* 179 U.S. 552, 565 (1900); … *Lincoln County v. Luning,* 133 U.S. 529, 530 (1890). *See also Jinks v. Richland County,* 538 U.S. 456, 466 (2003) ('Municipalities, unlike States, do not enjoy a constitutionally protected immunity from suit.') This is true even when, as respondent alleges here, 'such entities exercise 'a slice of state power', *Lake Country Estates, supra,* at 401."

As originally enacted in 1994, USERRA authorized an individual veteran or Reserve Component member to sue a state in federal court, either with his or her own attorney or with DOJ acting as the attorney. In 1998, the U.S. Court of Appeals for the Seventh Circuit held USERRA to be unconstitutional insofar as it authorized an individual to sue a state in federal court. *See Velasquez v. Frapwell,* 160 F.3d 389 (7th Cir. 1998), *citing Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996).

Later in 1998, Congress amended USERRA to solve the problem created by the *Velasquez* decision. Section 4323(a)(1) of USERRA [38 U.S.C. 4323(a)(1)] now provides that USERRA lawsuits against state governments, as employers, shall be brought by the U.S. Attorney General (DOJ) in the name of the United States, as plaintiff. This solves the 11th Amendment problem, because that amendment bars federal court lawsuits against states initiated by

[9] The citation means that you can find this decision in Volume 547 of *United States Reports,* starting on page 189.
[10] The 11th Circuit is the federal appellate court that sits in Atlanta and hears appeals from district courts in Alabama, Florida, and Georgia.

individuals. The 11th Amendment does not bar a suit against a state initiated by the Attorney General in the name of the United States.

USERRA also 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).

In 1998, Congress also amended section 4323 of USERRA (enforcement) by adding a new final subsection, as follows: "In this section [pertaining to USERRA enforcement], the term 'private employer' *includes a political subdivision of a State.*" 38 U.S.C. 4323(i) (emphasis supplied). It is clear that Congress intended to permit individuals to file federal court lawsuits against *political subdivisions of states*, although suits against the states themselves must be brought in state court by the individuals or in federal court by the Attorney General of the United States, in the name of the United States, as plaintiff.

The United States Court of Appeals for the Seventh Circuit[11] has held that an individual can bring a federal USERRA lawsuit against a political subdivision (the City of Chicago in the case).[12] The only circuit that has held that USERRA bars individuals from filing federal court lawsuits against political subdivisions is the Ninth Circuit.[13] I am referring to *Rimando v. Alum Rock Union Elementary School District,* 2009 WL 4837653 (9th Cir. Dec. 15, 2009).

In *Rimando,* the 9th Circuit relied on its earlier decision in *Townsend v. University of Alaska,* 543 F.3d 478 (9th Cir. 2008). In that case, the court decided (correctly in my view) that the 11th Amendment and the 1998 USERRA amendment barred an individual's USERRA suit against the University of Alaska, which is an arm of the Alaska state government, just as Indiana University (in *Velasquez)* is an arm of the Indiana state government.

In its haste to be rid of *Rimando* without oral arguments and without an officially published decision, the 9th Circuit held, "Rimando's arguments are all foreclosed by our decision in *Townsend v. University of Alaska,* 543 F.3d 478 (9th Cir. 2008*)."* If the three judges on the *Rimando* court had given the case the time and attention that it deserved, they would have realized the critical distinction between the University of Alaska (which cannot be sued in federal court by an individual, under USERRA), and the Alum Rock Union Elementary School District, which can be sued individually in federal court. The University of Alaska is an arm of the state government. The school district is a political subdivision of the State of California.

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

[12] *See Sandoval v. City of Chicago,* 560 F.3d 703 (7th Cir.), *cert. denied,* 558 U.S. 874 (2009). I discuss the *Sandoval* case in detail in Law Review 13076 (May 2013).

[13] 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, Northern Marianas Islands, Oregon, and Washington.

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." Applying this definition, it is clear that the Alum Creek Union Elementary School District is a political subdivision, not a state government entity. Similarly, Roanoke County is a political subdivision of the Commonwealth of Virginia. Judge Conrad got it wrong.

We (ROA and the Service Members Law Center) are already working on an *amicus curiae* brief in the United States Court of Appeals for the Eleventh Circuit[14] on this same issue—whether a political subdivision of a state (in that case an Alabama school district) can be sued in federal court by an individual alleging USERRA violations. In that case, the District Court got it right and held that such lawsuits are permissible. The school district has appealed to the 11th Circuit, and we will be filing an *amicus* brief in support of the appellee.

I invite the reader's attention to the excellent article titled "Too Much to Ask? Supporting Employers in an Operational Reserve Era." The article can be found at pages 32-40 of the November-December 2013 issue of *The Officer,* ROA's monthly magazine.[15] The article is by Dr. Susan M. Gates, a senior economist in the Rand Institute for Civil Justice and a professor of economics at the Pardee Rand Graduate School.

In her article, Dr. Gates includes a pie chart showing the employment situations of Reserve Component members who were employed full-time as of January 2011. She reports that 10 percent were employed by state governments and another 11 percent by local governments.

[14] The 11th Circuit is the federal appellate court that sits in Atlanta and hears appeals from district courts in Alabama, Florida, and Georgia.
[15] The article is available online at http://browndigital.bpc.com/publication/?i=18283.